

**BALLANTINE'S
PROBLEMS IN LAW**

FOR LAW SCHOOL AND BAR EXAMINATIONS

WITH SOLUTIONS

WEST PUBLISHING CO.

Gerald B. Gray



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PROBLEMS IN LAW

FOR

LAW SCHOOL AND BAR EXAMINATION REVIEW

A COLLECTION OF CONCRETE PROBLEMS
WITH SOLUTIONS

HENRY WINTHROP BALLANTINE, EDITOR
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WITH KEY-NUMBER ANNOTATIONS



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BAL. PROB. LAW

PREFACE

THIS book does not aim to be a mere quizzer or cramming device to force a minimum of legal information into the memory by hurried study on points most likely to be asked. Its purpose is to give law students the materials for a careful review of the fundamental principles of most of the topics covered by law school and bar examinations. The questions are in the form of concrete problems such as are used in all the best law schools and are coming to be used by competent bar examiners. Such questions challenge the thinking powers of the student and test his ability to apply his knowledge of legal principles to specific facts.

The questions and answers have been prepared by teachers in the leading law schools, and often present some of the latest developments of the law in their respective fields. Some subjects are treated more in detail than others. Two or three case citations are usually given, often the most recent authority, and a reference to the Key-Number of the Decennial Digests, where the same principle has been applied in other cases. These digest references ought to be useful to those desiring to investigate further, and will help train the student in the important matter of where to look to find the case law. Often references have been given to law review articles and notes in which more elaborate discussion and citation may be found, as well as in the cases cited.

The questions and answers have not been made easy or trite, but are often more difficult than would be fair on a bar examination, and will demand serious study on the part of the student. They should stimulate reflection and research. It is suggested that the student cover the answers with a card until he has attempted the solution for himself. Let the student ponder on the questions and reason out his own answers. Difficulties may be removed by looking up the references.

Examination questions should test the reasoning ability and intellectual power as well as the information and memory of the student. A good question is one that requires some analysis by the student to discover what problem or problems it presents, which should turn on some broad, fundamental principles. Answers should be required to be supported by legal reasons, which include not only general rules but the

arguments which may be advanced as to the correct principle of decision. Reasons should get down to fundamental principles.

Law school and also bar examinations are a splendid stimulus to a comprehensive review. They afford an exercise worthy of serious preparation. Students should be encouraged to regard them as such and to profit by them to the fullest possible extent. One of the most effective methods of review is drill in the solution of legal problems and the application of the law to hypothetical cases. After one has studied cases and texts he needs exercise testing his capacity to use and present his materials. It is hoped that these questions and answers may be as useful to students in the law schools for frequent and systematic reviews in connection with their various courses as for the final bar examination review. They may even be useful to lawyers who wish to refresh their acquaintance with fundamental principles of certain subjects and have their attention called to recent developments and decisions.

Lord Francis Bacon fully recognized the advantage of taking concrete examples or cases as the basis of legal exposition in order to train the student in the capacity to apply his learning. "But the method of writing best suited to so various and intricate a subject (as the different branches of the law) is that by observation or discourse upon (concrete examples). * * * For the knowledge which is newly drawn, and, as it were, under our own eye, from particulars, best finds its way to particulars again. And doubtless it is much more conducive to practice that the discourse follow the example, than that the example follow the discourse." Francis Bacon, *Lord Verulam, Advancement of Learning* (Creighton's Rev. Ed.) p. 255.

HENRY WINTHROP BALLANTINE.

University of California, 1920.

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IMPORTANT

Read Carefully

THE KEY-NUMBER



The references in this book to the topics and sections of the Decennial Digests, such as "See Decennial Digests, Contracts 27," refer also to the same topic and section in all Key-Number Digests.

In the Key-Number Digests, every point of law in every case handed down by the courts of last resort has a permanent identifying number, a Key-Number, which means that all points of law of like character are always grouped together in the same numbered section under the same topic.

For example: If you have access to any of the Key-Number Digests listed below, such as the North Eastern Digest, you can, by turning to the Key-Number cited above, "Contracts 27," find cases of like character.

As the cases under each Key-Number of the Decennial and Reporter Digests are arranged alphabetically by states, the student can easily find the case law of his own state.

The following is a list of Key-Number Digests:

AMERICAN DIGESTS

First Decennial Digest. 1897-1906.	Key-Number Series. 1917 to 1925.
Second Decennial Digest. 1907-1916.	Current Digest. 1926 to date.

REPORTER DIGESTS

North Eastern.	Southern, vol. 4 et seq.
Pacific.	Atlantic, vol. 3 et seq.
South Western.	Federal.
North Western.	N. Y. Supplement.
South Eastern.	

STATE DIGESTS

Indiana Digest.	Missouri Digest Supp., vol. 12 et seq.
Kansas Digest.	Oklahoma Digest.
Kentucky Digest Supp., vol. 6 et seq.	South Carolina Digest.
Massachusetts Digest Supp. vol. 9 et seq.	Vermont Digest.
Michigan Digest.	Virginia and W. Va. Digest Supp., vols. 6 & 7.

REPORTER INDEXES

Current Advance Sheets and Bound Volume Reporter Indexes supplementing all of the above Digests.

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PROBLEMS IN LAW

FOR

LAW SCHOOL AND BAR EXAMINATION REVIEW

ADMINISTRATIVE LAW

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Section

1. Separation of Powers.
2. Delegation of Powers.
3. Finality of Action by the Administrative—Judicial Review.
4. Judicial Control over Procedure Within the Administrative.

Q. 1. What is the field of Administrative Law?

A. At least three factors have contributed to confusion in the use of the term "administrative law." At the outset one may notice the absence of the term in the ordinary vocabulary of Anglo-American law. Digests, reports, text-books, contain little or no hint as to its existence. Secondly, there has been no unanimity of opinion among the few who have written upon the subject as to the content to be given to the term.¹ The word "quasi," prefixed to some other term, such as legislative or judicial, has been overworked when applied to this conception.² Finally, the use of the term in foreign systems of law has led writers to find either the absence or the presence of the

¹ See 1 Goodnow, *Administrative Law*, 7; *The Growth of Administrative Law* (Essays by Freund, Fletcher, Davies, Pound, Kurtz, and Nagel) 15; Freund, *Cases on Administrative Law*, 1-3.

² "'Administrative law' is a convenient term to indicate that branch of modern law relating to the executive department of government, when acting in a quasi legislative or quasi judicial capacity." *The Growth of Administrative Law*, 5.

same elements in our system. Dicey, more than any other, has been responsible for coloring our entire conceptions of administrative law by his comparison of the French "*droit administratif*" with "the rule of law" that he found to obtain in England and America.³ Those liabilities of public officers that have come within the province of French administrative courts have been dealt with in common-law countries by ordinary judicial tribunals. It seems unnecessary to disturb this alignment merely because continental jurists have seen fit to classify these relations as "administrative."

The last half century has witnessed the rapid growth of tribunals, other than courts, designed to deal with new and complex problems of modern government or economic enterprise. Railroad commissions, banking commissions, irrigation and water power boards, licensing boards, workmen's compensation commissions, corporation or "blue sky" commissions, are only a partial catalogue of these new organs of government. The present trend towards "socialization" in the field of government promises an increase in their number and their activities.

The field of control and review exercised by courts over such administrative agencies and commissions, and over controversies intrusted to them for determination, may properly be designated as the province of administrative law.⁴ In America administrative law, so defined, gathers to itself some portions of constitutional law; for example, problems of separation and delegation of power, and the various prohibitions against arbitrary state action, which also confine the extent of administrative activity. Modes of administrative action, methods of administrative procedure, thus are restricted by our courts in accordance with constitutional requirements.

SECTION 1.—SEPARATION OF POWERS

Q. 2. A dam owned by the federal government burst and flooded a portion of the neighboring district. Congress passed a statute authorizing property owners who had suffered damage to present their claims to the federal District Court, and authorized the court to determine the extent of the damage and report the same to the Secretary of the Treasury. The Secretary was directed to pay the claim, if in his judgment he deemed it to be equitable. Discuss the refusal of the court to take jurisdiction of a claim brought under the provisions of the statute.

³ Dicey, *Law of the Constitution*, cc. 12, 13.

⁴ Felix Frankfurter, 37 *Harv. Law Rev.* 633.

A. In constitutional theory, separation of powers demands of the judiciary the exercise only of "judicial power." Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436. The determination of such a concept, as well as that of legislative or executive power, can be reached only by reference to traditional and functional processes of government. Between definite and common assumptions as to the duties of judiciary or Legislature lies territory wherein it becomes questionable whether separation of powers should not be considered merely as a political maxim, instead of judicial doctrine. Federalist, Paper No. 47. Finality of judgment, however, seems definitely to have been evolved as a necessary characteristic of the judicial function. *Gordon v. U. S.*, 117 U. S. 697, append. Thus the judgment of a court cannot be subjected to the supervisory correction of some executive official. *U. S. v. Ferreira*, 13 How. 40, 14 L. Ed. 42. Cf. *Muskrat v. U. S.*, 31 S. Ct. 250, 219 U. S. 346, 55 L. Ed. 246.

For other cases see Decennial Digests, Constitutional Law ¶69, 74; Courts ¶257.

Q. 3. A statute prescribing certain duties upon manufactured cigarettes authorized the collection of these duties by duly appointed inspectors, required the immediate transmission of any funds, whether or not paid under protest, to the Secretary of the Treasury, prohibited the bringing of any suit in any court against an inspector for an excess of duties paid, and limited the taxpayer to the remedy of filing an application before the Secretary, who, upon its being shown to his satisfaction that more money had been paid than required by law, was required to draw his warrant upon the Treasury for the overpayment. This statute is pleaded in bar to an action at law in a state court, brought against the inspector for an excess of duties paid by a manufacturer of cigarettes.

A. Ordinarily an action would lie in such a case at common law. *Irving v. Wilson*, 4 T. R. 485. But vesting what is ordinarily a judicial remedy in an executive official does not of itself invalidate the statute. *Oceanic Steam Nav. Co. v. Stranahan*, 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013. The intrinsic adequacy of the remedy provided, though formally intrusted to an executive official, the necessity for prompt and efficient administrative facilities for a particular organ of government, an apparent or revealed danger of abuse by permitting resort to slow-moving judicial tribunals, governmental practice in a particular field, as revealed in past experience, are among the factors that determine the result. Neither separation of

powers nor due process of law by an inescapable logical conclusion prevents such action. *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576.

For other cases see *Decennial Digests, Constitutional Law* ¶80(1); *Customs Duties* ¶55.

Q. 4. A federal corporation engaged in interstate commerce under the terms of its charter, which reserved the power of amendment, was required to pay to the government one-half the compensation it received for services rendered to the government, this sum to be applied in reduction of bonds and accruing interest held by the government. A realization that the corporation was paying dividends out of net earnings in such a fashion as to threaten its ability to meet capital payments due to the United States upon the maturity of the bonds was the motivating cause behind a new statute that required the corporation to pay over to the Treasury the remaining half of the compensation it received from the government, in order thereby to establish a sinking fund for the satisfaction of debts due to the United States upon the approaching maturity of the bonds. The validity of this legislation is now challenged by the corporation.

A. The precise point for determination is whether the statute, which requires the corporation to provide a sinking fund to meet mortgage debts when they mature, deprives the company of its property without due process of law. It does not. It is a reasonable regulation, in the interests of the public and the corporators. It is also warranted under the authority by way of amendment to change the privileges and immunities granted by the Charter. Powers usually regarded as judicial have been at times assumed by Legislatures. *Cooper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Commonwealth v. Warwick*, 33 A. 373, 172 Pa. 140. Their recognition as judicial has in fact been an evolutionary historic process. Legislative control over the administration of the affairs of a corporation finds, among other limits, that of the conception of legislative power. Legislative regulation may affect questions of right, obligation, and property, and prescribe new duties for debtors to their creditors. The validity of a particular regulation can be regarded only with reference to the reasonability of its purpose in affecting the field of business credit and relations threatened by the probable failure of a corporation. *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496.

For other cases see *Decennial Digests, Constitutional Law* ¶52, 53, 54, 125, 278(1).

Q. 5. A state railroad commission, after hearing and notice, prescribes the rates to be charged by the X Railroad, engaged purely in intrastate commerce. The railroad, claiming that the jurisdiction of the state commission does not extend to rate orders, sues out a writ of prohibition in a state court. Is this the correct remedy?

A. Function rather than nomenclature determines whether an administrative agency is a "court," within the purview of a writ of prohibition. Rate-making has been exercised as an ordinary common-law function of courts. In *re Janvrin*, 55 N. E. 381, 174 Mass. 514, 47 L. R. A. 319. The increasing generality in the application of rate orders, growth in the field of operation of public service companies, and the consequent increase of communal interests affected by rate orders, have produced a demand for the expertness and specialization of commissions. Traditional judicial procedure proved an obstacle to the adaptation of courtroom methods to such controversies. The conception was thus evolved that rate-making, in prescribing a rule for the future, was legislative, as distinguished from judicial, action that regarded only past conduct. *Prentis v. Atlantic Coast Line Co.*, 29 S. Ct. 67, 211 U. S. 210, 53 L. Ed. 150. The contrary conclusion seems justifiable on historical, as well as analytical, grounds. *People v. Wilcox*, 87 N. E. 517, 194 N. Y. 383.

For other cases see *Decennial Digests, Constitutional Law* ¶61, 62; *Courts* ¶508(1).

Q. 6. A statute permits an appeal from the state corporation commission to the state Supreme Court, permitting the court to affirm, vacate, or modify any order of the commission, or enter such order as the commission should have made. Discuss the propriety of the court's refusal to take jurisdiction on appeal from a rate order made by the commission.

A. To require a court to enter such order as the commission should have made devolves the function of rate-making upon the court. The fact that such a function can be vested in a commission does not conclude the same function from being vested in a court. Courts may however, properly refuse to exercise such a function, where a commission exists for the very purpose. *Honolulu Rapid Transit & Land Co. v. Hawaii*, 29 S. Ct. 55, 211 U. S. 282, 53 L. Ed. 186; *State v. Atchison, T. & S. F. Ry. Co.*, 197 P. 194, 108 Kan. 851. Refusal to exercise such a function, in the absence of commission regulation, is more doubtful. *Newton v. Consolidated Gas Co. of New York*, 42 S. Ct. 264, 258 U. S. 165, 66 L. Ed. 538. Court procedure, designed for the narrowing of an issue before the tribunal, is

ill adapted for the decision of cases where the field of inquiry and the scope of operation of the rule promulgated is continually expanding. The lack of qualification for the task has bred aversion to its assumption in such a degree that legislation imposing such duties upon courts has been held unconstitutional. *Keller v. Potomac Electric Power Co.*, 43 S. Ct. 445, 261 U. S. 428, 67 L. Ed. 731.

For other cases see Decennial Digests, Constitutional Law 61, 72, 74; Gas 14(1); Mandamus 3(4).

SECTION 2.—DELEGATION OF POWERS

Q. 7. A federal statute permits the Secretary of the Interior to make such rules as he may deem necessary and proper for the management and care of national parks and the protection of the property, game, and fish therein. The violation of such rules is made a misdemeanor, punishable by a fine of \$500 or imprisonment not exceeding six months, or both. Rules are promulgated and published under this statute for the governance of the X National Park. D, indicted for a violation of them, demurs to the indictment.

A. That it has become impracticable for the national Legislature to prescribe the necessary rules and regulations for the various national parks is evidenced by the very fact of legislation that devolves such a duty upon an executive official. There can be no doubt but that such an official, in making rules whose violation is made criminal, is actually legislating. Cf. *U. S. v. Eaton*, 12 S. Ct. 764, 144 U. S. 677, 36 L. Ed. 591. More or less definite standards may be furnished him, according to which his rules are to be gauged, but the nature of the problem may make the standards nothing more than general admonitions. *Mutual Film Corp. v. Industrial Commission of Ohio*, 35 S. Ct. 387, 236 U. S. 230, 59 L. Ed. 552. Judicial doctrine as to the nondelegability of legislative power has thus modified itself, as the necessity for delegation to expert agencies equipped to handle problems ill-adapted for solution by a representative deliberative body has become apparent. *U. S. v. Grimaud*, 31 S. Ct. 480, 220 U. S. 506, 55 L. Ed. 563; *Dominguez Land Corp. v. Daugherty* (Cal. Sup.) 238 P. 703.

For other cases see Decennial Digests, Constitutional Law 62; Corporations 61; Internal Revenue 45.

Q. 8. A federal statute authorizes the deportation of aliens convicted under certain war-time penal statutes for certain specified offenses, and then enumerates an additional number of offenses for which deportation may be had by the Secretary of Labor upon au-

thorization by the President of the United States, when "in view of the present internal and international situation he deems the deportation of aliens convicted of the enumerated crimes advisable and for the best interests of the United States." A general order is issued by the President, authorizing deportation for certain of the enumerated offenses, under which proceedings are had for the deportation of X, who had been convicted of one of these offenses. The order for deportation being affirmed by the Secretary of Labor, X petitions the federal District Court for a writ of habeas corpus.

A. The operation of a law may be made contingent upon action by the executive. *The Brig Aurora*, 7 Cranch, 382, 3 L. Ed. 378. Thus Congress may vest the executive with a power of bringing legislation into play as an instrument of diplomacy in the adjustment of international affairs. *Field v. Clark*, 12 S. Ct. 495, 143 U. S. 649, 36 L. Ed. 294. The purpose of such legislation may also be to allow for executive judgment and discretion in situations unamenable to rules. *Mahler v. Eby*, 44 S. Ct. 283, 264 U. S. 32, 68 L. Ed. 549. Action by the executive in these instances involves judgment upon technical and complicated matters; actually, though disguisedly, it is an exercise of legislative power. To deprive the legislative department of opportunities to utilize other agencies of government, in the enactment and enforcement of measures demanded by the complicated problems of government, is to make the maxim of non-delegability an obstacle to the ability of Legislatures adequately to cope with their problems.

For other cases see *Decennial Digests, Constitutional Law* ¶62.

Q. 9. A statute authorizes the Federal Water Power Commission, after notice and hearing, to condemn such hydraulic projects as it considers "obstructions either to navigation or to the efficient storage of waters, because of the insufficient height, openings, width or other deficiency of such project." The commission is authorized to require specific alterations in the project or its complete removal, and failure to comply with such order is made a criminal offense. In a proceeding under this statute for failure to remove an obstruction maintained by the X Company, after its removal had been ordered by the commission, an exception is taken to the court's refusal to submit the question of whether the project is an obstruction to the jury. Assuming that the statute, properly construed, does not require the submission of this issue to the jury, dispose of an appeal from a conviction of the X Company.

A. The question of whether a project is an obstruction to navigation has been determined both by courts and Legislatures. *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 14 L. Ed. 249; *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 15 L. Ed. 435. Intrusting its determination to an administrative agency may thus analytically be the delegation of either legislative or judicial power; in any event, it is delegation. But such legislation has behind it both a desire for securing expertness in the decision of complicated problems and a belief that a uniform policy may be achieved by intrusting the decision of these questions to a permanent, single body. Certain fundamental procedural safeguards must be provided, in order to insure fairness in such administrative determination of rights. *Union Bridge Co. v. U. S.*, 27 S. Ct. 367, 204 U. S. 364, 51 L. Ed. 523; *Monongahela Bridge Co. v. U. S.*, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435.

For other cases see Decennial Digests, Commerce §26; Constitutional Law §62.

Q. 10. A statute constitutes the Secretary of Labor, the Secretary of the Interior, and three other persons, to be appointed by the President, a board, among whose duties shall be the classification of the degrees of idiocy or imbecility, those contagious, incurable, or hereditary diseases, the nature of mental or physical defectiveness, those criminal or anarchical beliefs, and the degrees of illiteracy, that shall be sufficient for the exclusion or deportation of aliens from the United States. The statute further authorizes the board to revise these classifications from time to time, as it shall deem fit. Under a classification made by the board, X, an alien, is excluded. He petitions the federal District Court for a writ of habeas corpus.

A. Such a power of classification in a large measure vests the board with the determination of immigration policies. Cf. Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898. Where a necessity for the determination of classifications for inclusion and exclusion exists, if Congress has dealt with the problem as far as practically possible, it may intrust the further delimitation and definition of standards to a committee of experts. *Buttfield v. Stranahan*, 24 S. Ct. 349, 192 U. S. 470, 48 L. Ed. 525; *Inter-Mountain Rate Cases*, 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408. The complexity of the problems, the necessity for flexible and adaptable standards, are considerations that determine the bounds of congressional power. Essentially it is the wisdom of the Legislature in adopting such a method of exercising its functions that is passing under judicial review. Courts,

in setting limits must have due regard to the play of such wisdom. *Hall v. Geiger-Jones Co.*, 37 S. Ct. 217, 242 U. S. 539, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643. Cf. *People v. C. Klinck Packing Co.*, 108 N. E. 278, 214 N. Y. 121, Ann. Cas. 1916D, 105; *Burcher v. People*, 93 P. 14, 41 Colo. 495, 124 Am. St. Rep. 143.

For other cases see Decennial Digests, Constitutional Law ¶60, 62, 240(1).

SECTION 3.—FINALITY OF ACTION BY THE ADMINISTRATIVE—JUDICIAL REVIEW

Q. 11. A federal statute vests the Secretary of the Treasury with authority to determine and pay all claims for compensation for services rendered to the federal government in the transmission of troops, supplies, etc. No appeal lies from his decision to the Court of Claims. Under a ruling of the Secretary, "services rendered" is held not to apply to such transportation of supplies, etc., necessitated by the inability of railroads to handle shipments over designated routes, or to the storage of property at other than designated points. A claim for services of this nature is denied by the Secretary. The railroad sues out a writ of mandamus in the Supreme Court of the District of Columbia, seeking to compel the Secretary to make such an allowance.

A. Rulings upon matters of law, such as the construction of statutes, are commonly reserved for courts. Mandamus is thus sought to compel the Secretary to accept and abide by the judicial interpretation of the statute. Assuming that the statute intended to vest the Secretary with discretion in his interpretation, is it possible to make his decision final? Where Congress occupies the position of a benefactor rather than that of a debtor at law, it may permit the executive to give effect to his interpretation without the intervention of courts. *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559; *Work v. U. S.*, 45 S. Ct. 252, 267 U. S. 175, 69 L. Ed. 561. Technically, in the assertion of any claim against the government, the creditor is in the position of a petitioner to the grace of the sovereign. But, on the assumption that the government occupies, in essence, a position analogous to that of an ordinary debtor, the difficulty of decision increases. The tendency would be to allow the judiciary the final determination of questions of law. Cf. *American School of Magnetic Healing v. McAnnulty*, 23 S. Ct. 33, 187 U. S. 94, 47 L. Ed. 90.

For other cases see Decennial Digests, Constitutional Law ¶73; Injuries ¶75; Mandamus ¶72.

Q. 12. A federal statute makes final the decision of the Secretary of Labor, excluding aliens from admission into the United States, whatever the ground on which the right to enter the country is claimed. X is excluded upon a finding that he is an alien belonging to a race denied admission into the country. He presents a petition for habeas corpus to the federal District Court, alleging that he is a native-born citizen, returning after a temporary departure. Dispose of the petition.

A. The question arises upon the finality of administrative determination of matters of fact, upon which the power of the administrative to act depends. In questions involving immigration, the general powers of the government over the exclusion of aliens must be looked to. *Fong Yue Ting v. U. S.*, 13 S. Ct. 1016, 149 U. S. 698, 37 L. Ed. 905. Again, any particular legislation must be seen with reference to its background. The increasing congestion of the federal courts with immigration questions, and the consequent delay, where prompt adjudication of the issues was imperative, a necessity for thoroughness in the enforcement of an immigration policy, the vastness of the entire problem, are impossible to ignore, in determining whether such procedure satisfies the demands of due process. Clearly, exhaustion of administrative remedies can be made a prerequisite to judicial proceedings. *U. S. v. Sing Tuck*, 24 S. Ct. 621, 194 U. S. 161, 48 L. Ed. 917. The exigencies of the situation have sanctioned administrative finality in the decision of these particular questions. *U. S. v. Ju Toy*, 25 S. Ct. 644, 198 U. S. 253, 49 L. Ed. 1040.

For other cases see *Decennial Digests, Aliens* ¶18, 32(13); *Constitutional Law* ¶318; *Habeas Corpus* ¶23.

Q. 13. After being admitted to the United States and residing within the United States for one year, X, after hearing and notice, is ordered to be deported, on the ground that as a member of an alien race he had been improperly admitted. An appeal is taken to the Secretary of Labor, who affirms the decision of the immigration commissioners. Thereupon X presents a petition for habeas corpus to the federal District Court, alleging that he is a citizen of the United States.

A. Analytically, the issues presented by deportation are identical with those presented by exclusion. Yet the results are different. *Ng Fung Ho v. White*, 42 S. Ct. 492, 259 U. S. 276, 66 L. Ed. 938. However, deportation and exclusion present profound differences. The numbers contesting exclusion and those contesting admission

are numerically different. Again, deportation, viewed as a penalty, involves tearing the petitioner from his surroundings; exclusion denies him the opportunity to establish new surroundings. Such differences explain the attitude of the judiciary towards the administrative in these situations. Distinctions are also drawn between the determination of questions of citizenship and other questions upon which a right of residence within the country may depend. The latter are deemed capable of final determination by the administrative. *Zakonaite v. Wolf*, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218. Citizenship presents, however, a question traditionally within the competency of courts, and one whose determination, involving national character, has grave and far-reaching consequences.

For other cases see *Decennial Digests*, Aliens ⇨32(1,2), 54; *Constitutional Law* ⇨80(1), 318; *Habeas Corpus* ⇨2, 23.

Q. 14. Immigration commissioners denied X admittance to the United States, finding adversely on his claim of citizenship. The decision was affirmed by the Secretary of Labor. X petitions in the federal District Court, alleging specifically unfair conduct by the immigration commissioners, and that such conduct had influenced their decision. To this petition the respondent demurs.

A. A statute, in intrusting the administrative with the determination of certain question upon notice and hearing, is interpreted as requiring a fair hearing by impartial arbiters. The existence of partiality thus means that the administrative is acting without the orbit of its statutory authority. *Chin Yow v. U. S.*, 28 S. Ct. 201, 208 U. S. 8, 52 L. Ed. 369. Even though the determination of questions be finally intrusted to the administrative, the astuteness of a court to discover partiality in their determination is a possible check upon the action of the administrative.

For other cases see *Decennial Digests*, *Habeas Corpus* ⇨25(1).

Q. 15. What disposition should a court make of cases where it grants habeas corpus to one successfully resisting an administrative order of deportation or exclusion?

A. The procedure in these instances reflects the relation between judiciary and administrative. Unfairness, once exhibited by the administrative, may lead to the assumption that there can be no guaranty of fairness in a second trial by the same agency, and thus the court may itself dispose of the questions. *Ng Fung Ho v. White*, 42 S. Ct. 492, 259 U. S. 276, 66 L. Ed. 938. But, where the unfairness consists in the main of incompetency or gross error, the order

of discharge upon habeas corpus may be made conditional, to become effective only if the examining board fails to give the petitioner another and a fair hearing, on competent evidence, within a reasonable time. *U. S. v. Petkos*, 214 F. 978; *Colyer v. Skeffington*, (D. C.) 265 F. 17, 78.

For other cases see Decennial Digests, Aliens ⇨54; Habeas Corpus ⇨111(1).

Q. 16. A state public utilities commission prescribes the rates to be charged by a municipal gas company. The gas company seeks to enjoin the enforcement of these rates, alleging them to be so low as not to insure a fair return upon the capital investment of the company. The respondent demurs to the petition seeking an injunction.

A. Rate regulation, generally recognized as a legislative function, was originally conceived of as being immune from judicial limitations. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. The requirement that the rate must guarantee the company a fair return is very recent in origin. *Railroad Commission Cases*, 6 S. Ct. 334, 388, 1191, 116 U. S. 307, 29 L. Ed. 636. Such a requirement, now firmly embedded in American constitutional law, prevents the disposition of these interests finally by administrative agencies. *Chicago, M. & St. P. R. Co. v. Minnesota*, 10 S. Ct. 462, 702, 134 U. S. 418, 33 L. Ed. 970.

For other cases see Decennial Digests, Constitutional Law ⇨298(1, 2).

Q. 17. A state commission regulates the rates to be charged by a hydro-electric generating plant. The rate permits a return of 7 per cent. upon the valuation of the property of the plant. In computing this valuation, conflicting testimony is given before the commission as to the present value of a series of transformers. The estimates range from \$150,000 to \$400,000. The commission finds the value as \$225,000. Upon appeal from the commission to the state court, the latter, in reviewing this evidence, reaches an independent conclusion that the transformers should be valued at \$350,000. On appeal to the state Supreme Court, the decision of the lower state court is reversed; the court holding that the commission's finding was based upon evidence, and that the statute, in permitting an appeal from the commission to the lower state court, denied such court the power to pass upon the weight of evidence before the commission, but restricted the court to determining whether there was evidence to support the finding of the commission. On writ of error to the Su-

preme Court of the United States, the company contends that the state statute is not due process of law.

A. The confiscatory nature of the rate, and the theory upon which valuation proceeds, are subject to review by courts. Due process requires that the rate be neither confiscatory nor that the valuation—the basis for rate-making—be made without reference to reproduction cost. *Missouri, ex rel. Southwestern Bell Tel. Co. v. Public Service Comm.*, 43 S. Ct. 544, 262 U. S. 276, 67 L. Ed. 981, 31 A. L. R. 807. However, where the theory of valuation is correct, the valuation of separate items of property will be reached by judgment upon a maze of conflicting evidence. The judgment of the commission may be supported by evidence, though, in the opinion of the reviewing court, contrary to the weight of evidence. Due process prevents a statute from making the judgment of a commission, even though supported by evidence, controlling. The independent judgment of a court is required. Thus the commission must not only be justified in finding the valuation to be \$X, but the court must also find the valuation to be \$X. *Ohio Valley Water Co. v. Ben Avon Borough*, 40 S. Ct. 527, 253 U. S. 287, 64 L. Ed. 908; *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 43 S. Ct. 675, 262 U. S. 679, 67 L. Ed. 1176.

For other cases see *Decennial Digests*, *Constitutional Law* ⇨298(1); *Public Service Commissions* ⇨2, 7.

Q. 18. Under the provisions of a state statute, the state tax assessment board, authorized to determine the assessment of the properties of railroads throughout the state, submitted a preliminary estimate upon the property of the X Railroad. In accordance with the provisions of a statute, a hearing was had before the state board, and the preliminary estimate was adhered to by the tax board. An appeal was taken to the state court, which held that the statute did not authorize the court to review the findings of the board, if such findings were justified by the evidence. On appeal to the state Supreme Court, the contention is made that such a statute is not due process of law.

A. The statute prevents the trial court from reaching an independent judgment upon the valuation of the property reached by the assessment board. Nevertheless it is due process of law. *Baker v. Druesedow*, 44 S. Ct. 40, 263 U. S. 137, 68 L. Ed. 212; *Butters v. City of Oakland*, 44 S. Ct. 62, 263 U. S. 162, 68 L. Ed. 228. Theoretically the issues are identical with those involved in the valuation of property as a basis for rate regulation. The results are di-

ametrically opposed to each other. Decisions such as these represent the tenuous considerations that underlie conceptions of due process. The results are explicable only on the basis that taxation and rate regulation, being economically different processes, have secured different legal safeguards against administrative regulation. Taxation at sporadic intervals places a drain upon the treasury of a corporation; rate regulation determines continuously its earning capacity, and thus ultimately its commercial value as an enterprise.

For other cases see *Decennial Digests, Constitutional Law* ¶283, 284(1), 289; *Courts* 394(10), 399(1); *Taxation* ¶40(8).

Note.—These illustrations indicate how the scope of judicial review varies with respect to the particular agency in question. The problem is a complex one. Considerations as to the nature of the administrative regulation play an important part. Thus reparation suits before such an agency as the Interstate Commerce Commission, or claims for damages on the ground that rates have been excessive, seem more judicial in their character. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 17 S. Ct. 896, 167 U. S. 479, 42 L. Ed. 243. On the other hand, rate regulation, in prescribing a rule for the future, falls readily within the legislative category, and yet is subjected to stringent judicial scrutiny. Here the desirability of the exercise of legal control through administrative agencies plays its part. Judicial review over action by the post office department thus differs from that over the immigration department, and this again from taxation, public utility regulation, or licensing commissions. *Crane v. Nichols* (D. C.) 1 F.(2d) 33; *Silberschein v. U. S.*, 45 S. Ct. 69; 266 U. S. 221, 69 L. Ed. 256.

For other cases see *Decennial Digests, Army and Navy* ¶51½; *Commerce* ¶85; *Constitutional Law* ¶73.

SECTION 4.—JUDICIAL CONTROL OVER PROCEDURE WITHIN THE ADMINISTRATIVE

Q. 19. Proceedings for the deportation of X were instituted for the violation of a federal statute making the keeping of a house of prostitution by an alien within three years after entry a ground for deportation. From a finding absolving X of the alleged misconduct, an appeal was taken to the Secretary of Labor, who reversed the decision, as against the weight of evidence, and ordered deportation. X then petitions the federal district court for a writ of habeas corpus. Should the court prescribe the rule to be adopted by the administrative in reviewing its own decisions?

A. Rules of procedure can be prescribed by the administrative. *State Public Utilities Comm. v. Springfield Gas Co.*, 125 N. E. 891, 291 Ill. 209. Due process, as a limitation, requires only that the substantial guarantees of a fair trial be observed. It can hardly be interpreted to require the court to determine whether the Secretary should review the evidence with the broad powers of a chancellor on appeal or with the limited powers of a court reviewing the verdict of a jury. Cf. *U. S. v. Dunton* (D. C.) 291 F. 905. See *U. S. v. Curran* (C. C. A.) 297 F. 946, 36 A. L. R. 877.

For other cases see *Decennial Digests*, Aliens ⇨32(13); *Constitutional Law* ⇨70(1); *Habeas Corpus* ⇨45(4).

Q. 20. In a proceeding for compensation for damages suffered as a result of the employment, before a state workmen's compensation commission, the issue turned upon the question whether the plaintiff had actually come into contact with the machinery of the defendant. The only testimony of the plaintiff was the evidence of his own statements, as related by witnesses to whom the plaintiff had told the facts on the day after the accident occurred. In addition, a doctor testified that, in his opinion, the abrasions on the plaintiff's body could have been caused by contact with the particular type of machinery. The defendant's witnesses numbered four doctors, three of whom testified that the purported abrasions were manifestations of a disease, and the fourth testified to the fact that, four days after the date of the asserted accident, the plaintiff had been physically examined by him, and no abrasions had been found upon his body. The commission found for the plaintiff, and an appeal is taken from this award to the state court.

A. The earlier insistence of courts that common-law rules should regulate the admissibility of evidence before administrative tribunals has of recent years shown great relaxation. *Englebreton v. Industrial Accident Commission*, 151 P. 421, 170 Cal. 793. The change of attitude has largely been due to insistent legislative pressure. *Pacific Gas & Electric Co. v. Industrial Accident Commission*, 181 P. 788, 180 Cal. 497. Obviously, common-law rules, designed to exclude relevant evidence because of a danger of undue weight being given it by a jury, have little applicability when the fact-finding body consists of experts, as compared with twelve ordinary men of the vicinage. Yet courts have been strangely narrow in their decisions, and reluctant to realize that new and functionally different agencies can be freed from traditional limitations. *Matter of Car-*

roll v. Knickerbocker Ice Co., 113 N. E. 507, 218 N. Y. 435, Ann. Cas. 1918B, 540.

For other cases see Decennial Digests, Master and Servant ¶404.

Q. 21. Discuss the constitutionality of a statute establishing a state commission for the settlement of all disputes arising out of wages due an employee in any industrial establishment employing more than ten men, and providing that the admissibility of all evidence is to be governed by rules adopted and promulgated by the commission in consultation with two justices of the state Supreme Court.

A. See Warren H. Pillsbury, "Administrative Tribunals," 36 Harv. Law Rev. 405, 583; John H. Wigmore, "Administrative Boards and Commissions: Are the Jury Rules of Evidence in Force for Their Inquiries?" 17 Ill. Law Rev. 263.

For other cases see Decennial Digests, Master and Servant ¶403, 404, 405, 417(8).

Q. 22. A state waterworks commission is intrusted with the power of condemning land for reservoirs and water sites, such condemnation to be had only on grounds of public necessity and convenience. The procedure for condemnation provides for a public hearing before an inspector in the vicinity of the site to be condemned, followed by a further hearing, at which the parties whose land is to be condemned may be represented, before the commission in banc at its headquarters. A public hearing is held by an inspector to condemn the land of X, at which evidence is heard and presented. A record of this hearing, together with a report of the inspector, is forwarded to the commission. At the hearing before the commission, X's application to see the report of the inspector is denied. Condemnation of the land is ordered by the commission. An appeal is taken to the court from this order.

A. The proceeding before the commission being in the nature of adversary litigation, the requirements of due process must be observed. Notice and hearing and action in good faith are recognized necessities of due process. *Peoria & P. U. R. Co. v. U. S.*, 44 S. Ct. 194, 263 U. S. 528, 68 L. Ed. 427. But how far can the administrative be permitted to act upon evidence not submitted to the parties? Various considerations are here encountered. Professional practice, in itself a guaranty of fairness and impartiality, may satisfy the court's conscience. *Local Government Board v. Arlidge*, [1915] A. C. 120. The social history of a particular problem, and the need for

its efficient handling by extrajudicial methods, may be determinative. *Auffmordt v. Hedden* (C. C.) 30 F. 360; *Origet v. Hedden*, 15 S. Ct. 92, 155 U. S. 228, 39 L. Ed. 130. A guaranty of fairness may be assumed, because of the existence of a corrective process within the administrative itself.

For other cases see *Decennial Digests*, Commerce ¶86; Customs Duties ¶80.

Q. 23. In a rate hearing before a state public utilities commission the findings of the commission were based in part upon the report of an engineer in the employ of the commission. The report had not been disclosed to the parties, but was on file in the commission records, that were made open to the public. A rule promulgated by the commission informed parties that the commission would consider all matters contained in its records to be evidence in any case before it. The decision of the utilities commission was affirmed on appeal to the state Supreme Court, and the case is now on writ of error to the Supreme Court of the United States.

A. One factor leading to the establishment of administrative agencies is the assumption that in the performance of their functions they will employ a mass of knowledge, incapable of exact formulation, and derived from familiarity with the field over which they exercise control. *Interstate Commerce Commission v. Baird*, 24 S. Ct. 563, 194 U. S. 25, 48 L. Ed. 860; *In re Gross*, 29 A. 25, 161 Pa. 344. Such knowledge, though by itself incapable of sustaining a specific finding, is the background upon which detailed evidence before the commission is weighed and adjudged. *Chicago Junction Case*, 44 S. Ct. 317, 264 U. S. 258, 68 L. Ed. 667; *International Harvester Co. v. Industrial Commission*, 147 N. W. 53, 157 Wis. 167, Ann. Cas. 1916B, 330. A distinction may be drawn between knowledge of this nature and reports containing definite and detailed information. If material to the conclusion, fairness demands that the attention of the parties be called to their existence and their probable materiality. *U. S. v. Abilene & S. R. Co.*, 44 S. Ct. 565, 265 U. S. 274, 68 L. Ed. 1016; *Wichita R. R. & Light Co. v. Court of Industrial Relations*, 214 P. 797, 113 Kan. 217.

For other cases see *Decennial Digests*, Commerce, ¶87, 95; Intoxicating Liquors ¶75(7); Master and Servant ¶415; Public Service Commissions ¶17.

Q. 24. A state securities commission, intrusted with the duty of licensing brokers to deal in securities issued by domestic corporations, after a hearing removed X from the roll of licensed brokers.

Among the procedural rules established by the commission for hearings in cases of this nature, a rule provided for giving notice to any broker against whom complaint had been made 30 days in advance of such hearing. Under telegraphic instructions from the state secretary of finance, the time of notice was cut down in the case of X to 14 days. From the commission's order removing X, he appeals to the state court, in accordance with statutory provisions permitting such an appeal.

A. The establishment of reasonable rules and regulations for hearing and notice is clearly within the province of the administrative. Furthermore, changes in the rules must naturally be allowed from time to time. A change in the general rules for a particular case, however, indicates partiality and arbitrariness in the conduct of the administrative. *Stock v. Central Midwives Board*, [1915] 3 K. B. 756; *Colyer v. Skeffington* (D. C.) 265 F. 17. The nature of the change, its affect upon denying the petitioner a fair hearing, the materiality of the change in influencing the decision of the commission, such considerations will impose limitations upon the scope of such action by the administrative.

For other cases see *Decennial Digests*, *Allens* ¶54.

BAL.PROB.LAW

AGENCY

By NATHAN ISAACS, Professor, Harvard University

Section

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2. Capacity to Appoint or Act as Agent.
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16. Liability of Servant.

SECTION 1.—CREATION AND EXISTENCE OF RELATION OF PRINCIPAL AND AGENT OR MASTER AND SERVANT

Q. 1. The following is the gist of an agreement: "The Smith Motor Car Company appoints the Lincoln Sales Company as the agent for the sale of its cars in Nebraska. The Sales Company is to get the cars at 25 per cent. off list price and to pay 40 per cent. of the price on receipt of a car and the balance when the car is sold; the manufacturer is to take in payment of the balance notes of the purchasers, indorsed by the Sales Company. The latter agrees to sell cars at a specified rate per month." Nebraska now seeks to tax the Smith Motor Company, whose main office is in Michigan, as a foreign corporation doing business in the state, on the strength of the sales made in Lincoln. Is the tax proper?

A. One essential of "doing business" within a state is physical presence in the state, personally or by agent. Although the Sales Company is described as an "agent" in this agreement, it seems actually to be an independent dealer. The choice of means, methods, and details in the conduct of its business is not left to the Smith Motor Company. Apparently title is intended to pass to the Sales Company, and from it to the purchaser. The terms of payment,

though not in themselves controlling, point rather in the direction of independent dealing. The same is true of the practice of having the notes made out to the Sales Company and indorsed by it. The wording of the agreement to sell cars at a certain rate, instead of buying them at that rate, suggests agency; but that form is easily explained when we remember that the time of payment depends on the time of sale, and that the manufacturer is therefore interested in the rate of sale. It is, of course, possible to enter into an agreement by which a sales company is actually the agent of the manufacturer; but the use of the term "agent" is in itself no proof that such a contract has been made, as the term "agency" is constantly being used of the business of local distributors, whether independent or not.

International Harvester Co. of America v. Merrimac Veneer Co., 81 So. 277, 120 Miss. 550.

Burkhalter v. Ford Motor Co., 116 S. E. 333, 29 Ga. App. 592.

For other cases see Decennial Digests, Corporations ⇨ 668(10); Principal and Agent ⇨ 1, 145(3).

Q. 2. P, a cash register company, employed A to make sales for the company. The contract between P and A provided that A should devote his entire time to the service of the company, should conform to its rules, should receive a fixed percentage on sales, should pay his own expenses, and might employ other salesmen to assist him. A purchased in his own name and with his own money an automobile with which to deliver the cash registers to purchasers. While driving the automobile to make a delivery, A negligently ran over T. Can T recover from P?

A. Assuming from the language used, and particularly from the stipulations as to "entire time," company's rules, and the permission apparently required to employ others, that A is an agent and servant of P, and not an independent dealer or contractor, we must conclude that, while driving negligently, A was doing the work of P, and that the injury was inflicted while acting within the scope of his employment. The ownership of the automobile in itself is no different from the ownership of a tool by a servant. He may be selling his own services, and also the use of the tool; but the law of master and servant will none the less apply to him.

Singer Mfg. Co. v. Rahn, 10 S. Ct. 175, 132 U. S. 518, 33 L. Ed. 440. 67 Univ. Pa. Law Rev. 136.

For other cases see Decennial Digests, Master and Servant ⇨ 316(1).

SECTION 2.—CAPACITY TO APPOINT OR ACT AS AGENT

Q. 3. B, an infant, acted as the agent of A in the sale of a horse to C, having been duly authorized by A to sell the same. A afterwards seeks to disaffirm the sale, and brings action to recover back the horse, on the ground that B's act was void by reason of his infancy. Judgment for whom, and why?

A. A cannot disaffirm on this ground. An infant can be an agent and make a binding contract for his principal. Capacity to contract is not necessary in an agent, as his agency is created, not by contract, but by appointment, and the contract which he effectuates is 'not his, but that of his principal.

Sims v. Gunber, 78 So. 62, 201 Ala. 286, 288.

For other cases see *Decennial Digests*, *Infants* ⇨6.

Q. 4. A statute in state M provided that married women might contract for the conveyance of their land, and also convey it by deed, upon a separate examination and acknowledgment before a magistrate. P, a married woman, authorized in writing her infant son, A, to contract for the conveyance of P's land, and then to convey it by deed. A contracted with T to convey the land, and, upon approval of the terms of the contract by his mother, gave a deed of conveyance to T. What rights did T acquire by the above transactions?

A. T has a good contract, but has not yet acquired any title. Where the law requires special formalities for the performance of an act, the same formality is required to authorize another to perform the act, if, indeed, the statute providing for the formality does not expressly or by implication exclude the possibility of doing it by proxy. In the present case there is no attempt to meet the requirement of a separate examination and acknowledgment.

Mott v. Smith, 16 Cal. 533.

For other cases see *Decennial Digests*, *Husband and Wife* ⇨196.

Q. 5. B and S make a contract for the sale of a 50-foot lot by telephone, and B authorizes S to make out a written memorandum and sign B's name to it. S made the memorandum, embodying all the terms of the contract, signed the names of each, and read it carefully over the telephone to B, who approved the instrument as executed. B refuses to perform. Can S enforce the contract?

A. Ordinarily the requirements of the statute of frauds are satisfied if the signature is by an agent orally authorized. But the other

party to the contract is regarded as incompetent to act as agent to sign the contract, on the theory that such a practice would be contrary to the intent of the statute and that he is disqualified by adverse interest. In the case before us, however, there is the additional element of the adoption of the signature after it is finished. This may possibly satisfy the statute, without reference to any question of agency.

Sharman v. Brandt, L. R. 6 Q. B. 720.

Mechem, Agency (2d Ed.) § 180.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 102, 116; Principal and Agent $\S$ 6, 11, 12.

SECTION 3.—DELEGATION AND SUBAGENCY

Q. 6. The X Bank, in New York, received a note payable in Chicago from A, and forwarded it to the Traders' Bank, in Chicago, for collection. The Traders' Bank negligently failed to collect. A sues the New York bank. Can he recover?

A. The result depends on whether the understanding in such a case is that the forwarding bank is employed to appoint an agent for the depositor in the place of collection, or merely employed to collect through its own agents. The so-called Massachusetts rule denies the liability of the initial bank to the owner, so long as it was not negligent in selecting the subagent. *Lord v. Hingham Nat. Bank*, 71 N. E. 312, 186 Mass. 161; *Tillman County Bank of Grandfield, Okl., v. Behringer*, 257 S. W. 206, 113 Tex. 415, 36 A. L. R. 1302. On this question of business fact, however, the courts of many leading business states, including New York, and the United States Supreme Court, have held that, in the absence of a special contract to the contrary, the forwarding bank is responsible for the negligence of subagents. *Isler v. National Park Bank*, 147 N. E. 66, 239 N. Y. 462; 25 Col. Law Rev. 965. Some courts place it on the ground: "Delegatus non potest delegare." As a result, banks often stipulate that they will exercise care in the choice of correspondents, but that they will not be responsible for their acts. See 13 Cal. Law Rev. 231, note; *Federal Reserve Bank of Richmond v. Malloy*, 44 S. Ct. 296, 264 U. S. 160, 68 L. Ed. 617, 31 A. L. R. 1261.

For other cases see Decennial Digests, Banks $\S$ 171 (1), (2), (6), 288½.

SECTION 4.—FORMALITY IN APPOINTMENT

Q. 7. An infant orally directs an unlicensed broker to make a purchase for him. The broker accordingly makes a written contract and signs the infant's name. Though the infant admits that the

things purchased were necessary, he refuses to complete the contract, alleging (1) that an infant cannot have an agent; (2) that an agent not authorized in writing cannot make a written agreement for his principal; and (3) that, as the broker was unlicensed, he could not act as agent. Are any of these sound?

A. An infant can, according to more recent cases, do through an agent such acts as he may in law do personally. *Casey v. Kastel*, 142 N. E. 671, 237 N. Y. 305, 31 A. L. R. 995; 33 Yale Law J. 790. It is not true that an agent authorized verbally lacks power to make a written agreement. In a few states, by statute, authority to execute contracts required to be in writing must also be written. As to sealed instruments, the common law requires the same degree of formality in authorization as in execution. *White Eagle Laundry Co. v. Slawek*, 129 N. E. 753, 296 Ill. 240. Cf. *McRae v. Ross*, 148 P. 215, 170 Cal. 74. The third defense assumes that the licensing law incorporates an extraordinary means of compulsion. Ordinarily such a law will expose the unlicensed broker to a penalty, and, at most, deprive him of a right to compensation. It will not invalidate the contract that he has undertaken to make for others. In other words, he has the power to act as agent, if authorized, though he has no right to do so.

For other cases see *Decennial Digests, Frauds, Statute of* §116(4, 5); *Infants* §5.

SECTION 5.—RATIFICATION

Q. 8. A, the agent of B, acted without authority in the sale of certain goods to C. B thereafter, on being informed of the facts, ratified the unauthorized act of A. Subsequently B refused to perform, and, being sued by C, set up the defense that there was no consideration for his ratification. Is the defense good?

A. No; a ratification is not a contract. It requires no consideration. It merely takes the place of a previous authorization. It is the subsequent affirmance or adoption of a contract or transaction which another has done while purporting to act as one's agent, or has done as his servant without being employed by him to do it.

McLeod v. Morrison & Eshelman, 120 P. 528, 66 Wash. 683, 38 L. R. A. (N. S.) 783.

Grant v. Beard, 50 N. H. 129.

For other cases see *Decennial Digests, Principal and Agent* §163(2).

Q. 9. A, an agent, made an unauthorized contract with B for the sale of C's house and lot. The quasi principal ratified, after he

learned of the contract, but B then refused to assent to the ratification. Is B bound?

A. Yes; the ratification remedies the defect of a lack of authorization completely, and no further assent by the other party is necessary. *McClintock v. South Penn Oil Co.*, 23 A. 211, 146 Pa. 144, 28 Am. St. Rep. 785. In *Dodge v. Hopkins*, 14 Wis. 631, the Wisconsin court held that ratification of an unauthorized sale of land will not make a contract obligatory on the other party without his assent. But this is erroneous. Ratification operates as a subsequent unilateral act of adoption. It is not a contract. See *Wambaugh*, 9 Harv. Law Rev. 60, 64; 25 Am. Law Rev. 711.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 115(2); Principal and Agent $\S$ 175(2).

Q. 10. The promoters of an intended corporation secure subscriptions to its stock and options on real estate for it, and enter into a contract on its behalf with Downey to act as manager. When it is duly chartered, it ratifies all these contracts. Can it sue and be sued on them?

A. Strictly speaking, it cannot "ratify," because there could not have been any previous authorization or any agency before the corporation was in existence. Various theories are resorted to in order to sustain similar results under the name of adoption: Novation assented to in advance; acceptance of an offer prepared and held open through the efforts of the promoters; acceptance of benefit of contract between others for one's benefit; assumption of burdens involved in advantages accepted. The applicability of these theories to the three types of contract mentioned will vary, and in some cases, as in the acceptance of benefit doctrine, there will be a difference between suing and being sued. There is a tendency of courts to overlook these distinctions, and give so far as possible the same effect to the adoption of promoters' contracts as to ratification of unauthorized contracts.

Kirkup v. Anaconda Amusement Co., 197 P. 1005, 59 Mont. 469, 17 A. L. R. 441.

For other cases see Decennial Digests, Corporations $\S$ 99(1), 448(1), (2); Novation $\S$ 11.

SECTION 6.—TERMINATION OF RELATION

Q. 11. A, the owner of property, appoints B as his agent to collect the rents of a certain building. A thereafter dies, and one of the tenants continues to pay the rent to B. B thereafter absconds. Can

A's administrator recover from the tenant the amount of rent paid to B?

A. Logically, yes; for the death of the principal automatically terminates the agency. Because of the extreme hardship involved in such cases, courts have so far as possible utilized special circumstances to protect the innocent person dealing with the agent, but the principle itself has not been questioned.

Weber v. Bridgman, 21 N. E. 985, 113 N. Y. 600.

Seavey, 31 Yale Law J., 283, Termination of Power of Attorney by Death.

For other cases see Decennial Digests, Principal and Agent ¶43(1).

Q. 12. A, being indebted to B, his agent, gives him (B) authority to sell certain goods, and to pay himself from the proceeds the amount which is due him. A dies before the goods are sold, and his representative seeks to recover the goods from the agent.

A. This authority is irrevocable, because it constitutes a part of a security. It is in principle similar to a "power coupled with an interest," and is frequently so described in the books; but it differs from the latter in that there is no transfer of a present interest in the thing, as by assignment, deed, mortgage, pledge, or the like, in the case before us. Though such authority is irrevocable, like the power coupled with an interest, unlike the latter, it is terminated by the death of the principal.

Hunt v. Rousmanier, 8 Wheat. 174, 203, 5 L. Ed. 589.

37 Harv. Law Rev. 253. Seavey, 31 Yale Law J., 283.

For other cases see Decennial Digests, Principal and Agent ¶34, 43(1, 2).

Q. 13. A, having a patent, authorized B to dispose of the right to use the patent in certain states, and agreed that B might have half the proceeds, and, further, that the authority should be irrevocable for two years. Before B disposed of the rights, A himself sold the rights for one of the states to X. B then sells the rights in the same state to Y, who knows of the previous sale. Y seeks to enjoin X from using the patent.

A. There is nothing in B's agency to take it out of the general rule that agency is terminable at the will of the principal. Even if he has given up the right to terminate the relation, so that by terminating it he lays himself open to an action for breach of contract, he still has the power to do so. This is not a case of an agency coupled with an interest in the subject-matter. B has an interest in the proceeds, to be sure, but he owns no part or interest in the patent. Nor is this a case of agency as a means of effectuating a security. The recitation that the authority shall be irrevocable for two

years does not make it so. A's act in selling the rights in one of the states mentioned clearly shows an implied revocation of B's agency, so far as that state was concerned. Y was therefore dealing with an agent as to a matter in which he knew the agent had no further authority. He has no claim to the exclusive use of the patent against X, nor has he any contractual claim against A.

Todd v. Superior Court of City and County of San Francisco, 184 P. 684
181 Cal. 406, 7 A. L. R. 938.

Cf. Boehm v. Spreckles, 191 P. 5, 183 Cal. 239.

19 Ill. Law Rev. 596.

For other cases see Decennial Digests, Principal and Agent ¶33, 34, 37.

SECTION 7.—IMPLIED AND APPARENT AUTHORITY

Q. 14. P sues D for the price of a horse sold by A as P's agent. A made the statement to D in good faith that the horse was sound and all right. Any such warranty by the agent was unauthorized, and made without the knowledge of P. The horse was delivered to D, and died of unsoundness existing at the time of the sale. D refuses to pay, alleging breach of warranty.

A. It has frequently been held that one having the unrestricted power to sell horses has the power to warrant their soundness. 2 C. J. 603, at note 75. Some courts have drawn a distinction between agents of horse dealers, who are said to have such a power, and agents of private individuals, who have not unless given special authority. Both statements must be taken merely as detailed application of the general rule that, if it is usual in the market to give the warranty in question in order to effect a sale of the particular type of goods in question, one dealing with the agent may safely assume that his authority to sell carries with it the ordinary powers of warranty. Just what the situation is at any given time or place as to the sale of horses is not so much a question of positive law as of business fact. Though the question of fact before us may be highly standardized, and though it may have come to the attention of the courts frequently in the form suggested here, it is, in view of the rapid changes in the horse trade in this age of motor vehicles, not an immutable fact.

See Cooley v. Perrine, 41 N. J. Law, 322, 32 Am. Rep. 210.

Moore v. Switzer, 239 P. 874, 78 Colo. 63.

For other cases see Decennial Digests, Principal and Agent ¶104(2).

Q. 15. P authorized A to contract to sell 100 bushels of wheat for \$200. A contracted to sell the 100 bushels to T for \$180. P refuses

to deliver, whereupon T sues for breach of contract. Can he recover?

A. One dealing with an agent is put on his guard as to the question whether the man is an agent, and further as to the general character and scope of the agency. He is not put on his guard as to detailed instructions, but may assume, in the absence of notice to the contrary, that the agent has customary authority. This would include authority to fix prices in a sale within a reasonable range. Assuming that the price fixed is not obviously unreasonable, the transaction stands.

Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

For other cases see Decennial Digests, Actions ¶8; Principal and Agent ¶147(2).

Q. 16. A sends B, his servant, with a horse of A's to C, with instructions to sell the horse to C for \$500, but in no case to take any money from C. B sells the horse to C for \$400 and makes away with the money. C knows nothing of the instructions to B. What are the rights of A against C?

A. Assuming that possession under the circumstances constituted a badge of authority to sell, and that, moreover, the agent had authority to sell, the private instructions to the servant will not affect the position of the buyer. It is reasonable to suppose that one in possession, who is authorized to sell, is authorized to receive cash for the sale.

Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

Hatch v. Taylor, 10 N. H. 538.

For other cases see Decennial Digests, Principal and Agent ¶116(1), 147(2).

Q. 17. The owner of a garage for the repair and sale of used cars, going on a vacation of a few days, leaves his head mechanic in charge, ordering him not to sell any cars. The mechanic, however, sells a car to one who had brought in his car for repairs, and also sells one to a stranger in another town. Was the sale of either car valid?

A. The man left in charge of an establishment that sold cars was sufficiently "held out" as authorized to sell the cars in stock to make the contract binding on the proprietor. Whether there was such a holding out to the stranger in the other town is a different question of fact. The mere fact of possession of the machine sold is not enough to clothe the agent with authority to sell. Unless there is something more to lead the buyer to believe that the owner has au-

thorized his agent to sell, such as being left in general charge of a selling establishment in the first part of this case, the owner can refuse to recognize the sale.

Carter v. Rowley, 211 P. 267, 59 Cal. App. 486.

For other cases see *Decennial Digests*, *Estoppel* ⇨72, 75; *Principal and Agent* ⇨103(7).

SECTION 8.—UNDISCLOSED PRINCIPAL

Q. 18. The proprietor of a local express business sold the business to the defendant company, but remained in charge of the business as the agent of the buyer, with authority to make settlements for all losses not exceeding \$20. The plaintiff, who presented a claim for the loss of an expensive dress belonging to her, was authorized by the agent "to buy a new dress of the same kind and send the bill to us." The plaintiff, acting under the impression that the agent was still the owner of the business, bought a new dress similar to the former one for \$250. What are her rights?

A. Quite aside from any question of the liability of the express company as carrier, it seems that the agreement of settlement entered into was a binding agreement, entered into in the ordinary course of business by an agent on behalf of an undisclosed principal. By the ordinary rule, the principal, upon being discovered, may be sued. His defense is that the agent's authority to make settlements was limited to claims of \$20 or less, and that, though this instruction was secret, the whole agency was equally secret, so that no claim can be made as to the apparent scope of the agent's authority, as no authorization was "apparent." It has been held, however, in such a case, that "the ordinary rules of responsibility of a principal to third persons for the acts of his agent within the apparent scope of his authority apply when the relationship of principal and agent is found to exist in a case in which the agent has been acting for an undisclosed principal."

Brooks v. Shaw, 84 N. E. 110, 197 Mass. 376.

See 7 Minn. Law Rev. 578.

For other cases see *Decennial Digests*, *Principal and Agent* ⇨145(1,2),

Q. 19. A, in good faith, sold goods to B, supposing him to be the principal. B in fact was acting as agent of C and within the scope of his authority. The goods were charged to B, and on refusal to pay he was sued by A to recover the price. While the action was pending, A learned of C's relation to the transaction. Nevertheless he proceeded to judgment against B and took out execution, which

has never been satisfied. After the lapse of several months, he sues C for the price of the goods. Result?

A. The liability of the agent and the undisclosed principal is alternative. A delay of a few months after learning of the undisclosed principal will not in itself bar an action against such principal, nor will anything done before knowledge of the undisclosed principalship affect the rights of the other party. Hence the question is whether prosecuting a case to an unsatisfied judgment under these conditions will operate as an election and free the principal. There is a conflict of authority on the point. The tendency of the courts is to consider the doctrine of election harsh, and not to be extended. Hence most courts hold that a mere judgment will not operate as an election not to hold the principal, though of course only one satisfaction is to be allowed.

Beymer v. Bonsal, 79 Pa. 298.

Contra: *Murphy v. Hutchinson*, 48 So. 178, 93 Miss. 643, 21 L. R. A. (N. S.) 785, 17 Ann. Cas. 611.

22 Col. Law Rev. 474.

For other cases see *Decennial Digests*, Election of Remedies ☞3(4); Principal and Agent ☞145(4).

SECTION 9.—EXECUTION OF WRITTEN INSTRUMENTS

Q. 20. J. T. H. was the treasurer of a parish, and as such wished to execute several notes to bind the parish, and not himself individually. In each case the payee knew that the principal received the consideration. The first note he signed: "J. T. H. Treas., St. Paul's Parish." The second was signed: "J. T. H., Treas. of St. Paul's Parish." The third was signed: "J. T. H., Treas. for St. Paul's Parish." On which, if any, is J. T. H. personally liable?

A. It was held in *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409, that the first of these was the note of J. T. H., and that the rest of the signature was mere description of the person. The same was held of the second signature in *Sheridan v. Carpenter*, 61 Me. 83. But the third was held in the same case to bind the parish. Though the application of the principle is somewhat technical in these cases, the principle itself is perfectly clear: That mere words of description will not release the agent from liability, and that there must be words of "procuration," or something in the body of or on the face of the instrument to show agency, in order to make the document that of the principal. The word "for" was held sufficient indication in the last of the three cases.

For other cases see *Decennial Digests*, Bills and Notes ☞123(2); Principal and Agent ☞126, 136(3).

Q. 21. The cashier of a bank signed commercial paper for the bank thus: "A, Cashier." Was he personally liable?

A. No; by well-recognized commercial usage, this is an exceptional case. Such a signature, made in the usual course of the business of the bank, is understood to be the signature of the bank, and not that of the individual.

Baldwin v. Newbury Bank, 1 Wall. 234, 17 L. Ed. 534, followed in numerous cases.

For other cases see *Decennial Digests, Bills and Notes* ⇨123(3).

Q. 22. A promissory note was signed by an agent, followed by the word "for" and the name of the principal inclosed in brackets. Was this *prima facie* the note of the agent or of the principal?

A. Such a note has been held *prima facie* the note of the agent, although, had the brackets been omitted, it would have been clearly the note of the principal. *Early v. Wilkinson*, 50 Va. (9 Grat.) 68. The tendency of courts to-day is perhaps a little more liberal in utilizing any information on the document to clarify the intention of the parties, and hold them accordingly.

See 2 O. J. 679, § 333.

For other cases see *Decennial Digests, Bills and Notes* ⇨123(2).

SECTION 10.—EXECUTION OF AGENCY—DUTIES OF AGENT

Q. 23. An attorney forwarded a note to another attorney for collection, but failed to give instructions as to the ownership of the note. The second attorney collected the money and remitted it to the payee whose name was indorsed on the note. The payee, however, was at the time not the owner of the note. Nevertheless he kept the money and absconded. What is the liability, if any, of the first attorney to his client?

A. He is liable. In the first place, there may be some doubt as to whether he was authorized to delegate his authority; but, assuming that the circumstances were such as to imply this right, or that he could make the second attorney the direct agent of his client, in this case he has failed to take such reasonable precautions as should accompany the act of delegating his authority.

Lewis v. Peck, 10 Ala. 142.

For other cases see *Decennial Digests, Principal and Agent* ⇨64(1).

Q. 24. A undertook gratuitously to act as the agent of B in the purchase of certain property. He thereupon purchased it for himself and resold it to his principal for an advanced price. The prin-

cial, upon learning of the nature of the agent's transactions, sues for the profit made by the agent. The agent resists, on the ground that he was not bound to the ordinary duties of an agent, because of the absence of consideration.

A. The defense is not good, for, although the agent could not be compelled to enter upon performance, or made to pay damages for his refusal to do so, yet, when he did enter upon performance, he was bound to the same degree of good faith as a paid agent. A paid agent may be bound to exercise greater care and more diligence in most instances than a gratuitous agent, but there is no difference between them in the matter of loyalty and fidelity.

Samonset v. Mesnager, 41 P. 337, 108 Cal. 354.

For other cases see *Decennial Digests, Principal and Agent* ¶62(2).

Q. 25. A jobber of cigars, in consideration of being given the sole agency for a certain cigar, agreed to render his best services in pushing their sale. At the same time he was making efforts to introduce and sell another cigar of the same general character, manufactured by himself. Was he guilty of a breach of his duties as agent?

A. The answer depends upon the meaning of the contract. This, in turn, must be ascertained by reference to the general understanding and customs of the trade. It has been held in such a case as this that there was no breach of contract. *Hichhorn v. Bradley*, 90 N. W. 592, 117 Iowa, 130. On the other hand, a somewhat similar contract for the exclusive agency for the sale of a machine has been held broken by the acceptance of an agency of a rival machine. *Ewing's Appeal* (Pa.) 4 A. 832.

For other cases see *Decennial Digests, Principal and Agent* ¶69(1), 70.

Q. 26. An agent was employed by an insurance company to adjust losses. After he had effected an adjustment in a particularly difficult case for his company, other insurance companies that were involved in the same case adopted his adjustment and paid gratuities to him. Was the agent bound to account for these to his principal?

A. No; if these were truly gratuities or gifts, prompted by politeness after the event, they are the property of the agent, and, in the absence of an agreement covering such case, there is no obligation to turn them over to the principal.

Ætna Ins. Co. v. Church, 21 Ohio St. 492.

For other cases see *Decennial Digests, Principal and Agent* ¶69(2).

Q. 27. An agent was authorized to lease the land of his principal. He made a lease under this authority to himself. Was it valid?

A. In the absence of clear authorization to do so, the agent cannot make a lease to himself, any more than he can sell to himself the property which has been intrusted to his care.

Anderson v. Grand Forks First Nat. Bank, 67 N. W. 821, 5 N. D. 451.

For other cases see Decennial Digests, Banks Ⓒ261(3).

Q. 28. The confidential agent of a theater manager used his position to ascertain the profits of the business, and on the basis of this knowledge secretly overbid his principal and secured for himself a lease of the theater. What are the principal's rights?

A. Equity will regard the lease as taken for the principal's benefit, and hold the agent as trustee.

Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541.

For other cases see Decennial Digests, Principal and Agent Ⓒ69(7).

Q. 29. A undertook gratuitously to invest money for B. B gave him positive instructions as to the specific character of the security to be taken. Nevertheless A disregarded these instructions in making the investment. The investment results in a loss. What are the rights of B?

A. B has the same rights as he would have had if the agency had not been gratuitous; that is to say, A is liable for the loss, because of his disobedience of orders.

Passano v. Acosta, 4 La. 26, 23 Am. Dec. 470.

For other cases see Decennial Digests, Principal and Agent Ⓒ61(2).

Q. 30. An agent was instructed to remit to his principal in notes of \$50 and \$100. Instead he sent notes of \$5, \$10, and \$20, thus increasing the size of the package. The package was lost in transit. What are the rights of the principal?

A. Although the loss cannot be traced exclusively to the agent's disobedience, yet through his disobedience he has made himself absolutely liable for the unforeseen consequences.

Wilson v. Wilson, 26 Pa. 393.

For other cases see Decennial Digests, Principal and Agent Ⓒ64(3).

Q. 31. A factor in possession of goods, upon learning of the declaration of a war likely to interfere with his chances of disposing of the goods in accordance with his instructions, proceeds to sell them at once for the best price he can get. Will he be liable to his principal for disobedience of orders?

A. Not if he has acted in good faith and exercised his discretion reasonably; for the factor has implied authority to act for his principal, irrespective of instructions, in accordance with what appears to him the needs of any emergency that may arise. Cf. *Greenleaf v. Moody*, 13 Allen (Mass.) 363. The term "agency of necessity" is sometimes applied to the power of an agent or carrier in emergency to assume authority from the necessity of the case, and a sale to prevent a loss, if fairly made, will be binding on the principal or owner.

See 2 Cambridge Law J. 241.

For other cases see *Decennial Digests, Principal and Agent* ¶59.

Q. 32. An agent disposed of his principal's property in accordance with his authority, and secured a contract for the payment of a valuable consideration therefor. Thereafter the purchaser requested a release from the contract. The agent, without authority from the principal, and before the principal had been informed of the making of the contract, released the purchaser. What are the rights of the principal?

A. He can demand an accounting from the agent on the basis of the conditions as they existed before the unauthorized release. Cf. *Kountz v. Gates*, 47 N. W. 729, 78 Wis. 415. Furthermore he may contend that the agent had neither the authority nor the semblance of authority to grant the release, and that therefore, as against the purchaser, the contract is in full force.

For other cases see *Decennial Digests, Principal and Agent* ¶63(1).

Q. 33. B was engaged in the illegal sale of liquor. He employed A as a salesman and C as a collector. Both received money from customers and both refused to settle their accounts with B. Has he any legal standing against either of them?

A. The illegality of the whole business may bar him from proceeding against A. *Ruemmeli v. Cravens*, 74 P. 908, 13 Okl. 342. As to C, however, the transaction is simply for money paid to the agent for the account of the principal, and the agent cannot be heard to deny his principal's right to the money. Cf. *Hertzler v. Geigley*, 46 A. 366, 196 Pa. 419, 79 Am. St. Rep. 724.

For other cases see *Decennial Digests, Intoxicating Liquors* ¶327(1).

Q. 34. A, a real estate agent, is employed by B to sell or exchange a certain lot in the city of New York for a farm, and is also employed by C to sell or exchange his farm in Rockland county for a piece of property in the city of New York. Neither B nor

C knew of A's employment by the other, both relying on A's judgment and knowledge of city and country property. An exchange was effected between B and C, A having brought them together. Thereafter B and C, learning of A's acting for both, refused to pay commission. A sues both parties in separate actions for commissions. Can he recover from both or either?

A. The double agent forfeits his commission from both sides, unless both sides have knowledge of his double agency and assent to it. This knowledge and assent may be made out in a proper case by reference to customs of a trade, but there is no evidence of such a custom presented here. Accordingly A can recover from neither.

Gordon v. Beck (Cal.) 239 P. 309.

14 Cal. Law Rev. 239.

Glenn v. Rice, 174 Cal. 269, 162 P. 1020.

For other cases see Decennial Digests, Brokers ⇨67(2), 100; Principal and Agent ⇨157.

SECTION 11.—UNAUTHORIZED ASSUMPTION OF AGENCY

Q.35. The defendant was the agent of a foreign corporation, which had failed to comply with the registry laws of the state. Registration was a condition precedent to the right to do business in the state. The defendant, knowing these facts, made a contract in behalf of the corporation with the plaintiff, who did not know them. By the law of the state the corporation was not liable on this contract. Is the defendant liable, and, if so, on what possible theories?

A. The requirement of registration is purely statutory, and the effect of noncompliance must depend on the statute. Assuming that it says nothing about the effect of noncompliance on the position of the agent, and that it does not impute knowledge of the lack of registration to the plaintiff, he may proceed against the defendant for breach of the implied warranty of his authority to act for the principal, which in this case would include the compliance with the terms of the statute. Ryerson & Son v. Shaw, 115 N. E. 650, 277 Ill. 524. There is some conflict of authority whether there is any implied warranty of authority that the principal has capacity to contract, as, for example, where the contract is ultra vires of the corporate principal. Thilmany v. Iowa Paper Bag Co., 79 N. W. 261, 108 Iowa, 357, 75 Am. St. Rep. 259.

For other cases see Decennial Digests, Banks ⇨253; Corporations ⇨653; Principal and Agent ⇨136(6).

SECTION 12.—IMPUTATION OF NOTICE TO PRINCIPAL

Q. 36. A, the vice president of the B Bank, was also treasurer of the C corporation. As vice president he discounted two notes of C, and placed the proceeds to its credit on the books of the bank. Then, as treasurer of C, he drew a check on B "to the order of draft N. Y.," and issued two drafts to himself as an individual, which he signed as vice president of B. B sues C on the notes, and C claims that it may set off the amount of the drafts, the proceeds of C's checks. Judgment for whom?

A. It has been held that the knowledge of A, as vice president of B, of his intent to misappropriate the funds obtained on defendant C's check, was not imputable to the bank, so as to enable C to set off the amount fraudulently obtained by him on the drafts. In general, a bank or corporation would be chargeable with the knowledge of its officer, by which it was represented. But an exception is made where the officer or agent is adversely interested, and is acting for his individual benefit. But this exception, in turn, is subject to qualification. If the agent was the sole representative of the corporation in the fraudulent transaction, and if the corporation claims through the agent's act, it must take the benefit of the agency with the burden of notice.

The issue here is: In what capacity did A commit the fraud? It would seem to be in that of treasurer of C. B gained nothing by his act as vice president. When A embezzled the money, it was the money of C, and it should bear the loss. *Gunster v. Scranton Illuminating Heat & Power Co.*, 37 A. 550, 181 Pa. 327, 59 Am. St. Rep. 650. See *Hughes v. Riggs Bank (Ariz.)* 239 P. 297, where cashier's knowledge, as sole representative of the bank, made it chargeable with his knowledge that note discounted was without consideration. *First Nat. Bank of New Bremen v. Burns*, 103 N. E. 93, 88 Ohio St. 434, 49 L. R. A. (N. S.) 764; 39 Harv. Law Rev. 646; 26 Harv. Law Rev. 237; 27 Harv. Law Rev. 481; 65 Univ. Pa. Law Rev. 35; 19 Ill. Law Rev. 174, 595.

For other cases see Decennial Digests, Banks ¶116(2,6); Corporations ¶401, 428(3).

SECTION 13.—LIABILITY IN TORT—EXISTENCE OF RELATION OF SERVANT

Q. 37. A is owner of an automobile. B, his wife, was driving the car with his consent, making a trip solely for her own purposes, when she negligently runs into C and injures him. C sues A. What decision?

A. In general, the doctrine of respondeat superior applies only when the relation of master and servant exists between the wrongdoer and the defendant, sought to be charged for the consequences of some wrong or neglect. According to a majority of decisions, the relationship of husband and wife, or parent and child, does not make the driver of the car the owner's servant. *Landry v. Richmond*, 124 A. 263, 45 R. I. 504, 32 A. L. R. 1500. But some courts have adopted the so-called "family purpose doctrine," that, where the owner furnishes a vehicle for the customary conveyance of the members of his family, he makes their conveyance by that vehicle his business, and any one driving the vehicle for that purpose with his consent is his agent. *Birch v. Abercrombie*, 133 P. 1020, 74 Wash. 486, 50 L. R. A. (N. S.) 59; 13 Cal. Law Rev. 337.

For other cases see *Decennial Digests, Master and Servant* ⇨301(1); *Parent and Child* ⇨13(1).

Q. 38. P employs A to rebuild his house; A agreeing to furnish competent workmen at a certain daily rate, and to charge for the material the cost price plus ten per cent. The work is to be done under the supervision of P's architect. Needing an engine on the work, A hires from T an engine for \$50 for a week. While the engineer is operating under the direction of A's foreman, he negligently allows the pressure in the boiler to become too great, and it explodes, injuring a passerby. The latter sues T, P, A, and the foreman.

A. Whose servant was the negligent engineer? We can eliminate T from the discussion, as there is nothing to show that the engineer was his employee. Even if he came from T's establishment with the engine, the fact that he was operating under the direction of the foreman would relieve T. We can eliminate P, the owner of the premises, if we can establish A's position as an independent contractor. Two circumstances may be utilized to suggest an opposite conclusion: The supervision of P's architect, and the mode of payment. As to the first: An architect's supervision is not ordinarily a power of direction as to the doing of details, but a power to pass or reject work after it is done. It is not inconsistent with the existence of an independent contractor; in fact, it has come into existence as a means of dealing with independent contractors. As to the mode of payment, the "cost plus" system is commonly resorted to in a rapidly changing market, without in the least changing the relations among the parties involved. If the ordinary methods of the building trades can be assumed, A is an independent contractor. The foreman and the engineer are his serv-

ants, and he is liable. As to the foreman, though he directed the acts of the engineer, he was not the "master" of the engineer, and, unless he can be charged with personal negligence or other fault in the manner of his directions, he is not liable.

Standard Oil Co. v. Anderson, 29 S. Ct. 252, 212 U. S. 215, 53 L. Ed. 480.
33 Harv. Law Rev. 714.
23 Col. Law Rev. 444, 456.
23 Mich. Law Rev. 421.

For other cases see Decennial Digests, Master and Servant  301 (4).

Q. 39. The owner of a wagon rents it to a construction company, with an agreement that a driver selected and paid by the owner shall superintend the loading. The driver permits the wagon to be loaded so heavily that, when he drives it upon a bridge, damage is done to the bridge, the wagon, and the load. Who, other than the driver and the person actually loading the wagon, should pay for the respective items of damage?

A. It is a difficult question in such cases whether the driver has become a servant of the construction company for the time being. The mode of selection and of payment, and the apparent absence of control over his actions, by the construction company, indicate that he is not its servant. The persons directly at fault were the driver and the loader, but the driver's part would seem to bar any claim against the loader's employer for the injury to the wagon. Likewise the loader's position would bar any claim against the driver as to the damage to the load. The bridge owner has a claim against the owner of the wagon for coming on it with an improper load. The fault of the loader is perhaps too remote from the damage to be complained of in a claim against the construction company for damage to the bridge.

Charles v. Barrett, 135 N. E. 199, 233 N. Y. 127.
8 Minn. Law Rev. 551.

For other cases see Decennial Digests, Master and Servant  301 (4).

SECTION 14.—SCOPE OF EMPLOYMENT

Q. 40. M, a rich farmer, employs S to drive a big load of cotton to the gin and deliver it there. When the driver gets there, he strikes a match to light his pipe, and that sets fire to the cotton, which destroys the gin and the whole town. Is M liable for the consequences of the negligent act of his servant?

A. It would be a question of fact for the jury whether S was acting at the time in the scope of his employment. It might be argued that the act of S was not connected with the work which S

was sent to do. See *Adams v. Southern Bell Telephone Co.* (C. C. A.) 295 F. 586; *Williams v. Jones*, 3 Hurlst. & C. 256, 159 Eng. Reprint, 528, affirmed in 3 Hurlst. & C. 602, 159 Eng. Reprint 668, by a divided court. It has been held that the jury may find that one employing young men to work in a field containing dry grass ought to have known that they would smoke, unless forbidden to do so, and must use reasonable means to protect the property from fire which might be set by their carelessness. *Palmer v. Keene Forestry Ass'n*, 112 A. 798, 80 N. H. 68, 13 A. L. R. 995.

For other cases see *Decennial Digests, Master and Servant* ⇨302(6), 332(1).

Q. 41. The cook in the defendant's lunch room caught a mouse and threatened to put it on the plaintiff, a waitress in the establishment. In running away she fell and was injured. It was part of the cook's general duties to keep the place clean and free from mice and vermin. Plaintiff sues the owner of the lunch room.

A. The cook was not acting in the scope of his employment, but "on a frolic of his own," and his employer is not liable.

Smith v. Western Union Telegraph Co. (Mo. App.) 232 S. W. 480.

For other cases see *Decennial Digests, Master and Servant* ⇨302(3).

Q. 42. The defendant's chauffeur was ordered to take home an employee of the defendant, who had become ill. On his arrival at the residence of the employee, the latter requested the chauffeur to take his wife's dressmaker to her home, which was in the direction of, but beyond the defendant's garage. While on his errand, but before reaching the defendant's garage, which he would naturally pass on the way, the chauffeur drove carelessly and injured the plaintiff, a pedestrian, who was using due care. Has the plaintiff a good cause of action against the defendant?

A. To relieve a master from liability on the ground of deviation by the servant, the deviation must be substantial. Where the servant is engaged in his master's business, notwithstanding the deviation, or proposed deviation, or where the deviation is slight, the master is still liable for the servant's negligence.

Riley v. Standard Oil Co., 132 N. E. 97, 231 N. Y. 301, 22 A. L. R. 1382.

See 23 Col. Law Rev. 444, 716.

19 Ill. Law Rev. 189.

21 Mich. Law Rev. 229.

For other cases see *Decennial Digests, Master and Servant* ⇨302(6).

Q. 43. A freight agent of a railroad at a competitive point, in order to accommodate a certain shipper, furnished him with sever-

al signed order bills of lading, upon the shipper's promise that he would properly fill out the blank spaces and that the goods to be described therein would be forthcoming. The shipper filled out the blank spaces in the bill of lading, and delivered the instruments to a commission merchant, who in good faith made advances upon the same. Later the commission merchant discovered that no goods were ever delivered to the railroad, and he now seeks to hold the railroad responsible. Will he succeed?

A. Assuming that the fraud, amounting to forgery, is a sufficient defense for the railroad company on the contract involved in the bill of lading, the question remains whether it is liable for the damages caused by the negligence of its servant in his effort, probably contrary to instructions, to further the interests of his employer in a particular way. The intention of the agent, while relevant, is not conclusive to show that the unusual act he has been guilty of was "within the scope of his employment." Some courts have held that the carrier is not liable on a bill of lading issued without delivery of goods, although it misleads a bona fide purchaser for value. *Friedlander v. Texas & P. Ry. Co.*, 9 S. Ct. 570, 130 U. S. 416, 32 L. Ed. 991. Other courts have held carrier corporations liable upon bills of lading issued in their name by an agent, whose power to do an act depends upon the existence of facts peculiarly within the knowledge of the agent, and of the existence of which the doing of the act is itself a representation within the scope of his employment. *Bank of Batavia v. New York L. E. & W. R. Co.*, 12 N. E. 433, 106 N. Y. 195, 60 Am. Rep. 440. See *Fraudulent Bills of Lading*, Ferson, 21 Mich. Law Rev. 655. "The statement has been made on behalf of the company, and the consequences thereof should be visited upon the company."

See 24 Col. Law Rev. 787.

For other cases see *Decennial Digests*, Carriers ¶57.

Q. 44. A passenger in a railroad station, who becomes apprehensive that he will lose his train because of the length of time he is kept in line waiting for baggage he has checked, loudly demands his baggage, and, upon being refused any attention until his turn comes, jumps over the baggage counter to get his baggage himself. The baggage master orders him out, and upon his refusal to go without his baggage the baggage master hits him on the head with an ax, which the railroad company had provided to be used in case of fire only. Is the railroad company liable to the passenger for the injury?

A. In such a case it has been held that the servant was fighting his own battle. He was not merely doing his duty in the wrong way; he was doing something not at all within the line of his duty. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373. But the fact that the tort was committed wantonly or willfully, if within the scope of the employment, does not exonerate the master. It matters not that the servant goes beyond his strict line of duty and authority, if it does not arise wholly from some independent and personal motive on the part of the servant to do the act upon his own account, and not within the general scope of his duties. *Jones v. Seaboard Air Line Railway Co.*, 64 S. E. 205, 150 N. C. 473; *Davis v. Merrill*, 112 S. E. 628, 133 Va. 69.

For other cases see *Decennial Digests, Master and Servant* ⇨302(1), (3), 303, 306.

Q. 45. While an electrician was working on a ladder perched on a table in a schoolroom, the janitor came in to clean the room. He complained about the electrician being in the way. The latter replied with a sarcastic remark. The janitor by this time had mopped the floor up to the table, and in trying to get under it he gave it a vigorous push, which caused the ladder to topple and injured the electrician. The electrician sues the owner of the school for damages. Result?

A. A finding has been upheld in such a case that the servant was not doing the wrong thing, but rather the work in his line of duty in the wrong way. There was no detour, and his employer was held liable.

Nelson's Business College Co. v. Lloyd, 54 N. E. 471, 60 Ohio St. 448, 46 L. R. A. 314, 71 Am. St. Rep. 729.

For other cases see *Decennial Digests, Master and Servant* ⇨306.

SECTION 15.—LIABILITY TO SERVANT

Q. 46. A milkman, whose duties required him to open a garage early in the morning, found the way blocked one morning by a vicious dog. As soon as he tried to open the door, the dog jumped on him, and bit him, causing serious injuries. Was he entitled to compensation under a statute limiting compensation to injuries arising out of and in the course of employment?

A. This clause has been more frequently the subject of litigation than any other in the compensation laws. A reasonable leeway must be allowed for coming to and leaving work, and for accidents only remotely connected with the doing of the work. In a case of

this kind it has been held that the injury came within the scope of the clause "arising out of and in the course of employment."

Chandler v. Industrial Commission, 184 P. 1020, 55 Utah, 213, 8 A. L. R. 930.

Id., 208 P. 499, 60 Utah, 387.

See *Case of Withers, Claimant*, 147 N. E. 831, 252 Mass. 415, 40 A. L. R. 1475.

For other cases see *Decennial Digests, Master and Servant* ⇨371, 373, 375(2).

Q. 47. Peters has a shoe factory in Boston and a box factory in Cambridge. Adams is an engineer in the shoe factory. Alderson is an engineer in the box factory. Atkyns is manager of the box factory. Peters invites all his employees to come to the opening of a new building at the box factory. At the opening, Adams and Atkyns are injured, because Alderson, while trying to show how fast he can make the machinery work, causes the boiler to explode. What is Peters' liability?

A. The invitation, we may assume, did not amount to a command; hence Adams is present in the capacity of an invitee, and not of a servant. In any event, as an employee in another plant of an entirely different kind, he is not a "fellow servant" of Alderson. The facts are not absolutely clear as to (1) whether the act of Alderson is within the scope of his employment, or (2) whether running the machinery at high speed constituted negligence; yet, in the absence of evidence to the contrary, we may fairly assume that showing the workings of the machinery was the employer's purpose, and that the manner of showing it was improper. Peters is therefore liable to Adams. As to Atkyns, the fellow servant rule applies. Whether or not the superior servant rule applies, in a jurisdiction as to the negligence of the superior, it is clear that the master is not liable for an injury to the superior resulting from the negligence of his subordinates.

McGrory v. Ultima Thule, A. & M. R. Co., 118 S. W. 710, 90 Ark. 210, 23 L. R. A. (N. S.) 301, 134 Am. St. Rep. 24.

For other cases see *Decennial Digests, Master and Servant* ⇨177.

SECTION 16.—LIABILITY OF SERVANT

Q. 48. R, a plumber, received an order to repair the gas pipes in two vacant houses. He sends A to do the work. A, on reaching the first house, begins the work, but, getting tired, leaves before it is finished and goes home. That afternoon, owing to the escape of gas in the two houses, there is an explosion in each. Is A responsible?

A. A is responsible to the plumber for his disobedience, and anything that may be found to have resulted from it; but he is not responsible to strangers for mere nonfeasance. On this basis a distinction might be drawn between the conditions in the two houses; he would be liable as to the one in which he had begun to work, and wrongfully or negligently left the work unfinished. It may be argued that he is liable, even in the case of the other house, because of the dangerous nature of the agency, defective gas pipes, for the repair of which he has assumed responsibility.

Emery & Co. v. American Refrigerator Transit Co., 184 N. W. 750, 193 Iowa, 93, 20 A. L. R. 86.

Cf. Murray v. Cowherd, 147 S. W. 6, 148 Ky. 591, 40 L. R. A. (N. S.) 617. **For other cases see Decennial Digests, Master and Servant** 310; **Principal and Agent** 159(2).

BAILMENTS AND PERSONAL PROPERTY

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Section

1. Acquisition of Title to Wild Animals.
2. Rights of Finder of Lost Property.
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4. Confusion of Goods.
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11. Trade Secrets—Bona Fide Purchase for Value.

SECTION 1.—ACQUISITION OF TITLE TO WILD ANIMALS

Q. 1. A owned a ship, which he employed in the whaling industry. A boat's crew from this ship pursued and struck a whale, and the harpoon and the line attached to it remained in the whale, but did not remain fast to the boat. The boat's crew continued in pursuit. B likewise owned a ship, which he employed in the whaling industry. A boat's crew from B's ship, seeing the whale struck and the boat's crew from A's ship in pursuit, also pursued it, and killed it; the harpoon from this boat remaining in the whale and remaining fast to the boat. The sea was calm. About five minutes later, the boat's crew from A's ship came up, cut B's line, and began to cut up the whale. Who first acquired title to the whale?

A. In general, the first taker of a wild animal (*feræ naturæ*), who does some act of appropriation and reduces it to possession, acquires title. When possession has become effective and complete, the right of property is clear. Mere pursuit alone gives no title. *Buster v. Newkirk*, 20 Johns. (N. Y.) 75. Possibly fresh pursuit, with a reasonable prospect of success, would give the pursuer a prior right to acquire property against interference by third persons. But the authorities seem to hold that the pursuer must have subjected the animal to his control, so that capture is practically certain, to have any basis of action against others, who intercept and kill it. *Pierson v. Post*, 3 Caines (N. Y.) 175, 2 Am. Dec. 264; *Liesner v. Wanie*, 145 N. W. 374, 156 Wis. 16, 50 L. R. A. (N. S.) 703. Thus, where plaintiffs had mortally wounded a wolf and were in vig-

orous pursuit, and would have had actual possession in a few moments, when defendant interfered and shot it, title was held to be in plaintiffs. It seems that, in the whale fishery, the usage is that the first iron, whether attached to the boat or not, holds the whale. *Swift v. Gifford*, 2 Lowell, 110, Fed. Cas. No. 13,696; *Ghen v. Rich* (D. C.) 8 F. 159. Fish in a net are reduced to possession, though there is still a possibility of their escape. *State v. Shaw*, 65 N. E. 875, 67 Ohio St. 157, 60 L. R. A. 481.

For other cases see Decennial Digests, Animals ⚡2; Fish ⚡3; Larceny ⚡5.

Q. 2. B, a chance passer-by, finds a bear trap set by A on public land, but springs it, moves the trap a little way, and resets it. The next night a bear is caught in the trap. To whom does it belong?

A. The ownership of wild animals may be acquired by occupancy, or the mere taking of possession. Physical seizure is not necessary; it is sufficient that the animal be brought within the captor's control. B has converted A's trap, and the capture was made by B, who was in the wrongful possession of the trap. A can no more claim the bear, because it was caught with his trap, than he could claim all game which B might shoot, if B stole or converted A's rifle. A may, however, be entitled to recover consequential damages from B by reason of the trespass on his personal property. See *State v. State Journal Co.*, 106 N. W. 434, 75 Neb. 275, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254. The measure of damages, however, is not the value produced by the labor of the wrongdoer, but the detriment to the owner by the unauthorized use of his property. It might possibly be argued that B's interference with the trap was not such a tangible and exclusive appropriation of the trap as to deprive A of possession, so that the capture could be said to be made by B rather than by A.

For other cases see Decennial Digests, Animals ⚡2; Bailment ⚡32.

Q. 3. A, trespassing upon the property of B, set thereon a bear trap. B, coming up the next day, found a bear caught in the trap. He promptly killed the bear, and sold the carcass and skin for a total amount of \$36. After the bear was killed, he was recognized by C as the one which he had held in captivity for two years. The bear, captured when very small, had become very tame and was allowed to go at liberty about the premises of C. In his second summer, however, he had fallen into bad habits, and frequently absented himself for periods varying from two days to three weeks. When

caught in the trap, he had been absent from home over two weeks. Both A and C bring their actions against B for converting the bear. What should be the result of each action?

A. In the case of wild animals, captured and confined alive, title is defeasible, if they escape and regain their natural liberty. Wild animals, which are so tame as habitually to return to their captor, are said to have the *animus revertendi*, and are not regarded as having escaped, even though they stray at large. On the facts here, C would probably be able to make out a case against B.

Assuming that the bear had escaped and was open to the first taker, the question is raised as between a trespasser and the landowner. The common law is that, if animals are wrongfully taken on another's land, they become the property of the landowner. B is not liable to A. *Gratz v. McKee* (C. C. A.) 270 F. 713, 23 A. L. R. 1393.

It has been held that a person capturing a bear in a trap, contrary to the game laws, has no title to support an action against a game warden. *Jones v. Metcalf*, 119 A. 430, 96 Vt. 327; 21 Mich. Law Rev. 943; *James v. Wood*, 19 A. 160, 82 Me. 173, 8 L. R. A. 448.

For other cases see *Decennial Digests*, Animals ⚡2; Fish ⚡5(1), 7(3); Game ⚡10.

Q. 4. A placed a small pine box, intended as a beehive, in the crotch of a tree, in the woods on the land of B. A visited the hive about twice a year, to ascertain whether any bees had hived in the box. Ten years later, C went on the premises and took and carried away the hive, together with honey and a swarm of bees then in it, and appropriated them to his own use. Neither A nor C had any permission or license from B, the owner of the land, to place or keep the hive in the tree, or enter on the land. After C had removed the contents, he replaced the hive in the tree. Did A acquire any property in the bees by hiving them, notwithstanding they were upon the land of another? He sues C for conversion of the hive and its contents. Can he recover?

A. It has been held that in such a case A acquired no title to the bees or the honey, since he was a trespasser in placing the hive on B's land. The illegal capture of a wild animal gives no title to support an action. *Rexroth v. Coon*, 23 A. 37, 15 R. I. 35, 2 Am. St. Rep. 863; *Jones v. Metcalf*, 119 A. 430, 96 Vt. 327; *Gratz v. McKee* (C. C. A.) 270 F. 713, 719, 23 A. L. R. 1393. While it may well be that the title inures at once to the owner of the land as against the captor, it would seem that the possession of the hive was in A, and also the contents. This bare possession might well be considered a

good title as against a later trespasser. 5 Harv. Law Rev. 404; *Adams v. Burton*, 43 Vt. 36. See 39 A. L. R. 353, note.

Note.—Compare the case of the finder, where A finds on B's premises a ring, the existence or presence of which was not known to B; can A, if a trespasser, retain it against B? Against C, a third party, who takes it from A's possession?

For other cases see Decennial Digests, Animals ⚡2; Fish ⚡5(1), 7(3); Game ⚡10.

SECTION 2.—RIGHTS OF FINDER OF LOST PROPERTY

Q. 5. B, a gardener, found buried and concealed in the soil and underneath the surface of A's land more than \$1,200 in coins. The land was owned and occupied by A, who held it under a deed with the usual covenants of warranty, and had occupied it for many years. Did he acquire possession of these coins through his purchase and occupancy of the land, or was the finder entitled to the money, regardless of the ownership and occupancy of the land by A?

(a) A employed B to repair an old icebox, in the wall of the house owned and occupied by A. In the course of his work, B found pushed between the zinc lining and the outer wall of the icebox a little bag containing \$60 in gold and silver coins, and currency to the amount of \$140. A saw B make this find, and demanded possession of the bag and its contents. Upon B's refusal to surrender it, A brings his action of replevin. What should be the result?

A. It is commonly said that, as between the finder and the owner of the premises, right to possession should depend on whether the property is to be regarded as being in the possession of the owner of the premises at the time of its discovery. Some cases say that the finder is entitled to "treasure trove," defined as gold or silver, in coin or bullion, found hidden in the earth or other private place, but not lying on the ground. 17 R. C. L. 1200; *Vickery v. Hardin*, 133 N. E. 922, 77 Ind. App. 558; *Roberson v. Ellis*, 114 P. 100, 58 Or. 219, 35 L. R. A. (N. S.) 979. It would seem, on principle, that the landowner's general power to control, his intent to exclude unauthorized interference, carries with it possession of everything lying on or under the land, except on premises to which the public is invited, like stores. Most American authority is contra, holding in favor of the finder as against the landowner in case of lost property, particularly treasure trove, and saying that the place of finding is immaterial, except as to property "misaid." But, if property has been misaid on a chair or counter in a store, hotel, or street car, the owner is held the proper custodian, rather than some one who

chances to discover it. *Foulke v. New York Consol. R. Co.*, 127 N. E. 237, 228 N. Y. 269, 9 A. L. R. 1384; 9 Minn. Law Rev. 390; 6 Minn. Law Rev. 527; 21 Mich. Law Rev. 664; 20 Col. Law Rev. 780; 10 Cornell Law Quart. 255.

For other cases see *Decennial Digests*, Abandonment ⇨4, 7; Bailment ⇨1; Finding Lost Goods ⇨1, 6, 10.

Q. 6. A purchased a bureau at auction, and later discovered a purse containing a large sum hidden in a secret drawer, which he at once appropriated. At the time of the sale, neither A, the purchaser, nor B, the seller, knew that the bureau had anything in it. The purse belonged to C, who had placed it in the bureau and forgotten it years before.

(a) Did the seller, B, have possession of the purse, and, if so, did he give it up to A, when he sold the bureau?

(b) Was C still in possession when A found the purse, or did A obtain possession when he innocently bought the bureau?

(c) Was A guilty of larceny by dishonestly misappropriating the purse from the possession of another?

A. Larceny is the crime of taking possession from another with intent to steal. For a person to be guilty of the theft of lost goods there must have been an intent to steal at the time of the taking of possession. It is said that possession involves a certain power to control, and the intent to control, or at least exclude others. It is a disputed question how far knowledge of the existence of the article is necessary, and how far the intent to exclude must be directed to the specific thing. In an English case it was thought that A would be guilty of larceny if, when he purchased the bureau, he had no reason to believe that anything more than the bureau was sold to him. *Merry v. Green*, 7 Mees. & W. 623. If the bureau had been delivered to A for the special purpose of repair, if he opened any part and appropriated to his own use what he found, that would seem to be a felonious taking. *Cartwright v. Green*, 8 Ves. 405. If B, the seller, had possession of the purse, he surrendered it when he turned the bureau over to A for all purposes. C might be regarded as still in constructive possession, because the rights of a possessor continue in the person who last exercised dominion as owner over the property. *White v. State*, 47 So. 192, 156 Ala. 111; *Ellis v. Garrison* (Tex. Civ. App.) 174 S. W. 962. A might possibly be regarded as having possession as soon as he purchased, because the intent to exclude all from the contents was included in the general intent as to the bureau. American cases, however, seem generally to require a

more specific intent to give possession. *Robinson v. State*, 11 Tex. App. 403, 40 Am. Rep. 790; *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528.

For other cases see *Decennial Digests*, Finding Lost Goods ⌘10; Larceny ⌘8, 10, 16.

Q. 7. N, a maid, had been told that her employer, E, had lost a valuable diamond ring, but understood the ring had been lost down town. While cleaning rugs in the yard, N found a diamond ring, but did not recognize it as that of E. N wore the ring for a while and later sold it. E had at one time given the diamond in the ring to her minor son, H, but, because she thought it better not to let him have it till he got older, he returned it to her. E had the stone reset for herself, and it had been in her possession till lost. N was indicted and convicted of larceny of a ring, the property of H. Can this conviction be sustained? Why?

A. The conviction cannot be sustained, if the indictment is not supported by the evidence as to H being the true owner of the ring. Delivery is necessary to transfer title from E to H; but H need not retain possession after delivery. The bailment of the ring by H to E did not affect his title. *Garrison v. Union Trust Co.*, 129 N. W. 691, 164 Mich. 345, 32 L. R. A. (N. S.) 219. The question remains whether N, the finder, was properly convicted of larceny on this evidence. The important point is whether, at the time of finding, N had the guilty intent to misappropriate, and whether she believed that the owner could be found. If N reasonably believed that the ring had been abandoned by the owner, her conversion would not be larceny. *Rex v. Mortimer*, [1908] 1 Cr. App. Rep. 20, 72 J. P. 349, 99 L. T. 204. There can be no larceny at common law, unless the article was taken from the actual or constructive possession of another, with the intent of depriving the owner thereof; the felonious intent to steal must concur with the taking. *People v. Hoban*, 88 N. E. 806, 240 Ill. 303, 22 L. R. A. (N. S.) 1133, 16 Ann. Cas. 226; *Atkinson v. Birmingham*, 116 A. 205, 44 R. I. 123, 36 A. L. R. 366, "Larceny by finder of property;" 64 Univ. Pa. Law Rev. 90. It does not clearly appear from the evidence that N had reason to believe that the owner could be found, or that she formed the intent to misappropriate the ring and take the entire dominion over it before she sold it.

For other cases see *Decennial Digests*, Gifts ⌘43, 49(1); Larceny ⌘8, 16.

Q. 8. A found X's watch and lost it. B found it and later lost it. C then found it, and after advertising it five times in a newspaper, and waiting 6 months, sold it to D. D pledged it with E as security for \$25. E repledged it with F as security for \$50. What rights and remedies against F does D have? Or B? Or A?

A. He who first discovers and takes possession of an article lost by the owner acquires a title good against all the world, except the owner or one having a prior possession. A therefore has a better title than B, and B has a better title than C. In the absence of statute giving title to the finder who advertises for a certain time, C is guilty of conversion as against X, A and B, by selling to D. The finder is merely entitled to possession as quasi depositary holding for the owner. Even if D is a purchaser in good faith, he is also a converter against X, A, and B, and so likewise are E and F. E is also a converter, as against D, by repledging for a greater amount than his own lien. D may therefore sue F in trover or replevin, but, if F is a bona fide pledgee, must probably tender \$25, the amount of E's lien. A and B may sue F in trover or replevin without tender, as D's pledge is entirely void as against their prior possessory title.

Clark v. Maloney, 3 Har. (Del.) 68.

Anderson v. Gouldberg, 53 N. W. 636, 51 Minn. 294.

Agnew v. Baker, 204 Ill. App. 56.

For other cases see Decennial Digests, Bailment ⚡8; Replevin ⚡8(2), (3); Trover and Conversion ⚡16.

SECTION 3.—TITLE BY ACCESSION

Q. 9. A is the owner of a vineyard, in which wine grapes are raised. B, a trespasser, with knowledge of A's title, takes the grapes and manufactures wine from them. C, who has obtained judgment against A previous to the seizure of the grapes by B, issues execution upon his judgment against A, and the sheriff, under C's instructions, levies upon and sells the wine, which is bought in by C at the sheriff's sale. B brings trover against C. Can he recover?

(a) Suppose B had taken the grapes innocently, in the belief that they were his; would the decision be the same?

A. C, under the execution sale, has succeeded to whatever title A has to the wine which has been made from his grapes by B. It is generally held that the willful trespasser or converter, B, can acquire no title by accession, no matter how greatly he may change the species or increase the value of the materials. B therefore cannot recover against C, either in replevin or trover. Silsbury v. Mc-

Coon, 3 N. Y. 379, 53 Am. Dec. 307. It has even been held that A, the true owner, could recover the full value of his improved property against an innocent purchaser from a willful trespasser. *E. E. Bolles Wooden-Ware Co. v. U. S.*, 1 S. Ct. 398, 106 U. S. 432, 27 L. Ed. 230; 18 Harv. Law Rev. 305; *Pine River Logging Co. v. U. S.*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164; *Trustees v. International Paper Co. (C. C.)* 132 F. 92; *Union Naval Stores Co. v. U. S.*, 240 U. S. 284, 36 S. Ct. 308, 60 L. Ed. 644.

(a) The older authorities, still followed in some states, make change of species (specification) the test of ownership, where a converter innocently makes improvements upon the materials of another. Thus, if grain be made into malt, wheat into bread, milk into cheese, or grapes into wine, it cannot be reclaimed. The more modern cases attach less importance to the extent of physical alteration than to the increase of value. It has been said that the increase must be so great as "to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at first blush." Just what proportion of value must be added by the innocent converter to escape forfeiture does not seem to have been reduced to any principle, except by statute in a few states. *Civ. Code, Cal.* § 1029; *Rev. Codes, Mont.* § 1414. *Isle Royal Mining Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520; *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Detroit Steel Co. v. Sistersville Brewing Co.*, 233 U. S. 712, 34 S. Ct. 753, 58 L. Ed. 1166; 22 Col. Law Rev. 103.

For other cases see *Decennial Digests*, Accession Ⓒ1, 2; Confusion of Goods Ⓒ7; Fixtures Ⓒ20; Trover and Conversion Ⓒ48, 52.

Q. 10. X, believing in good faith that he had authority to do so, cut timber on A's land and manufactured it into sash, doors, and cabinet work. The timber was worth \$60 when cut, but when thus manufactured it was worth \$850. A brings replevin against X for the manufactured products. Can A recover? Why?

A. A cannot recover, either under the change of species or increase of value theory. To constitute a change of species, an entire chemical change or physical transformation is not requisite. There has been here a permanent alteration of A's material, which is altered in its qualities and kind. But it has been said that mere change of form will not prevent the owner, A, from reclaiming, as by change of timber into boards, or leather into shoes.

It is uncertain what increase of value will suffice to preclude replevin by A, the owner of the materials. Twenty-eight times has

been held sufficient, but six-fold has been held insufficient. *Eaton v. Langley*, 47 S. W. 123, 65 Ark. 448, 42 L. R. A. 474. There seems no sufficient reason to confine this rule, preventing forfeiture, to cases where the enhancement is very great, unless possibly in the case of the willful trespasser. The innocent improver should not forfeit his workmanship or materials, where they constitute the greater part or value of the product, but might well have title, subject to a lien on the product in favor of the one whose materials are taken without his consent. Such a rule would protect both parties, but probably can be attained only by the aid of a statute. The California Civil Code makes reimbursement of the innocent improver a condition precedent to the right of the original owner to the article in its improved form (Civ. Code Cal. §§ 1025, 1028), and, if the value of the workmanship or addition exceeds the value of the materials, the thing belongs to the maker, on reimbursing the value of the materials. Thus the law denies to the former owner the recovery of his materials in specie, where by labor bestowed in good faith the trespasser has contributed the larger part of the value of the improved product, or where by union with other materials they have become annexed, as accessory to the new product. Justice is best done by an award of damages for the actual loss, which is an adequate remedy. *Atchison, T. & S. F. Ry. Co. v. Schriver*, 84 P. 119, 72 Kan. 550, 4 L. R. A. (N. S.) 1056. Thus a sack filled with flour becomes a minor accessory to the flour, which is the principal thing. The rules of accession are not primarily a matter of the acquisition of title, but of denying the remedy of specific relief to avoid a forfeiture.

For other cases see *Decennial Digests*, Carriers ⚡91; Replevin ⚡4.

Q. 11. (a) D had taken stone for houses, which he built for third parties from land owned by P, without P's consent. State, in their historical order of development, each form of action in which P could sue D at common law, and the gist of each action.

(b) Suppose D was, when he took the stone, and still is, in possession of, and claiming title to, P's land; what difference would it make in your answer to (a)?

A. (a) P could bring an action of trespass *quare clausum fregit* (5 Minn. Law Rev. 155), in which he could recover the damage done to the real estate; that is, the diminution in the value of the real estate caused by the removal of the stone from the land. P may bring trespass *de bonis asportatis*, in which he will recover for the loss of the stone as a chattel wrongfully taken from his posses-

sion. P may bring trover, a form of trespass on the case, in which he will recover the value of the stone as personal property at the time and place of conversion; that is, after severance. *Warner v. Abbey*, 112 Mass. 355; *Trustees of Dartmouth College v. International Paper Co.* (C. C.) 132 F. 92. P cannot bring replevin, because the stone has become real property by being annexed to land, as part of houses built by D. P may waive the trespass, and sue for money had and received, if D has transformed the stone severed into money if the title to the land is not in dispute. *Downs v. Finnegan*, 59 N. W. 981, 58 Minn. 112, 49 Am. St. Rep. 488.

(b) It is generally held that trespass or trover cannot be maintained for things severed from the land while in the adverse possession of the defendant. P must first resort to ejectment, or other remedy to recover possession of the land. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 128 N. E. 4, 236 Mass. 185, *Betha v. Jeffres*, 189 S. W. 666, 126 Ark. 194, L. R. A. 1918A, 549. The normal remedy, after ejectment, is trespass for mesne profits; but some cases allow trover against the adverse possessor, or even against a bona fide purchaser. See 5 Minn. Law Rev. 155.

For other cases see Decennial Digests, Action ⌘28; Assumpsit ⌘8; Crops ⌘2; Landlord and Tenant ⌘331(1); Logs ⌘35; Mines ⌘49; Money Received ⌘15.

SECTION 4.—CONFUSION OF GOODS

Q. 12. A and B own adjoining wood lots. The timber standing on A's was worth \$1,000; that on B's lot was worth \$2,000. B cut all the timber on both lots. In cutting half of A's timber, B was conscious that he was trespassing; in cutting the other half, he was not so conscious. The timber was doubled in value by being cut. It was of similar quality, and was mixed together, so that it was not possible to say which was from A's land, and which was from B's land. B converted the timber into shingles, which were worth \$12,000. B sold \$2,000 worth of the shingles to C, who believed B had a right to sell them, and paid B for them. What are the remedies of A at the different stages of the case?

A. By the modern and better rule, the wrongful intermixer only forfeits his contribution to the mass, when the goods are not apportionable because of the different qualities, or because the wrongdoer cannot prove what is his proportion. B is therefore a tenant in common with A as to two-thirds of the mass of logs. Some courts might hold that B forfeited his entire contribution, where he was guilty of fraudulent confusion of any part of A's logs. *St. Paul Boom Co. v*

Kemp, 103 N. W. 259, 125 Wis. 138; Ayre v. Hixson, 98 P. 515, 53 Or. 19, 133 Am. St. Rep. 819, Ann. Cas. 1913E, 659.

When B converted the timber into shingles, worth twice as much as the timber, he has increased the value four times over that of the standing trees; but there has probably been neither a change of species nor a sufficient increase in relative values to give B title by accession, even if he had been acting in good faith. A may therefore reclaim his proportion (one-third) of the shingles from B in its enhanced condition, either by self-help or by replevin. If an action of trover is brought, A cannot recover for the half of the timber cut in good faith, except for its value at the time of conversion. *Trustees of Dartmouth College v. International Paper Co.* (C. C.) 132 F. 92; *Eaton v. Langley*, 47 S. W. 123, 65 Ark. 448, 42 L. R. A. 474. When B sold C \$2,000 worth of shingles out of the mass of \$12,000 worth, he sold less than his share of the mass, which may be regarded as a severance of his share. Therefore C should not be liable to A, unless under the strict rule, by which B lost all interest in the mass. If so, the innocent purchaser from the wrongful taker should be liable only for the value of the materials at the time of the original taking from B. But there is some authority contra.

For other cases see *Decennial Digests*, *Confusion of Goods* ¶3, 5½, 7, 9; *Replevin* ¶4; *Trover* ¶48, 52.

Q. 13. A cut 1,000 logs on B's land by mistake. Soon after the cutting was done, A discovered that he had trespassed upon B's land. Nevertheless, A placed his mark upon the logs, which were very fine ones, and mingled them with 1,000 logs of his own (of a lower average grade) beyond possibility of identification, and floated the whole mass down the river. B seized possession of the entire mass of logs, and sold half of them to C. What are A's rights against B and C?

A. Since A has willfully marked B's logs like his own, and wrongfully mixed them with his logs, so that they cannot be distinguished, he cannot maintain replevin for a proportional part of the whole number against B, nor against C, his vendee. *Dillingham v. Smith*, 30 Me. 370, 383; *Arpin v. Burch*, 32 N. W. 681, 68 Wis. 619; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627. By the strictest rule, the willful confuser forfeits his contribution, regardless of the possibility of apportionment. But, according to a more reasonable doctrine, the forfeiture occurs only where the contribution of the wrongdoer is inferior in quality. *Jenkins v. Steanka*, 19 Wis. 126, 188 Am. Dec. 675. Even here there seems no sufficient ground to re-

fuse the wrongdoer a minimum, if he can show the value he contributed to the mass. The rule of forfeiture awards the innocent party redress beyond his loss, and imposes on the wrongdoer an arbitrary penalty. See *St. Paul Boom Co. v. Kemp*, 103 N. W. 259, 125 Wis. 138. It is admitted that there would be no forfeiture, if the articles confused were of equal values, even if the confusion were fraudulently made. 2 Minn. Law Rev. 224; *Page v. Jones*, 190 P. 541, 26 N. M. 195, 10 A. L. R. 761; *Claflin v. Continental Jersey Works*, 11 S. E. 721, 85 Ga. 27. In this case, if A has any right to recover any logs or their value, to the extent which he can prove the value of the mass exceeds the value of B's 1,000 logs, it should be against B, rather than C, who presumably acquired title to B's share. *Stone v. Quaal*, 29 N. W. 326, 36 Minn. 46.

For other cases see *Decennial Digests*, *Confusion of Goods* ¶1, 3, 4, 5½, 7, 12; *Replevin* ¶4; *Trover* ¶4.

Q. 14. A, thinking he was on his own land, cut 25 logs on the land of B, and hauled them to a millpond on his own land. A few days later A, knowing he was trespassing, cut 25 logs on the land of C, and put them in the same pond. They became intermingled with and indistinguishable from the logs cut from B's land. The logs were of approximately equal value. B, not knowing how many of the logs were cut on his land, seized and carried off the 50 logs. What rights, if any, has A against B, either before or after demand?

A. B, the innocent owner of one-half the logs confused, was not entitled to seize the entire mass, because the logs were of approximately equal value, and because as to him A was not a willful trespasser. See *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627. C would have had a right to possession of the entire mass as against A, if the confusion had lowered the average quality. *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; 13 Col. Law Rev. 630. A had acquired possession of the mass of the logs, and therefore should be entitled to recover 25 logs from B in replevin, or the value of 25 logs from B in trespass or trover, although he will be accountable for what he recovers to C, the true owner, who is now become tenant in common with B by A's act. Bare possession is a good title against all the world, except the true owner, at least as far as recovery of possession is concerned. The rule by which a wrongful possessor is allowed to sue and recover the value in damages if the true owner is known has been vigorously criticized. *Barwick v. Barwick*, 33 N. C. 80. A demand is not necessary by the plaintiff, unless the defendant became lawfully possessed of the entire mass. It might be

argued that, if B cannot ascertain how many of the logs were cut on his land, he should be justified in retaking possession of the mass, and put the burden of proving his contribution upon A who caused the confusion. If so, B would not be liable, until A had pointed out his proportion of the mass and demanded it. See *Bryant v. Ware*, 30 Me. 295; *Smith v. Morrill*, 56 Me. 566; *Wright v. Ellwood* (C. C.) 128 F. 462.

For other cases see *Decennial Digests, Confusion of Goods* ¶1, 3, 7, 12, 13; *Trover* ¶4.

SECTION 5.—TITLE BY ADVERSE POSSESSION

Q. 15. B stole A's watch. A few days later he sold it to C, who believed that B was the owner. C used it openly for six years, and then sold it to D. A statute provides that no action shall be brought for the recovery of personal property, or for damages for its taking or detention, more than five years after the cause of action arises. May A now maintain an action against D?

A. No. C has held possession openly and adversely for over five years, the period of limitation on actions for the recovery of possession and also for damages for its taking or detention. B, the thief, merely by concealing the property for five or six years, could not have acquired title or immunity from suit. *Gatlin v. Vaut*, 91 S. W. 38, 6 Ind. T. 254. But C has held under claim of right, openly and continuously for the five-year period, and his title is quieted. He can therefore dispose of the property to D, who takes free and clear of any claim by A. The statute in terms only limits the bringing of actions, but where all remedies are taken away the title of A is deemed extinguished. A purchaser from one against whom all remedy is barred is entitled to stand in as good a position as the seller. *Chapin v. Freeland*, 8 N. E. 128, 142 Mass. 383, 56 Am. Rep. 701; *San Francisco Credit House v. Wells* (Cal. Sup.) 239 P. 319; *Shelby v. Shaner*, 115 P. 785, 28 Okl. 605, 34 L. R. A. (N. S.) 621; "Title by Adverse Possession," 32 Harv. Law Rev. 135.

For other cases see *Decennial Digests, Limitation of Actions* ¶45.

Q. 16. By statute it was provided that "actions of replevin and all other actions for taking, detaining or injuring goods or chattels shall be commenced within six years next after the cause of action accrues, and not afterwards." A owned a ring, which he lost, and which B found in 1900. B kept the ring for the owner up to 1903, when he sold it to C, who believed that it was B's ring. C wore the ring at all times until 1907, when he sold it to D, who believed that it

was C's ring. D wore the ring at all times until 1910, when he sold it to E, who recognized it as the ring which A had lost, and who knew that A had never sold or abandoned his rights in it. Did C acquire title to the ring when he purchased it? Did D acquire title to the ring when he purchased it? Did E acquire title to the ring when he purchased it?

A. C did not acquire title when he purchased the ring from B, the finder in 1903, but he commenced an adverse possession. D did not acquire a good, indefeasible title when he purchased from C, but he succeeded to C's possessory title. This title is quieted against A's right in 1909, when six years of adverse holding were completed. E acquired this title in 1910, when he purchased from D, and his recognition of the ring as the one A had lost cannot revive A's title.

Possession, to be deemed adverse, must be under claim of title. Until B sold the ring to C, he held for the owner and in subordination to him. Mere possession, though continued six or more years, would not divest the owner A of his property.

It might be argued that D's purchase in 1907 was a new conversion, and that A's right of action for damages against him is not barred. But, to follow the analogy of the adverse possession of land, the time of the several converters in privity with each other may be "tacked" or added together to make up the limitation period. When the right to recover the article itself is barred, all rights of action for damages should also be held extinguished. This is sometimes expressed by the fiction of relation back. The truth is that, after the open exercise of ownership under claim of title for the statutory period, no one may disturb or question it.

Lightfoot v. Davis, 91 N. E. 582, 198 N. Y. 261, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747.

13 Cal. Law Rev. 256; 14 Cal. Law Rev. 218.

For other cases see *Decennial Digests*, Adverse Possession ¶6, 13; Limitation of Actions ¶100(2).

SECTION 6.—SATISFACTION OF JUDGMENT FOR VALUE

Q. 17. B wrongfully transferred A's goods to C. While C was in possession, A sued B in trover and recovered judgment against B for their value; but this was not satisfied. Then C sold to D. A seeks to recover possession of the goods from D, an innocent purchaser, in replevin. Can he do so?

A. The issue is raised whether judgment in trover passes title until satisfaction. It is said that the great weight of authority is that

it is the satisfaction of the judgment that by law divests the owner of his title. *Decker v. Milwaukee Cold Storage Co.*, 180 N. W. 256, 173 Wis. 87, 14 A. L. R. 416; *Miller v. Hyde*, 37 N. E. 760, 161 Mass. 472, 25 L. R. A. 42, 42 Am. St. Rep. 424. According to this, replevin would not be barred by an unsatisfied judgment for conversion. It has been suggested, however, that if the converter had possession, at the time of judgment against him, "the converter's possession, being thus set free from adverse claims, changes into ownership." 3 Harv. Law Rev. 23, 313, 327; 16 Harv. Law Rev. 141; 30 Yale Law J. 742; Ames Lectures on Legal History, 207, 208; *Equitable Trust Co. v. Connecticut Brass & Mfg. Corp.*, 290 F. 712. Thus, if A had sued C, while C was in possession, and recovered judgment against him, he would get good title, and could transfer it after judgment, because A could not have another action against him. It is otherwise here, where A got judgment against B after he has transferred the goods to C, since A would still have his right of action against C, notwithstanding judgment against B, and a new right of action against D. There is thus no election of remedy, or double vexation, which precludes action against D, the purchaser, also. See *Ledbetter v. Embree*, 40 N. E. 928, 12 Ind. App. 617.

For other cases see Decennial Digests, Election of Remedies ⚡3(1, 2); Judgments ⚡590(1), 748; Trover ⚡70.

Q. 17a. B rents a piano from A for one year. During the year it is stolen by C, who sells it to D, an innocent purchaser. B brings trover against D, and recovers a judgment; execution is issued on the judgment, and the sheriff, under B's instructions, levies on an automobile belonging to D. Before the automobile is sold, and after the year has expired, A brings a replevin suit against D for the piano. What judgment, and why?

A. On the theory suggested above, D could not be twice vexed for the same cause of action. A, the bailor, was represented by B, the bailee, who recovered judgment for the full value.

Equitable Trust Co. v. Conn. Brass, etc., Corp. (C. C. A.) 290 F. 712.

Miller v. Hyde, 37 N. E. 760, 161 Mass. 472, 25 L. R. A. 42, 42 Am. St. Rep. 424.

For other cases see Decennial Digests, Election of Remedies ⚡3(1, 2); Trover ⚡70.

SECTION 7.—TRANSFER OF TITLE BY GIFT

Q. 18. A was about to commit suicide, indorsed a promissory note, sealed it in an envelope, directed to B, a friend with whom he was living, placed it in an envelope, together with a letter to the friend,

upon a table beside his bed, and then shot himself. The friend rushed in from his room in another part of the house, and found the letter; but the dying man, without referring to the gift, passed into a comatose state from which he never rallied. Was this a valid gift?

A. No. There had been no delivery of the note in spite of the fact that B picked up the envelope before the donor died, after he became unconscious. The Oregon court said: "There must be a parting with dominion over the subject-matter of the gift, with the present design that the title shall pass out of the donor to the donee." Placing the addressed envelope on the table, where it was still under the hand of the donor, was not a delivery, and he never made one. *Liebe v. Battmann*, 54 P. 179, 33 Or. 241, 72 Am. St. Rep. 705; 12 Harv. Law Rev. 349; *Jones v. Crisp*, 109 Md. 30, 71 A. 515. There was no delivery by the act of A, because he never relinquished possession. There was no delivery by reason of the donee's subsequently finding and appropriating the letter and note. Apparently an act of delivery must at least be done in the presence of some third person. If A had mailed the letter before his death, no doubt this would have been sufficient.

It has been held that a gift *causa mortis* is invalid, when made in contemplation of suicide; but this seems unsound, as the donee does not participate in the wrong or illegality. In *re Dudman*, [1925] 1 Ch. 553. See 36 Harv. Law Rev. 483; *Bainbridge v. Hoes*, 149 N. Y. S. 20, 163 App. Div. 870; 24 Mich. Law Rev. 197.

For other cases see Decennial Digests, Gifts ⚡30(1, 3), 59, 64(2), 66(1).

Q. 19. A, who was visiting her nephew, N, made a promissory note, which recited "value received," for \$3,000, payable at her death or before, and delivered it to N as a gift. Can the note be enforced against A's estate?

A. No. The note was the voluntary promise of an executory or future gift. The note, made as a promise of bounty, is not given for "value received," however its maker may have recited it as a matter of form.

Tracy v. Alvord, 50 P. 757, 118 Cal. 654.

Dougherty v. Salt, 125 N. E. 94, 227 N. Y. 200.

For other cases see Decennial Digests, Gifts ⚡32(1); Bills and Notes ⚡493(4).

Q. 20. A, intending to make a gift to his daughter, B, during his last illness, three days before his death, drew his check on a trust company for \$20,000 to B's order and delivered the check to her. She deposited the check in the C Bank, which collected it two days

after her father's death from the trust company on which it was drawn, and paid the proceeds to her. The father supposed that the delivery of the check would accomplish his intention, and no change of intention was indicated prior to his death. X, the administrator of the father's estate, now sues to compel B to restore the \$20,000 to the estate.

A. The donor's check, delivered to the payee as a gift, and not accepted or paid by the bank before the drawer's death, is not a valid gift. There is no transfer or assignment of the chose in action or claim of the depositor against the bank, by the weight of authority. 25 Yale Law J. 143; *Edwards v. Guaranty Trust & Savings Bank*, 190 P. 57, 47 Cal. App. 86; *Foxworthy v. Adams*, 124 S. W. 381, 136 Ky. 403, 27 L. R. A. (N. S.) 308, Ann. Cas. 1912A, 327; *Burrows v. Burrows*, 137 N. E. 923, 240 Mass. 485, 20 A. L. R. 174. A vigorous minority of courts, however, holds that the donor's own check, particularly where it is for the entire amount of the deposit, will be regarded as a valid assignment of the fund and effective as a gift of a chose in action or claim against the bank. See 8 Minn. Law Rev. 546, on effect of the Negotiable Instruments Law on transfer of donor's check as gift. The gratuitous assignment of a note or check received for value from some third party is clearly a good gift. *Parker v. Mott*, 107 S. E. 500, 181 N. C. 435, 25 A. L. R. 637.

Even if the donor, delivering his own check on his bank deposit as a gift, delivered the bank passbook with the check, this would not make the gift effective, where it was not a savings bank book, but an ordinary deposit book, which need not be produced on the withdrawal of funds. If, however, the bank assents to the transfer at the request of the depositor, this is a valid gift of the deposit. *Ogdon v. Washington Nat. Bank*, 145 N. E. 514, 82 Ind. App. 187; 9 Minn. Law Rev. 484.

For other cases see *Decennial Digests*, Assignments ¶50(2); Gifts ¶4, 18(1), (2), 28(1), 31(1), 32(1), (2), 34, 62(1).

Q. 21. F delivered to C an envelope containing a certificate of stock in the X Corporation, with an assignment to P indorsed upon it, with directions in writing to C to deliver the certificate to P "only in case of my death." After F's death, C delivered the certificate to P. The administrator of F sues P to recover the stock or its value. What decision?

A. P has acquired title to the stock by gift. The donor, it may be found, intended the gift to take effect at once, but the beneficial enjoyment was postponed until his death. It is similar to a case where

a deed of real estate is deposited with a third party, to be delivered to the grantee after the death of the grantor. The difficult question is whether the evidence shows an absolute delivery, or whether the donor has retained dominion and control over the title. The reservation of a life interest, such as dividends on the stock, will not show such a failure to relinquish control as to defeat the transaction as a present gift, or render it testamentary. A gift of personal property, to be effective, must take effect at once, and be irrevocable.

Innes v. Potter, 153 N. W. 604, 130 Minn. 320, 3 A. L. R. 896.

20 Col. Law Rev. 196.

In re Valentine's Estate, 204 N. Y. S. 284, 122 Misc. Rep. 486.

For other cases see *Decennial Digests*, Gifts ⇨21, 29; Wills ⇨90, 93.

Q. 21a. A gives B a sealed envelope containing two Liberty Bonds, placing C's name thereon, and telling B to give it to C upon his death. When A dies, two years later, C claims the bonds. Is he entitled to receive them? Why?

A. Yes. See Question 21, *supra*.

Q. 22. X deposited \$1,000 in a bank, and by his direction the bank issued a certificate of deposit, payable to himself or to his brother, Y. X retained the certificate till his death. Y, who heard of this for the first time after the death of X, files claim for the money against the estate of X. What judgment? Why?

A. There must be manifested an intention on the part of X to relinquish immediately to the donee all control over the fund. Thus, where A put a savings deposit in the names of A and B, there was held to be no valid gift, since A would retain control during his life. *Wolfe v. Hoefke*, 214 P. 1047, 124 Wash. 495; 38 Harv. Law Rev. 243, 33 Yale Law J. 93; *Schippers v. Kempkes* (N. J. Err. & App.) 67 A. 74, 12 L. R. A. (N. S.) 355; *Smith v. Planters' Savings Bank*, 117 S. E. 312, 124 S. C. 100; 22 Harv. Law Rev. 453; 9 Cornell Law Quart. 48. Cf. *Battles v. Millbury Sav. Bank* (Mass.) 145 N. E. 55; 23 Mich. Law Rev. 799. A deposit to a joint account in a savings bank may, however, operate as a complete gift, if so intended, and the retention of the deposit book is only evidence as to this intention, according to some decisions.

To constitute a gift, it is commonly said that there must be an acceptance of the thing given by the donee; but, where the gift is beneficial, the acceptance is "presumed," showing that gift is properly to be regarded as unilateral, rather than as a bilateral transaction, like a contract. The fact that Y heard of the issue of the certificate for the first time after the death of X will therefore not be material.

Unless the bank has paid over the money to the executor or administrator of X's estate, the proper remedy for Y would be to sue the bank as the survivor of two joint obligees, and as payee of the certificate.

For other cases see Decennial Digests, Banks ⚡129; Gifts ⚡30(4), 49(5), 66(3); Wills ⚡90.

Q. 23. A, the owner of certain bonds, which were in the hands of his nephew, B, as custodian, wrote a letter to B, saying: "I desire that the three \$1,000 bonds be transferred to you." B wrote, accepting the gift. Was the letter of A sufficient to transfer title to B?

A. Yes; in a gift inter vivos. The bonds were already in B's possession, and no further delivery to B was necessary. *Northern Trust Co. v. Swartz*, 141 N. E. 433, 309 Ill. 586. A deed of gift passes title without actual delivery, because it declares the donor's intention in a binding form. In *re Reh's Estate*, 162 N. W. 978, 196 Mich. 210. But see *Allen-West Com. Co. v. Grumbles*, 129 F. 287, 63 C. C. A. 401. A writing not under seal is sufficient to transfer a chose in action, particularly where the document which evidences the claim is already in the hands of the donee. See 33 Yale Law J. 662; *Burkett v. Doty*, 167 P. 518, 176 Cal. 89; *Goldsworthy v. Johnson*, 204 P. 505, 45 Nev. 355; 6 Minn. Law Rev. 595. It has been held, however, that a gift of a savings bank book, *causa mortis*, to be good, must be accompanied by a present delivery, and that a previous and continuing possession, confirmed by words of gift, is not sufficient, on the ground that gifts *causa mortis* are not to be encouraged. *Drew v. Hagerty*, 17 A. 63, 81 Me. 231, 3 L. R. A. 230, 10 Am. St. Rep. 255. It is also held that a gift *causa mortis* cannot be effected by deed alone, without delivery of the gift. *Mahoney v. Martin*, 83 P. 982, 72 Kan. 406, 10 Cal. Law Rev. 96.

For other cases see Decennial Digests, Gifts ⚡11, 15, 24, 28(2), 29, 31 (1), 54, 56, 59, 62(6), 64(2), 66(2).

Q. 24. E had money on deposit in a savings bank. He delivered a box containing his bank book to P, stating that he was about to go the hospital for a serious operation, and, if he did not return, he gave P the box and its contents. E underwent a successful operation, but he died suddenly of a disease other than that for which the operation was performed. Is P entitled to the deposit in the savings bank?

A. Yes; the gift was *causa mortis*, and was consummated by the delivery of the deposit book, representing the account. The gift

was not rendered invalid by the fact that the donor did not die of the disease from which he apprehended death. A gift *causa mortis* is recognized, where death is anticipated from immediately impending disease or peril. The theory is that it enables the donor to make a disposition in circumstances which render the making of a will impracticable, and at the same time regain the title in case he survives. There is some conflict whether title passes at once upon delivery, subject to be defeated by the donor's recovery or revocation, or whether it vests fully only at his death. It is not necessary that the gift be made in extremis, when there is no opportunity to make a will; but it must be made while the donor is in contemplation of death from present illness or impending peril.

Possession must be actually or constructively delivered to the donee, or to some one for his use. The delivery of a passbook of a commercial bank, which is a mere receipt for deposits, is not a sufficient delivery; but delivery of a savings bank book is effective delivery, because by it the donor parts with control over the claim. The principal distinctions between gifts *causa mortis* and those *inter vivos* are that the former are made in contemplation of death from present illness or some immediate peril, and are revocable by the donor, and revoked by his recovery or escape. *Ridden v. Thrall*, 26 N. E. 627, 125 N. Y. 572, 11 L. R. A. 684, 21 Am. St. Rep. 758; 36 Harv. Law Rev. 483; 27 Yale Law J. 646.

If the donee redelivers the goods to the donor for safe custody, the gift does not end. *In re Hawkins*, *Watts v. Nash*, [1924] 2 Ch. 47; 2 Cambridge Law J. 237.

For other cases see Decennial Digests, Gifts ☞30(3), 59, 74.

Q. 25. B owned a strong box, in which he kept his money and securities. Both he and his wife, F, had keys to this box, both having equally free access to it. One day B, when feeble, but still able to walk into the next room, where the box was kept, delivered his key to F and said: "Fanny, I want you to take this key, and to have everything in my strong box." B died three days later, neither he nor F having done anything further with reference to the strong box. X was subsequently appointed B's administrator, and demanded the surrender of the box from F. Must she surrender it?

(a) A father, desiring to make his daughter, B, a present, bought \$2,000 worth of bonds, but at her request left them in his safe deposit box at the bank, and remitted the interest to her. On his death-bed he handed her the key to the deposit box. The executor now claims there was no valid gift. Who is entitled?

A. Courts generally hold that symbolic or constructive delivery is sufficient, where actual delivery is not possible. Constructive delivery expresses the intent to transfer dominion by means of a symbol. Courts have become more liberal in dealing with symbolic delivery. 20 Col. Law Rev. 196; 24 Col. Law Rev. 545, 767; *Hillebrant v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757; *Devol v. Dye*, 24 N. E. 246, 123 Ind. 321, 7 L. R. A. 439. But many courts still insist that the delivery must be as perfect and complete as the nature and control over the articles will admit of. In the first case above, the donor, B, could have actually delivered the contents to F, and many courts would hold that F must surrender the box to X, because there was no sufficiently completed delivery.

In (a) however, the delivery of the key to the deposit box was the only delivery the father could make on his deathbed. Further, there is evidence from which a court might conclude that the father was holding the bonds as trustee for B, and a declaration of trust is valid, without either consideration or delivery. *Apache State Bank v. Daniels*, 121 P. 237, 32 Okl. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Foley v. Harrison*, 136 S. W. 354, 233 Mo. 460, 29 L. R. A. (N. S.) 166; *Barnhouse v. Dewey*, 109 P. 1081, 83 Kan. 12; *Harrison v. Foley*, 206 F. 57, 124 C. C. A. 191; 4 Cal. Law Rev. 66.

For other cases see Decennial Digests, Gifts $\S$ 22, 23, 28(2), 31(1), 62(2), 65(5), (6), 65.

Q. 26. A was engaged to B, and in anticipation of marriage obtained from B certain jewelry, fur, money and a diamond engagement ring. A broke her promise to B and married C, and upon demand refused to return the gifts she had received. May B recover them?

A. Yes; the donor may recover. Such gifts are usually construed as being made subject to implied condition, even though the gift is absolute in form. Gifts made merely to secure the lady's favor, like a Christmas present, are unconditional. *Richmond v. Nye*, 85 N. W. 1120, 126 Mich. 602. But gifts made in contemplation of marriage are conditional, and must be returned if the donee breaks the engagement. *Antaramian v. Ourakian*, 194 N. Y. S. 100, 118 Misc. Rep. 558. See *Rosenberg v. Lewis*, 206 N. Y. S. 353, 210 App. Div. 690; 25 Col. Law Rev. 237; *Williamson v. Johnson*, 20 A. 279, 62 Vt. 378, 9 L. R. A. 277, 22 Am. St. Rep. 117; 18 Col. Law Rev. 174.

For other cases see Decennial Digests, Gifts $\S$ 34, 43.

Q. 27. B was the priest and spiritual adviser of A, who had no near relatives. While A was ill, but not in expectation of death, A stated to B his desire to make to B a gift of one-third of A's property. B remonstrated, and explained to A that A would probably recover, and then might repent of his generosity; but A insisted on making the gift. B finally yielded, and brought in an attorney, C, to draw up the requisite deed. C held no private conversation with A, and offered no advice on the subject of the gift. A executed and delivered to B deeds of one-third of his property. On his recovery, A sues to set aside the gift. Should he succeed?

A. Where a fiduciary relation exists, the donee must establish the fairness and freedom of the gift. Such a relation exists in case of a spiritual adviser. *Gilmore v. Lee*, 86 N. E. 568, 237 Ill. 402, 127 Am. St. Rep. 330. It affords the power to exercise undue influence over the donor. In a few states the validity of the gift depends on whether the donor had the protection of independent advice. There is a presumption of undue influence from the existence of confidential relations, such as those of attorney and client, guardian and ward, priest and penitent, as against the donee of a gift inter vivos, probably also of a gift causa mortis, but not in the case of a gift by will, at least by the weight of authority. Any such presumption can be rebutted here, so A cannot set aside the gift. *Williams v. Johnston*, 104 S. W. 789, 84 Ark. 109.

For other cases see *Decennial Digests, Gifts* ¶38, 80.

SECTION 8.—BAILMENTS—LIABILITY OF BAILEES

Q. 28. A went into B's restaurant for lunch. The waiter took his hat and coat, and hung them up on a hook on a post near A's seat at the table. When A had finished his meal, the coat was missing. Can A recover the value of the coat from B?

A. No; the coat had not been placed in the possession or under the care of the restaurant keeper. B could not be expected to stand guard over coats and hats unchecked and hung on hooks about the room. The assistance of the waiter did not show an intrustment of the property to the defendant's care, such as would constitute a bailment.

Apfel v. White's, Inc., 180 N. Y. S. 712, 110 Misc. Rep. 670.

Wentworth v. Riggs, 143 N. Y. S. 955, 159 App. Div. 899; *Id.*, 139 N. Y. S. 1082, 79 Misc. Rep. 400.

See *Zeterstrom v. Thomas*, 104 A. 237, 92 Conn. 702, 1 A. L. R. 392.

For other cases see *Decennial Digests, Bailment* ¶1, 12; *Innkeepers* ¶11(9).

Q. 29. A was a keeper of a public bathhouse, and gave to B, one of his patrons, for a fee, a metal check marked "No. 15," for his purse, containing \$100, his watch, and a diamond ring. Through B's negligence the check was lost, and it came into the possession of C. A delivered the property in question to C upon presentation of the check. B made demand upon A for his property, and finally brought an action against A for damages. Judgment for whom?

A. A was a bailee for hire. Even though B was negligent in the care of the check, this would not prevent his recovery from A, the bailee for delivering the property to C, if he could have avoided the loss by the use of reasonable care in ascertaining C's identity and whether C was entitled to the property, as by requiring his signature. The check was a means of identification of B, but could not be exclusively relied on, particularly if A knew B personally. It is a customary precaution to require the patron to sign his name, as well as present the check. A negligent delivery to the wrong person makes the bailee liable for the loss.

Tombler v. Koelling, 28 S. W. 795, 60 Ark. 62, 27 L. R. A. 502, 46 Am. St. Rep. 146.

See *Walpert v. Bohan*, 55 S. E. 181, 126 Ga. 532, 6 L. R. A. (N. S.) 828, 115 Am. St. Rep. 114, 8 Ann. Cas. 89.

Clark v. Burns Hammam Baths (Cal. App.) 236 P. 152.

For other cases see *Decennial Digests*, Bailment §14(4).

Q. 30. A deposited his suit case in the parcel room of the B. R. Co. and received in return a check, upon which was printed a limitation of B's liability for loss to \$10. The checking charge was 10 cents. B failed to return the case, which had disappeared. A testified that he had seen the printed matter, but had not read it. Can he recover the value of the case and its contents?

A. Yes; the failure to return is prima facie evidence of negligence, which will charge the bailee, in the absence of a showing of due care. The parties may by contract limit liability for loss, except where due to fraud and gross or willful negligence in the bailee. But without actual assent by the bailee, there is no such contract. It seems that the bailment had been completed when the parcel check was issued, and the check was a mere token or means of identification. *Jones v. Great Northern Ry. Co.*, 217 P. 673, 68 Mont. 231, 37 A. L. R. 754; 22 Mich. Law Rev. 154; 24 Col. Law Rev. 312; 29 Yale Law J. 562. Posting a notice in a garage, disclaiming responsibility for loss by fire, has been held insufficient to establish a special contract, in the absence of proof that the plaintiff, whose car was destroyed, ever saw the notice. *Parris*

v. Jaquith, 197 P. 750, 70 Colo. 63; Scott Auto, S. C. Co. v. McQueen, 226 P. 372, 111 Okl. 107, 34 A. L. R. 162; 6 Minn. Law Rev. 66.

For other cases see Decennial Digests, Bailment $\Leftrightarrow$ 14(1); Livery Stable Keepers $\Leftrightarrow$ 7.

Q. 31. Y rented a safe deposit box of the N. Bank and placed eight Liberty Bonds in the box. The bank gave Y one key and retained the master key itself, both keys being necessary to open the box. Burglars entered the vault, broke open Y's safe-deposit box and took Y's bonds. Is Y entitled to recover of the bank for the loss of the bonds?

A. No; the relationship of the bank to Y is commonly said to be that of bailee for hire, and it is under a bailee's liability. *Mayer v. Brensinger*, 54 N. E. 159, 180 Ill. 110, 72 Am. St. Rep. 196; *Webber v. Bank of Tracy*, 225 P. 41, 66 Cal. App. 29. A few cases and writers deny that there is a bailment, on the ground that bank has not possession of the contents, and that the depositor alone has access to the contents of the box. See *People v. Mercantile Safe Deposit Co.*, 143 N. Y. S. 849, 159 App. Div. 98, 101; 10 Cornell Law Quart. 355; 9 Harv. Law Rev. 131; 34 Yale Law J. 795. However, the relation is sufficiently similar to bailment to give rise to the same legal liability. If the bank exercises ordinary or reasonable care to be expected from banks in like circumstances, it is not liable. Proof that a country bank did not employ a night watchman, only kept lights burning till 11 p. m., and did not equip the building with burglar alarm, did not show lack of ordinary care to protect plaintiff's bonds, deposited in the safe-deposit box, from burglary. The measure of the bailee's obligation is the exercise of ordinary care, and he is not an insurer of the property against theft. *Young v. First Nat. Bank of Oneida*, 265 S. W. 681, 150 Tenn. 451, 40 A. L. R. 868. See *Pennington v. Farmers' & Merchants' Bank*, 231 S. W. 545, 144 Tenn. 188, 17 A. L. R. 1213.

For other cases see Decennial Digests, Bailment $\Leftrightarrow$ 11, 12, 17; Banks and Banking $\Leftrightarrow$ 153; Taxation $\Leftrightarrow$ 905(3); Warehousemen $\Leftrightarrow$ 43, 45.

Q. 32. A goes to a hotel, registers as a guest, and is assigned a room. She goes to her room, unpacks her trunk, hangs her dresses in a closet, places an open jewel case, with necklace therein, on a dressing table, and, without locking her door, goes down to the dining room for dinner. On her return, she finds that the jewel case and necklace, one of the dresses she had put in the closet, and

some shoes she had left in the trunk have been stolen. At common law would the hotel keeper be liable to A?

A. At common law an innkeeper was considered an insurer of the guest against loss of all chattels which are customarily brought by a guest to an inn. *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405. The reason for this strict liability is largely historical. Only the act of God or of the public enemy or the negligence of the guest are defenses. The fact of loss creates a *prima facie* case. According to some decisions, the failure of the guest to lock the door is not necessarily negligence, but is a fact to be considered by the jury as one of the circumstances of the case. *Spring v. Hager*, 13 N. E. 479, 145 Mass. 186, 1 Am. St. Rep. 451. The question whether the guest has taken such ordinary care as a prudent person could be reasonably expected to take under all the circumstances is a question of fact for the jury. To leave an open jewel case with a valuable necklace on a dressing table in an unlocked room might well be regarded as negligent exposure, even if there was no lack of due care as to the dresses or shoes. See *Swanner v. Conner Hotel Co.*, 224 S. W. 123, 205 Mo. App. 329; 19 Mich. Law Rev. 223. Statutes have been enacted in many states by which an innkeeper may be exempted from liability for loss of valuables by keeping notice posted in rooms to deposit valuables in the hotel safe, but the statutory notice must be given exactly as provided, *Gillett v. Waldorf Hotel Co.* (Wash.) 241 P. 14.

For other cases see *Decennial Digests, Innkeepers* ¶11 (i, 9, 10, 11, 12).

Q. 33. A bought a handsome fur coat at second hand, which he loaned gratuitously on a cold day to his friend, B. While wearing the coat, B chanced to run his hand through a hole in the pocket and discovered in the lining of the coat two \$20 bills, which he proceeded to spend in riotous living in the Radisson Hotel. While there the overcoat was stolen.

(a) Assume that the hotel company is liable for the loss of the coat: State what actions could be brought respectively by A and B against the hotel company, and show what is the measure of damages recoverable by each.

(b) Can A, who knew nothing about the money in the coat lining, compel B to account for it?

A. (a) Assuming that the relation of guest and innkeeper existed between B and the hotel company, and that the hotel company is liable for the loss of the coat, B, as bailee, could recover in trespass on the case on the innkeeper's liability for the value

of the overcoat and its contents. Trover would not be maintainable for goods lost or stolen by accident. The liability of the common carrier and innkeeper is very similar. To maintain trover against such a bailee, an actual conversion or refusal to deliver must be shown. *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547, 24 Am. Dec. 88. But see *Heiser v. Berger Catering Co.*, 106 S. W. 579, 128 Mo. App. 210. Assumpsit is sometimes allowed upon the implied contract of the innkeeper safely to keep the goods. If A, the bailor, could sue, it would probably have to be in case for the negligent loss of the coat, in which A could recover the value of his interest, since the extraordinary absolute liability of the innkeeper is owed only to the guest, B.

(b) On principle, A should be able to compel B to account for the money found in the lining of the coat. B was merely a gratuitous bailee, allowed by A to use the coat as a favor. A's permission did not authorize B to take anything out of the coat, but merely to use it. The argument for B would turn on the question whether A could be held to have had possession of the bills, when he was not aware of their existence when he bought the coat or later. They were lost, not mislaid, property. But in any event A should have the prior right to acquire possession. See, however, *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528. Cf. *Cartwright v. Green* (1802) 2 Leach, 952, 8 Ves. 405.

For other cases see *Decennial Digests, Innkeepers* ¶11(3, 12); *Finding Lost Goods* ¶10.

Q. 34. The B Bank allowed A to deposit valuable papers and silverware in its vault for safe-keeping. A was a customer of the bank, but the deposit was purely for the accommodation of A, without any charge therefor. A fire occurred, and the articles deposited were lost. Can A recover against B?

A. Not in the absence of proof of gross negligence or bad faith. The bank occupies the relation of gratuitous bailee, and as such is obligated only to the exercise of a slight degree of care, and is answerable only for gross negligence or bad faith. Ordinary and gross negligence differ in the degree of inattention or lack of care. There is some controversy, however, as to whether there are properly any different degrees of negligence, such as slight, ordinary, and gross. *Sherwood v. Home Sav. Bank*, 109 N. W. 9, 131 Iowa, 528; 34 Harv. Law Rev. 82. But by the great weight of authority a gratuitous bailee is not subject to the same strict duty of care as a paid bailee. *Kierce's Adm'r v. Farmers' Bank*, 191 S. W.

644, 174 Ky. 22, 4 A. L. R. 1180; *Altman v. Aronson*, 121 N. E. 505, 231 Mass. 588, 4 A. L. R. 1185; *Siegel v. Spear & Co.*, 138 N. E. 414, 234 N. Y. 479, 26 A. L. R. 1205. To determine what degree of care is required of the bailee, it is necessary to consider the nature and value of the articles bailed, the custom of the business, the care which he might reasonably be expected to take of his own property under like circumstances, and the lack of remuneration. *Trustees of Elon College v. Elon Banking Co.*, 109 S. E. 6, 182 N. C. 298, 17 A. L. R. 1205.

For other cases see *Decennial Digests*, *Bailment* ¶12; *Banks and Banking* ¶153, 154(5); *Negligence* ¶13.

Q. 35. A leaves a suit of clothes with B to be cleaned and pressed. Two days later A is advised by B that, after cleaning and pressing the suit, his shop and its contents were destroyed by fire. A bill for \$2 for cleaning and pressing was enclosed by B. Is B liable to A for the loss of the suit? Discuss this question fully.

A. B, as bailee for hire, is bound to exercise reasonable or ordinary care of the property. Upon proof that the goods were destroyed by fire, A, to hold B liable, must prove negligence on his part causing the loss. The bailee for hire is not an insurer against theft or loss by accidental fire. B is not liable for the loss of the suit, but A is liable for the cleaning and pressing bill.

Corbin v. Cleaning Co., 167 S. W. 1144, 181 Mo. App. 151.

For other cases see *Decennial Digests*, *Bailment* ¶2, 31(1, 3).

Q. 36. A for several weeks, was a guest of a hotel. His business called him to other cities. Each week he checked out with expectation of returning at end of week as a guest. By arrangement with a porter, an authorized employé, A left his trunk and contents for storage until his weekly return, and obtained a receipt therefor. While A was absent, his trunk and contents were stolen from storage.

(a) What kind of bailment, and what degree of care was bailee required to use?

(b) Would fact that bailee received no compensation for storage affect his liability?

A. (a) This was a bailment for mutual benefit and the bailee was required to use ordinary care for the keeping of the goods. The relation of innkeeper and guest was terminated when the guest paid his bill and departed without taking his baggage. The innkeeper was relieved from the strict responsibility which makes

him liable for goods lost, unless caused by act of God or the public enemy or the fault of the owner.

(b) Although A paid nothing directly for the storage of the trunk, the proprietor received his compensation in the profits of the business of which the bailment was an incident, and so the bailment was one for hire. *Hotel Statler Co. v. Safer*, 134 N. E. 460, 103 Ohio St. 638, 22 A. L. R. 1190. But, if a guest left a trunk in free storage, without any definite expectation of returning shortly as a guest, the innkeeper might be liable only as a gratuitous bailee. *Miles v. International Hotel Co.*, 124 N. E. 599, 289 Ill. 320.

For other cases see Decennial Digests, Innkeepers ⌘11(2, 3, 9).

Q. 37. A had a cheese and butter factory, and took the milk of various farmers, which he agreed to manufacture into cheese and butter, market the product, deduct his compensation, and divide the proceeds in proportion to the amount of milk furnished by each. Suppose the factory and the product burn before sale. Suppose that A assigns the products to B as security for a personal debt. What are the rights of X, Y, and Z, who furnished the milk?

A. The contract was one of bailment, rather than of sale. As to loss by fire, A assumed simply the duty to exercise ordinary care, as a bailee for hire, to protect and preserve the property. The burden is upon X, Y, and Z to show a failure to perform his duty, and no presumption of negligence arose from the fact that the loss resulted from fire. *Stewart v. Stone*, 28 N. E. 595, 127 N. Y. 500, 14 L. R. A. 215.

X, Y, and Z became tenants in common of the milk and its products, mingled by their consent. *Hall v. Pillsbury*, 44 N. W. 673, 43 Minn. 33, 7 L. R. A. 529, 19 Am. St. Rep. 209. A had the power of sale, but he had no authority to assign the product as security for his personal debt, and X, Y, and Z can claim their property against B. *Sattler v. Hallock*, 54 N. E. 667, 160 N. Y. 291, 46 L. R. A. 679, 73 Am. St. Rep. 686; *Mack v. Snell*, 35 N. E. 493, 140 N. Y. 193, 37 Am. St. Rep. 534.

For other cases see Decennial Digests, Bailment ⌘15; Sales ⌘4(3); Warehousemen ⌘20.

Q. 38. M, a miller, received wheat from F, a farmer, which was, with F's consent, placed in M's warehouse, and there mixed with wheat of like quality received by M from other farmers. F had the right at any time to call on M, either for a like quantity of

wheat of like quality, or for the market price thereof, but, on such call, the option was in M to give wheat or cash. The memorandum signed by F and M also contained the following: "Storage to be paid by F at the rate of one-quarter of one cent a bushel a month." The warehouse and its contents were destroyed by fire without the fault of M. F thereafter called on M for wheat or cash, but M refused to give either. What action, if any, may F sustain against M?

A. This was probably a bailment, rather than a sale, until M exercised his option by paying cash. The loss therefor falls on F, the bailor, who cannot maintain any action for the wheat or its price. See *State v. Rieger*, 60 N. W. 1087, 59 Minn. 151. See authorities in Q. 41.

For other cases see Decennial Digests, Sales ¶4(5).

Q. 39. A deposits 10,000 bushels of wheat in a grain elevator just before it closed. The warehouseman was insolvent and absconded. B, C, and D, the only other claimants, deposited each 10,000 bushels there at different times before A's deposit. The warehouseman had wrongfully withdrawn some of the grain thus deposited prior to A's deposit. There turns out to be only 20,000 bushels of grain in the elevator. To how much is each claimant entitled?

A. As far as appears, B, C, and D were tenants in common of the grain in the elevator in proportion to their respective contributions. The mass had been wrongfully reduced to 10,000 bushels before A's deposit, so that B, C, and D were each entitled to one-third of this amount. A was entitled to one-half of the 20,000 bushels after his deposit, and B, C, and D to one-sixth each. In a bailment, as distinguished from a sale, the bailee must keep sufficient grain on hand to return to each depositor his proportionate amount. Failure to do so is a conversion, which the depositor may treat as a sale, or he may recover from the purchaser from the bailee. *James & Neer v. Plank*, 26 N. E. 1107, 48 Ohio St. 255. Loss or conversion of part of the common mass is shared proportionately by the tenants in common. *Sexton v. Graham*, 4 N. W. 1090, 53 Iowa, 181; *Huether v. McCaull-Dinsmore Co.* (N. D.) 204 N. W. 614, noted in 3 Wis. Law Rev. 375.

For other cases see Decennial Digests, Sales ¶4(5); Warehousemen ¶16, 20.

Q. 40. A stored 5,000 bushels of wheat in X's warehouse, and later others stored additional amounts until the warehouse con-

tained 20,000 bushels; all the grain being put in large bins and mixed. X sold 10,000 bushels out of the mass as his own, and lost the proceeds in speculation. A later, but without knowledge of X's acts, prepared to move his grain, and ordered X to put 5,000 bushels in sacks. This was done, and the sacks were on the shipping platform of the warehouse, when the other depositors, learning of the shortage, stopped the removal of the sacks. What are A's rights in the 5,000 bushels? Why?

A. A was tenant in common of the mass for a one-fourth undivided share. After X has sold and converted one-half the mass, A is entitled to only 2,500 bushels, since the loss falls on all proportionately. The other depositors may prevent A from taking more than his share, viz. sacks containing 2,500 bushels. See *supra*, Q. 39.

Q. 41. A owned and operated a grain elevator. Grain was received from the public and stored in a mass. The warehouse receipts read: "Received in store for account of ——— or bearer, ——— bushels of wheat. Storage one-half cent per bushel per month. Insured against fire by us [A] for account of whom it may concern. Damage by heating at risk of holder hereof. We [A] have option either to deliver the grade of wheat that this ticket calls for, or to pay the bearer the market price in money for the same, less elevator charges, on surrender of this ticket. We are not obligated to keep wheat on hand, but shall have a reasonable time to procure it after demand by the holders hereof." While a number of these receipts were outstanding, A incurred large debts and was declared bankrupt. There was enough grain in the elevator to satisfy the demands of all depositors. What are their rights?

A. The question whether there is a bailment or a sale is often a close one. In this case, if there is a bailment, the depositors may collect their demands in full; but, if there is a sale, the depositors must share the assets with the other creditors. Where it is the duty of the warehouseman to keep in his elevator sufficient grain to meet the outstanding receipts, each depositor is regarded as retaining title as tenant in common of the mass to the extent of his contribution. *James v. Plank*, 26 N. E. 1107, 48 Ohio St. 255. But it is generally held that, where the warehouseman has the option either to deliver the grain or to pay the market price, and is not obligated to keep wheat on hand, the transaction is a sale, and title passes. *Bonnett v. Farmers' & Growers' Shipping Ass'n*,

181 P. 634, 105 Kan. 121. But compare *State v. Rieger*, 60 N. W. 1087, 59 Minn. 151. If the depositor has the option to take either the grain or its market value, the transaction remains a bailment until the option is exercised to demand the price. The circumstances in this case, that storage is charged, that damage is at the risk of the holder, and that insurance runs in his favor, look in the direction of a bailment, until the option is exercised by the warehouseman to pay the price instead of the grain. But the fact that he is not obligated to keep the wheat on hand tends to show it a sale. 38 Harv. Law Rev. 518; 22 Mich. Law Rev. 257.

For other cases see *Decennial Digests*, Sales 4(5); Warehousemen 34(7).

Q. 42. On January 2, A deposited in a grain elevator owned by B 1,000 bushels of wheat, and took the receipt in this form: "Received in store, for and on account of A, 1,000 bushels of wheat, loss by fire at owner's risk. Wheat may be stored with other wheat of the same quality." The wheat was placed in a bin with wheat belonging to other persons and to B. The wheat was gradually drawn out of this bin by B, without the bin being filled up, until January 27, when the bin was empty. B began on January 29 to fill up the bin again, and on February 8 it was as full as when A's wheat was first deposited. On February 11 the elevator was burned without B's fault. A brings trover to recover for the value of the wheat. On these facts, can he recover?

(a) Suppose B filled up the elevator with the grain of third parties?

A. Yes; this was a bailment, and A became tenant in common with B and the other depositors. When there has been a conversion by B, the warehouseman, depositors may sue him, and even those who purchase from him in good faith. *Kastner v. Andrews* (N. D.) 194 N. W. 824. If the warehouseman, having wrongfully sold all the grain in the elevator, later deposits more himself, the receipt holders may claim from these subsequent deposits. *Hall v. Pillsbury*, 44 N. W. 673, 43 Minn. 33, 7 L. R. A. 529, 19 Am. St. Rep. 209. But, where the depositary appropriates to his own use more than his proportion of the common mass, the depositors may elect to treat the transaction as a sale, and demand pay for the wheat delivered. See *James v. Plank*, 26 N. E. 1107, 48 Ohio St. 255; 6 Am. Law Rev. 363. It was therefore B's wheat which burned up.

(a) Where the subsequent deposits are made by others than the warehouseman, these cannot inure to the benefit of the wronged

tenants in common. The doctrine of confusion of goods does not apply. But see *Carson State Bank v. Grant Grain Co.* (N. D.) 197 N. W. 146; 33 *Yale Law J.* 884; *Torgerson v. Quinn Co.*, 201 N. W. 615, 161 *Minn.* 380; 9 *Minn. Law Rev.* 690.

For other cases see *Decennial Digests*, Sales ¶4(5); *Warehousemen* ¶16, 20, 25(7).

Q. 43. A hires an automobile from B for the ostensible purpose of going to a certain lake on a hunting and fishing trip. Instead of using it as above, he goes to a neighboring town and enters the car in a racing contest. In the race that is held, another car runs into A's, and without any negligence on A's part his car is badly damaged. Can B, the car owner, sue A and recover for such damage?

A. If the bailee, A, departs from the terms of the bailment, as by driving the car to a different place and using it for an unauthorized purpose, he virtually becomes an insurer, absolutely liable for injury or loss occurring during such unauthorized use, though without negligence on his part. *Palmer v. Mayo*, 68 A. 369, 80 *Conn.* 353, 15 *L. R. A.* (N. S.) 428, 125 *Am. St. Rep.* 123, 12 *Ann. Cas.* 691. Some courts would hold that A was guilty of conversion, and liable for the value of the car, from the mere fact that he used it for a different purpose from that for which it was hired, even if it had not been damaged thereby. *Wheelock v. Wheelwright*, 5 *Mass.* 104. See 21 *Harv. Law Rev.* 408. Cf. *Doolittle v. Shaw*, 60 N. W. 621, 92 *Iowa*, 348, 26 *L. R. A.* 366, 54 *Am. St. Rep.* 562. The mere wrongful use by a bailee in possession, not in defiance of the owner's title, and without intent to deprive the owner of his property, should not be regarded as conversion. *Jeffries v. Pankow*, 223 P. 745, 229 P. 903, 112 *Or.* 439. Storage of goods in a different place than that agreed by a warehouseman makes him liable for damage or injury which occurs, even without his fault. *Tallahatchie Compress & Storage Co. v. Hartshorn*, 88 *So.* 278, 125 *Miss.* 662, 17 *A. L. R.* 974.

For other cases see *Decennial Digests*, Animals ¶27; *Bailment* ¶16, 21; *Livery Stable Keepers* ¶10, 12; *Trover and Conversion* ¶10; *Warehousemen* ¶24(1).

Q. 44. A, owner of a lot of land with a barn thereon, made a lease thereof to B, his brother, to continue so long as A willed. A also owned a wagon, and made a bailment thereof to B, to continue so long as A willed. A told B that he need not pay anything for the use of the barn or the wagon. B took and kept possession of the barn and wagon until they were totally destroyed by a fire

caused by the negligence of C, owner of an adjoining lot of land. The barn was worth \$1,500 and the wagon \$200. B now sues C for the destruction of the barn and the wagon. How much may he recover?

A. B, the bailee at will, may recover from C \$200, the entire value of the wagon, on behalf of himself and A, the owner. But B, as tenant at will of the land, having merely a temporary possessory right, is limited to a recovery for the injury to his use and enjoyment by the negligent destruction of the barn. The measure of damages would not be \$1,500, the value of the barn, but merely the diminution in the rental value of the land during the time B would probably occupy the same. *Cleveland Ry. Co. v. Born*, 96 N. E. 777, 49 Ind. App. 62. But see *Rogers v. Atlantic, G. & P. Co.*, 107 N. E. 661, 213 N. Y. 246, L. R. A. 1916A, 787, Ann. Cas. 1916C, 877. It is an exceptional rule by which the gratuitous bailee at will is entitled to recover the entire damage done to personal property by its injury, loss, or misappropriation, while a tenant at will of real property can recover only for his own damage, and not for that of the landlord. The bailee of personal property represents the bailor in protecting the property against third parties and recovering for injuries, partly for historical reasons. The mere naked bailee at the will of the bailor cannot recover the value, where the bailor or owner intervenes and asserts his general property. See 11 Cal. Law Rev. 29. Anciently the bailee was the only person who could sue, and it was his duty to act for his bailor. Both the bailor and the bailee have separate rights of action for the loss suffered by each. But from early times possession has carried with it all legal remedies pertaining to complete ownership. It may be expedient, even to-day, to let the bailee sue the tort-feasor for the entire damage in a single action, and let the bailor and bailee settle between themselves. Except in case of bailment, the owner of a special or qualified interest in personal property can recover only for the value of his own interest therein, and not the full value.

For other cases see Decennial Digests, Damages ¶105; Life Estates, ¶22.

Q. 45. A hires an automobile at the X Company's garage for an hour; B, in another auto, negligently runs into him and damages A's hired machine to the extent of \$300. A is not responsible to the garage. Can A sue B for the \$300? If A is defeated on the grounds of contributory negligence, can the X Company still sue?

A. As between the bailee and a stranger, the bailee is treated as if he were owner, and may recover the entire damages against the defendant. The bailee will, of course, have to account to the bailor, the X Company, as trustee, for the damages which he recovers beyond his interest in the thing bailed. It has been suggested that a distinction might be made between a case where the possessor is the only known owner and a case where the true owner is known and standing by, ready to sue for the property or its damage. *Barwick v. Barwick*, 33 N. C. 80; 25 Harv. Law Rev. 655. It would seem on principle that the general owner and the one having only a transitory possession should each sue for the actual loss or damage to his own particular interest. But it is generally recognized that even the gratuitous bailee may maintain trespass, trover, or replevin on the basis of the possession; much more so a bailee with a right of possession for a specific time and purpose. *Engel v. Scott & H. L. Co.*, 61 N. W. 825, 60 Minn. 39; *Union Pac. R. R. v. Meyer*, 107 N. W. 793, 76 Neb. 549, 14 Ann. Cas. 634. This may perhaps be explained as resting on the duty or authority of the bailee to protect the property as he would his own. If taken from him, he should seek to reclaim it. *Roberts v. Stuyvesant Safe-Deposit Co.*, 25 N. E. 294, 123 N. Y. 57, 9 L. R. A. 438, 20 Am. St. Rep. 718.

There is a conflict of authority whether the contributory negligence of the bailee is imputable to the bailor, so as to prevent recovery by him, but the better view is that it should not be. *Cain v. Wickens*, 122 A. 800, 81 N. H. 99, 30 A. L. R. 1246.

For other cases see *Decennial Digests*, Bailment §7, 35; Negligence §90; Warehousemen §25(8).

Q. 46. A owns a horse, which he loans to B to use without compensation. C steals the horse from B. Can either A or B bring (a) trespass, or (b) trover, against C?

A. Both A and B can maintain either trespass or trover against C. The immediate right of possession is all the property right or title necessary as against the wrongdoer. A, the bailor, is said to have the constructive possession; that is, he is given the same rights and remedies as if he were in actual possession. The bailee at will is subject to his orders to return the property at any time, and so it is said that the possession of the bailee at will is the possession of the bailor. This is not the case where the bailee has the exclusive right of possession as against the bailor. But a bailor may maintain trespass or trover against a wrongdoer, even though the bailee has a lien, for he may terminate the bailment at any time on

paying the debt. If the bailment is not terminable by the bailor at his option, then his remedy against third parties would be in case for the injury to his reversionary interest.

A mere servant of A, who is in charge of the horse, has only the custody of the horse. His holding is the possession of the master, because possession involves the exercise of dominion with some claim of title, though it may be only for a very transitory interest. The servant has the physical control, but he has not the requisite mental element of legal possession; what he does is the act of the master, who is given the possessory rights and remedies.

Holly v. Huggefords, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

Ames v. Palmer, 42 Me. 197, 66 Am. Dec. 271.

29 Harv. Law Rev. 514.

For other cases see *Decennial Digests*, Trespass §19(9), 20(2); Trover and Conversion §16.

Q. 47. A delivers grain at B's warehouse, and B gives to him a warehouse receipt, in which A is named as the bailor. The grain actually belongs to C, and C notifies B of that fact. A afterwards tenders B the warehouse receipt and demands the grain. B refuses to deliver it. A sues in conversion. B pleads C's ownership in defense.

(a) When may the bailee deny the bailor's title?

A. In general, on receipt of possession by virtue of a bailment, the bailee admits the right of the bailor, holds in subordination to him, and becomes estopped to deny his bailor's title. *Jensen v. Eagle Ore Co.*, 107 P. 259, 47 Colo. 306, 33 L. R. A. (N. S.) 681, 19 Ann. Cas. 519. There are, however, a number of exceptions to this estoppel. The obligation of the bailee is to restore the property or to account for it. He does account for it when he has yielded it to the claim of one who has a right paramount to that of the bailor. *The Idaho*, 93 U. S. 575, 23 L. Ed. 978. If he yields to a stranger claiming the property, he takes the risk of establishing the title thus recognized. He cannot set up title in a third person against the bailor, however wrongful the bailor's possession, unless the true owner has claimed the property, and the bailee has yielded thereto, or unless, as here, he is defending his possession by the authority of the true owner. There is a similar estoppel of the tenant to deny the landlord's title, subject to like exceptions. See *Jeffers v. Easton Co.*, 45 P. 680, 113 Cal. 345. If B delivered the grain to A after demand by C, the true owner, he would be liable for conversion to C. It may be doubtful, however, whether a mere notice is equivalent to a demand. See *Gurley v.*

Armstead, 19 N. E. 389, 148 Mass. 267, 2 L. R. A. 80, 12 Am. St. Rep. 555.

For other cases see Decennial Digests, Bailment ⚡8; Carriers ⚡299; Landlord and Tenant ⚡63(1); Trover and Conversion ⚡3.

SECTION 9.—LIENS

Q. 48. A agreed with B that B should pasture A's cattle at a fixed price per week. A delivered the cattle to B, who put them in his pasture. A some time afterwards demanded the cattle from B, but did not pay or tender the amount due for the pasturage. B refused to give up the cattle until he was paid according to the agreement. Can A maintain trover against B?

A. Yes; an agistor, to whom horses or cattle are delivered for pasturage, or a livery stable keeper who merely takes an animal in to feed it, is not entitled to a lien at common law, for it is said he does not confer any additional value on the thing intrusted to him, which accession of value was formerly supposed to be the title to a lien. But the doctrine of liens is much favored in the law, as obviating the necessity of suit for just debts in matters often too trivial and annoying to bear litigation, and has consequently been extended by decision and statute, so that it may be stated as a general rule that any bailee employed to perform services about the chattel, so that he is entitled to compensation, has a lien by operation of law, even though he has not enhanced the value of the goods. The following are the most common liens:

1. The lien in favor of the artisan or repair man, who by his services or labor has increased the value of the article at the request of the owner.

2. The innkeeper's lien, in return for his exceptional liability and duty to serve, good even for debt of wrongdoer. The carrier's lien. The public warehouseman's lien.

3. The general lien of bankers, attorneys, factors, and brokers, based on mercantile custom.

4. Statutory liens given to livery stable and garage keepers, landlords, boarding house keepers, and others.

5. The seller's lien for purchase money.

There is no common-law lien for a private warehouseman's claim for storage. *Lewis v. Gray*, 83 A. 1, 109 Me. 128, 39 L. R. A. (N. S.) 1164, Ann. Cas. 1913D, 1298. An agistor has no common-law lien. *El Paso Cattle Loan Co. v. Hunt* (N. M.) 228 P. 888. *Lewis v. Tyler*, 23 Cal. 364.

For other cases see Decennial Digests, Animals ⚡26(1), (2); Bailment ⚡18(2).

Q. 49. Give illustrations of general as contrasted with particular liens.

A. A general lien, as distinguished from the ordinary particular lien, is a right to retain goods bailed by a debtor for a general balance of account in a course of dealings, and not merely for a claim arising from the particular bailment. As a rule, bailees have, at common law, no general liens, which exist only by well-established custom or usage in particular lines of business. Thus factors, bankers, brokers, and attorneys are said in certain jurisdictions to have a general lien. A factor is an agent intrusted with goods for purposes of sale, and has a general lien for his commissions and advances. An attorney has a retaining lien, by which he may retain the papers and documents of his client intrusted to him, not only for his fees with reference to them, but for his general balance of account. The attorney has, also, a particular charging lien on funds or judgments which he has recovered for payment of his compensation. 6 Minn. Law Rev. 588; 5 Minn. Law Rev. 549; 20 Col. Law Rev. 480, 703; 18 Mich. Law Rev. 529. A bank is said to have a general lien for its loans on valuables deposited with the banker, and also on the depositor's account at the bank. The bank, not being a bailee, but a debtor for the deposit, does not retain any money by way of lien, but merely may set off the deposit account to satisfy what the depositor owes. The banker's general lien upon the funds and securities of the customer seems to arise from custom and the credit extended upon the faith of them by the banker.

For other cases see Decennial Digests, Attorney and Client ⇨171; Factors ⇨47.

Q. 50. An automobile was sent by A to B for repairs. When repaired, A came for it, but B refused to give it up unless he was paid for the repairs; and he told A that, unless he paid for the repairs and took the car away, he should charge him storage. Some months later A tendered the amount due for repairs to B, and demanded the car, but B refused to give it up, unless he was paid for the storage. Can A maintain trover? Can B sell the car or bring suit to foreclose his lien for the repairs?

A. B is liable in trover after tender of the bill for the repairs. B cannot sell the car or foreclose the lien, as in pledge or mortgage. *Burrough v. Ely*, 46 S. E. 371, 54 W. Va. 118, 102 Am. St. Rep. 926; *Aldine Mfg. Co. v. Phillips*, 76 N. W. 371, 118 Mich. 162, 42 L. R. A. 531, 74 Am. St. Rep. 380. B probably has no claim

or lien for storage charges. But see *Malcolm v. Sims, etc., Co.* (Tex. Civ. App.) 164 S. W. 924.

At common law, a lien confers only the right to hold until payment, not to sell the chattel, and there is no adequate remedy for realizing on the security. Any expense incurred in keeping the property must be borne by the bailee, and a horse may "eat his head off." *British Empire, etc., Co. v. Somes*, El. Bl. & El. 353; 8 H. L. 338. Compare *Folsom v. Barrett*, 62 N. E. 723, 180 Mass. 439, 91 Am. St. Rep. 320. A power of selling for the satisfaction of liens, upon due notice, is given commonly by statute to certain classes of lien claimants, as for carriage, storage, and labor bestowed on goods. While it is true that the lienholder holds the property against the owner's consent and for his own benefit, yet he does so by reason of the owner's default. The expenses in keeping and caring for the property are an unjustified burden cast on the creditor, and a quasi contractual obligation to pay them might well be imposed by law. It is said to be an implied term of a contract of pledge to pay such expenses.

For other cases see *Decennial Digests*, Animals ⚡25; Bailment ⚡18(5); Liens ⚡18, 19; Livery Stable Keepers ⚡8(1).

Q. 51. A sold a piano to B for \$400, and B gave a chattel mortgage to A for \$300 of the price. The mortgage gave A the right to retake the piano on any default by B. B kept the piano in a house which he had leased from C. When the lease expired, B quit possession of the house, leaving the piano, and disappeared. C removed the piano to a warehouse, which he owned, and stored it there. B had made all payments on the piano up to the time he quit possession, but \$150 remained unpaid. Six months later another installment fell due, and was not paid. A discovered the piano in possession of C and demanded it. C refused to deliver it until his storage charges were paid. C did not state, and A did not ask, the amount of the charges. The fair market value of the piano is now \$250. A fair storage charge, if C is entitled to any, is \$25. A sues C for conversion. Should he recover, and, if he should, how much?

A. B, by leaving the piano in C's house, made C what is called an "involuntary depositary" of it, by an implied request to care for and store it. C was entitled to claim storage charges from B, but is not entitled to a lien on the goods. *Preston v. Neale*, 12 Gray (Mass.) 222. A person who stores goods for another, but is neither a public warehouseman, nor in the business of storing goods, has no lien for

his storage charges at common law. *Lewis v. Gray*, 83 A. 1, 109 Me. 128, 39 L. R. A. (N. S.) 1164, Ann. Cas. 1913D, 1298; *Graben Motor Co. v. Brown Garage Co.*, 195 N. W. 752, 197 Iowa, 453, 31 A. L. R. 832. The claim to hold the property, and the refusal to deliver it on A's demand, constituted a conversion and C would be liable for \$250.

If, however, there were a statutory lien for the storage, and A made no attempt to ascertain the amount due or offer to pay the charges, defendant is not liable for conversion, but may retain possession until paid, unless the mortgage lien takes priority of the storage lien. *Grice v. Berkner*, 180 N. W. 923, 148 Minn. 64. The statute may be construed as giving a lien for storage superior to the lien of a prior chattel mortgage, or it might be held that rightful possession in the mortgagor, B, implied authority to have the piano stored. See *Stebbins v. Balfour*, 195 N. W. 774, 157 Minn. 135; 8 Minn. Law Rev. 160. In general, however, subject to exceptions in favor of innkeepers, and possibly carriers, no common-law lien attaches to chattels delivered without the authority of the mortgagee or conditional seller. 33 Harv. Law Rev. 868; 22 Mich. Law Rev. 46; 10 Cornell Law Quart. 331; *Ehrlich v. Chapple*, 143 N. E. 61, 311 Ill. 467, 32 A. L. R. 989.

For other cases see Decennial Digests, Bailment ⚭5, 18(2), (3); Chattel Mortgages ⚭138(1); Landlord and Tenant ⚭161(2); Livery Stable Keepers ⚭8(1).

Q. 52. By statute it was provided that "any person who feeds or furnishes food and care for any horse shall have a lien therefor, to secure the payment of the same, upon such horse." A owned a horse, which he stabled with B, who fed and cared for it. A was accustomed to take the horse out of the stable each morning, and to return it before noon. One morning, when the horse was out, B was informed that A was about to make an assignment for the benefit of his creditors. A was indebted to B for the feed and care of the horse. B went to A's store, before which the horse was standing, and drove it back to his stable. A, without tendering to B the amount due him, replevied the horse. Is B entitled to a judgment for a return?

A. There is a conflict of authority as to the right of a stable keeper to assert a lien on a horse, where the owner is allowed to use it periodically. Some courts take the view that B, the stable keeper, does not have the continuous possession necessary to entitle him to a lien. *Vinal v. Spofford*, 29 N. E. 288, 139 Mass. 126; *Clarksburg Casket Co. v. Valley Undertaking Co.*, 94 S. E. 549, 81

W. Va. 212, 3 A. L. R. 660. There may well be a loss of lien, in case of a bona fide sale of the property by the owner while in his possession, even if the keeper could revive the lien and assert the right of possession as against A. *Abeytia v. Gibbons Garage*, 195 P. 515, 26 N. M. 622. It has been held that the lien is not lost as against an attaching creditor. *Welsh v. Barnes*, 65 N. W. 675, 5 N. D. 277.

For other cases see *Decennial Digests*, *Bailment* ⚡18(3); *Livery Stable Keepers* ⚡8(1, 3).

Q. 53. X steals from Y three automobiles, and sells all of them to Z, an innocent purchaser, for full value.

(1) Z sells No. 1 to A, who stops at a hotel for a week, making the hotel the headquarters for daily trips in the auto; he runs up a bill for his own keep, and also for the keep of the auto.

(2) Z sells No. 2 to B, who sends the auto to a garage for repairs.

(3) Z sells No. 3 to C, who ships it by railway to another city. If Y now discovers that the hotel, the repair shop, and the railway are unpaid, and insist on liens, what are his rights and remedies?

A. An innkeeper may claim a lien on goods which were not the property of the guest, but which were received by him as innkeeper, either without knowledge of the title of the third party, or where the guest is in lawful possession as servant or bailee. Y probably cannot claim car No. 1 against the hotel keeper, without paying A's bill. *Black v. Brennan*, 5 Dana (Ky.) 310; *Cook v. Kane*, 11 P. 226, 13 Or. 482, 57 Am. Rep. 28; *Gordon v. Silber*, L. R. 25 Q. B. D. 491. The innkeeper's lien covers the entire amount due for board and lodging of A and the keep of the car. The lien is not limited to the charges for keeping the car. *Mulliner v. Florence*, 3 Q. B. D. 484. Z, the innocent purchaser, has no title, and the garage man has no lien good against Y for B's bill for repairs or storage. The railway company has no lien, good against Y, for the carriage charges, though it would have a lien as against C. A common carrier is not, in America, given a lien good against the true owner, as is the innkeeper, upon goods transported for a wrongdoer. In England the common carrier has such a lien. The railway is therefore liable as a converter, if it refuses to deliver to Y.

For other cases see *Decennial Digests*, *Animals* ⚡26(3); *Innkeepers* ⚡13.

Q. 54. A traveling salesman arrives at a hotel with a large sample trunk, marked conspicuously, "Property of XY Company."

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The trunk, which contains samples of clothing, is placed in the salesman's room. During the week the salesman takes some of the samples out with him daily, and one day he has the empty trunk taken next door to be repaired, but it is returned to the hotel that evening. At the end of the week the traveling salesman departs without paying his bill, leaving the trunk and samples. Later the X Y Company demands the trunk and its contents from the proprietor of the hotel, and, upon his refusal to deliver, brings trover for the trunk and its contents. What judgment, and why?

A. The common law gave an innkeeper a lien upon goods owned by a third person in the rightful possession of the guest for the value of his entertainment. The innkeeper was compelled to receive and act as insurer for the goods in the guest's possession. *Horace v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 24 L. R. A. (N. S.) 958, 121 Am. St. Rep. 886, 12 Ann. Cas. 397. It has been held that the lien may attach to goods, even though the innkeeper knows that the goods are the property of a third person, as in case of samples carried by a commercial traveler as the agent of another. *Brown Shoe Co. v. Hunt*, 72 N. W. 765, 103 Iowa, 586, 39 L. R. A. 291, 64 Am. St. Rep. 198 (statute). Judgment for defendant. *Robbins & Co. v. Gray*, [1895] 2 Q. B. 501. See *Wertheimer-Swarts Co. v. Hotel Stevens Co.*, 80 P. 563, 38 Wash. 409, 107 Am. St. Rep. 864, 3 Ann. Cas. 625. Apparently a common carrier does not have a lien in this country upon the goods which he transports at the instance of one who is not the owner. *Fitch v. Newberry*, 1 Doug. (Mich.) 1, 40 Am. Dec. 33. It is not clear that there is any sound distinction between the case of the carrier and the innkeeper as to goods received without the authority of the owner, since both are bound to serve the public and receive all who apply.

For other cases see Decennial Digests, Carriers ⇨197(1); Innkeepers ⇨13.

Q. 55. A statute provides that the keeper of a boarding house shall have a lien upon the baggage and effects of any lodger and boarder, "the same as an innkeeper." A rents a typewriter to Y, and Y takes it to his room in a boarding house kept by X, and keeps it there in his room for a month, using it in his business as a public stenographer. There is a plate on the machine with the following legend: "Property of A — rented only, not sold." Y's board bill being unpaid, X takes the typewriter out of Y's room and puts it in X's office, stating that he intends to hold it until the bill is paid. In replevin by A against X, what judgment?

A. Keepers of boarding houses or lodging house keepers are not entitled at common law to any lien on the goods of their boarders or lodgers. Such a lien is, however, often given by statute; but such statutes are usually interpreted as restricted to the goods of the boarder or lodger. *Chickering, etc., Bros. Co. v. White*, 106 N. W. 797, 127 Wis. 83. The lien of the innkeeper on the goods of third parties is justified by the extraordinary liability of the innkeeper and his duty to receive all who apply. If a statute attempts to extend the lien to the goods of a third person brought to the boarding house by a boarder, it might be held unconstitutional, as depriving the owner of property without due process of law. *Van Laar v. Marchesini*, 175 N. Y. S. 456, 107 Misc. Rep. 186. But any one who intrusts his goods to the possession of another probably does so subject to statutory power to create liens for storage, repairs, etc. A statute might well be construed not to apply against the owner, unless by express terms. The statutory lien of one making repairs on an automobile at the instance of the mortgagor is sometimes held superior to the claim of a prior mortgagee. *Mortgage Securities Co. v. Pfaffmann*, 169 P. 1033, 177 Cal. 109, L. R. A. 1918D, 118 (statute). Cf. *N. M. Stone Co. v. Ellerson*, 230 Ill. App. 593.

For other cases see *Decennial Digests, Chattel Mortgages* ¶138(1), 150 (1); *Constitutional Law* ¶300; *Innkeepers* ¶2, 13.

Q. 56. B drove a car into A's garage. B was unknown to A, but A had no reason to believe that B did not own the car. A put repairs on the car worth \$50 at the request of B. B never came back to claim the car, but two months later C saw the car in A's garage and claimed it as his own, asserting that it had been stolen from him. A told C that he might have the car on paying for the repairs and storage. C paid, took the car, and disappeared. O now appears and proves that the car was his, that it had been stolen from him, and that neither B nor C had any rights in it. Can O maintain an action against A?

A. As against B, A would have a lien for his labor and materials, but not as against O. The question is whether a bailee of a thief is liable for conversion for delivering the car in good faith to C, who had no title. Is A liable to O, when he delivers the car to a person, C, whom he reasonably believes to be the owner? A might be liable for failing to exercise sufficient care in determining whether C was the one entitled. Any act of ownership or exercise of dominion over the property of another, inconsistent with his rights, is a conversion, and good faith or due care are no defense.

But a carrier or bailee, who acts as a mere conduit and delivers the goods to the bailor, is not liable, if he has no notice of the rights of the true owner. It might be argued that A should not be held liable to O for delivering to C, as he would not have been liable for delivering to B in good faith. But it would probably be held a conversion, since he has delivered to a third party without the consent of either the bailor or the owner. *Gurley v. Armstead*, 19 N. E. 389, 148 Mass. 267, 2 L. R. A. 80, 12 Am. St. Rep. 555; *Loring v. Mulcahy*, 3 Allen (Mass.) 575. See *Ashcraft v. Tucker*, 215 P. 877, 73 Colo. 363, 28 A. L. R. 692; *Varney v. Curtis*, 100 N. E. 650, 213 Mass. 309, L. R. A. 1916A, 629, Ann. Cas. 1914A, 340. If a bailee of property for the owner is induced to deliver the goods to an impostor, who pretends to be an employee of the owner, this unauthorized delivery to a third person is held to amount to a conversion. *Cowen v. Pressprich*, 192 N. Y. S. 242, 117 Misc. Rep. 663; 6 Minn. Law Rev. 579; 22 Col. Law Rev. 354.

For other cases see *Decennial Digests*, *Bailment* ¶11; *Master and Servant* ¶310; *Trover and Conversion* ¶3, 11.

Q. 57. A had a lien, as livery stable keeper and trainer, on B's horse for his services. A claimed that \$300 was due, and, although requested, A refused to deliver up the horse, except upon payment of that sum. The actual balance due was only \$129. B sues for conversion, without tender, on the theory that A, by his excessive demand, had lost his lien, and B was excused from tender of the amount due. Result?

A. Where the lienor, A, erroneously, but in good faith, claims more than is due, this does not excuse the debtor from the tender of the sum actually due; that is, unless the creditor shows that such tender would be useless. *Sabsevit v. Greenville Auto Co.* (N. J. Sup.) 127 A. 604; 24 Mich. Law Rev. 199. But if the lienor, A, fraudulently claims more than is due, he loses his lien. So, if the lienor bases his refusal to deliver upon some ground independent of the lien, he waives his lien and cannot afterwards set it up. *Folsom v. Barrett*, 62 N. E. 723, 180 Mass. 439, 91 Am. St. Rep. 320. A refusal to state the amount of charges, upon the owner's demanding the horse and offering to pay the amount of charges, has been held not to destroy the lien. This decision seems erroneous. *Sutton v. Stephan*, 36 P. 106, 101 Cal. 545. Levy of attachment waives a lien. 20 Mich. Law Rev. 361; 5 Cal. Law Rev. 259.

For other cases see *Decennial Digests*, *Animals* ¶26(4); *Bailment* ¶26; *Liens* ¶16; *Livery Stable Keepers* ¶8(3).

Q. 58. Compare a pledge with a chattel mortgage.

A. Pledge involves delivery of possession of goods as security for an obligation, and the lien so created may be enforced by public sale. Pledge is also the name used for collateral security by assignment of claims or rights represented by documents. Chattel mortgages are usually in form a bill of sale or transfer of the title to the mortgagee, subject only to be defeated by payment or performance of an obligation on a certain day. The essential difference between pledge and mortgage, however, is not in the formal transfer of title, but in the fact that under recording acts the mortgage security is not dependent on possession or bailment. The mortgagor may retain the possession and enjoyment of his property, consistently with the security, until default in repayment.

Q. 59. Suppose B, a pledgee, sells stock pledged as security for a loan at a private sale, or without notice to A, the debtor?

A. This is a conversion. If there is a wrongful sale of the pledge, no tender need be made before suing therefor. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269. The transfer by way of pledge carries by implication a power to realize on the security to satisfy the obligation by public sale on default of payment. No judicial proceeding or decree of foreclosure is necessary to pass a complete title. Notice must be given to the pledgor of the time and place of the sale, and he may redeem up to the moment of sale, and any surplus proceeds over the debt, interest, and expenses of sale belong to him. The law recognizes no agreement to prevent the redemption of the pledge, as by making the pledgee absolute owner on default. If the pledgor fails to pay his debt, the pledgee must foreclose by sale to realize on his security. The tender of the debt, even after maturity, extinguishes the lien of the pledge, for the debt is the principal thing, and the law will neither enforce nor countenance any forfeiture as a remedy for nonpayment. See 29 Harv. Law Rev. 277, on "Drastic Pledge Agreements." In regard to commercial paper pledged, the general rule is that the pledgee has no right to sell it, but should collect and apply the proceeds on the debt, returning the surplus to the debtor. In the case of long time commercial paper, to fall due much later than the maturity of the debt, or of marketable bonds, the presumption would be in favor of implication of a power of sale.

For other cases see *Decennial Digests, Corporations* ¶123(10); *Pledges* ¶52, 56, 58.

Q. 60. A, the pledgee of nonnegotiable conditional sales contracts, temporarily surrendered them to B, the pledgor, for the special purpose of indorsing on them payments by the debtors. They were to be immediately returned, but B, instead of returning them, pledged them to C for a loan. C took them in good faith. A sues C. Result?

A. If the pledgor, while in possession for a temporary purpose, sells or transfers the thing pledged to a bona fide purchaser for value without notice, the pledgee, A, can neither recover possession from such purchaser nor get its value as for conversion. A, the original assignee of the contracts, was only a pledgee. B is general owner, and, when he is restored to possession, the pledgee's lien is gone, as against purchasers in good faith, though not as against A. or creditors of A.

Schumann v. Bank of California, 233 P. 860, 114 Or. 336, 37 A. L. R. 1531.
11 Va. Law Rev. 860.

24 Mich. Law Rev. 201.

Hickok v. Cowperthwait, 103 N. E. 1111, 210 N. Y. 137, Ann. Cas. 1915B, 1002.

First Nat. Bank v. Bradshaw, 135 N. W. 830, 91 Neb. 210, 39 L. R. A. (N. S.) 886.

Clark v. Corser, 191 N. W. 917, 154 Minn. 508.

For other cases see Decennial Digests, Assignments ⚡87; Pledges ⚡11, 25.

Q. 61. M was a dealer in automobiles and ordered a car from the maker. D advanced the money to pay the price and took a note from M, for which the car was pledged as collateral. D stored it in M's garage, with other cars of M, for purposes of demonstration and sale. M became insolvent, and X, his trustee in bankruptcy, now claims the car as against the pledgee, D. Who is entitled?

A. The trustee in bankruptcy takes subject to the pledge. While possession by a pledgee is essential to the validity of a pledge, redelivery of the property to the pledgor for a temporary purpose does not destroy the lien of the pledgee, except as against a bona fide purchaser from the pledgor while so in possession. The doctrine has been criticized as virtually doing away with the rule that possession is necessary to preserve the lien of the pledgee.

Darragh v. Elliotte, 215 F. 340, 131 C. O. A. 482.

28 Harv. Law Rev. 211.

In re Smith-Flynn Co. (C. O. A.) 292 F. 465.

22 Mich. Law Rev. 381.

24 Mich. Law Rev. 201.

For other cases see Decennial Digests, Pledges ⚡11, 25.

SECTION 10.—CONVERSION

Q. 62. A, a money lender, makes a loan of \$1,000 for 6 months to B on the security of a certain race horse, which was delivered to A in pledge. A sold the horse to C before default and without notice. (1) A sues B for the debt which is now due. (2) B sues A and C for conversion. What result?

A. The issue is raised: May the pledgor sue the pledgee and his vendee for conversion without tender of the amount of the debt? By the general American rule, the wrongful sale has the effect of terminating the bailment, and reverts in B, the pledgor, the right to immediate possession, thus excusing tender as a condition precedent. *Austin v. Vanderbilt*, 85 P. 519, 48 Or. 206, 6 L. R. A. (N. S.) 298, 120 Am. St. Rep. 800, 10 Ann. Cas. 1123. The measure of damages will be the value of the goods at the time of the pledgee's wrongful act, less the amount of the debt, with interest thereon to the date of the judgment. See 6 Minn. Law Rev. 173, 184. The English and some American cases hold that, in spite of the illegal transfer, the pledgor cannot sue in conversion until he has tendered the amount of the debt. *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585; *McClintock v. Central Bank*, 24 S. W. 1052, 120 Mo. 127.

If C takes the pledge innocently, it may be argued that he should be regarded as the assignee of A as to the debt and the security. If this view is taken, B cannot hold C for conversion without a tender of the debt being first made. *Talty v. Trust Co.*, 93 U. S. 321, 23 L. Ed. 886; *Williams v. Ashe*, 43 P. 599, 111 Cal. 180. At least if C still has the pledge in his possession and has exercised no dominion over the goods. *Brittan v. Oakland Bank*, 57 P. 84, 124 Cal. 282, 71 Am. St. Rep. 58, 2 Cal. Law Rev. 70.

For other cases see Decennial Digests, Corporations ¶123(15); Pledges ¶33, 41, 56(5).

Q. 63. January 2 A pledges 500 shares of Union Central stock with B as security for a demand loan, market price of stock being \$22 per share. February 1, without notice to A or demand for payment, B sells stock on market at \$20 per share. A learns of sale on February 10, when stock is at \$19 per share, and that day demands return of stock, but makes no formal tender of the amount of his indebtedness to B until February 12, when stock has risen to \$23 per share. On March 1 stock rises to \$30 per share, and A sues B in trover for conversion. The case is reached for trial October 15 and stock can then be bought at \$15 per share. Can A recover

from B, and, if so, how much? Why? Would it make any difference whether the transaction occurred in London, New York, or Chicago? Why?

A. If B, the pledgee, sells or places beyond his power to return the stock pledged, he is guilty of conversion. By the American rule A may sue in trover for conversion by the pledgee without tender of the debt. The main issue, then, is as to the measure of damages. Some courts allow the highest market price of the stock between the conversion and the trial, namely, \$30 per share, less the amount of the debt. *In re Berberich's Estate*, 107 A. 813, 264 Pa. 437; 33 Harv. Law Rev. 474, 18 Mich. Law Rev. 239. Some courts allow the highest price reached during a reasonable time in which the plaintiff might have replaced the stock after learning of the conversion. *Wright v. Bank of the Metropolis*, 18 N. E. 79, 110 N. Y. 237, 1 L. R. A. 289, 6 Am. St. Rep. 356; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Id.*, 66 N. Y. 518, 23 Am. Rep. 80; 19 Col. Law Rev. 379. The general rule in trover is the value of the property at the time of the conversion, with legal interest from that time. *Continental Co. v. Bliley*, 46 P. 633, 23 Colo. 160. To allow the plaintiff to recover the highest intermediate value up to the time of verdict, it has been pointed out, permits him to speculate for an unreasonably long time at the expense of the converter. 4 Cal. Law Rev. 246. In England, A could not recover from B at all without tender. The rule of highest intermediate value seems to be recognized. In Illinois the value of the stock at the time of conversion is the rule, while in New York the highest value between the conversion and a reasonable time to replace is the standard. 8 Minn. Law Rev. 65.

For other cases see Decennial Digests, Brokers Ⓒ38(7); Corporations Ⓒ123(17); Trover and Conversion Ⓒ47.

Q. 64. P deposited 1,000 bushels of wheat with W, a warehouseman, at Echo, Minn., May 1, 1919, to be stored. The wheat was then worth \$2.50 per bushel. The storage was to be 2 cents per bushel per month. October 1, 1919, W borrowed \$2,000 from D, a commission merchant of Minneapolis, and issued to him a storage receipt for 1,000 bushels of wheat as security. W had no other wheat but P's, but D believed at all times that W owned the 1,000 bushels. Wheat was then worth \$3.50 per bushel. March 1, 1920, W shipped the 1,000 bushels to D to be sold and proceeds credited to W's account. The wheat was sold and delivered by D to other parties at \$3 per bushel, the then fair market price in Minneapolis.

The total storage charge up to this time was 10 cents per bushel, and transportation to Minneapolis cost five cents per bushel. On June 1, 1920, P demanded the wheat of W and D. Wheat was then worth \$3.75 per bushel in Minneapolis. What amount if any, may P recover from D?

A. D, the commission merchant, who took a receipt representing P's wheat and sold it to other parties, is liable for its conversion. If D had acted merely as agent for W, a more difficult question as to conversion would be presented. As D is not a willful converter, but acted in good faith, the measure of damages is the value of the property at the time of the demand for its return, less storage charges and the expense of transporting it to Minneapolis, where it was sold. If the conversion was willful, the measure of damages would be the value at the time of demand, without deduction for improvements by the wrongdoer. But, if the conversion were inadvertent, the damages would not include the value after transportation to market, or other value added by the converter.

Gunstone v. Chicago, etc., R. Co., 140 P. 907, 79 Wash. 629, 52 L. R. A. (N. S.) 392.

Dolliff v. Robbins, 86 N. W. 772, 83 Minn. 498, 85 Am. St. Rep. 466.

See 5 Cornell Law Quart. 326.

For other cases see Decennial Digests, *Trover and Conversion* §48; *Warehousemen* §34(8).

Q. 65. A left his tools overnight in B's barn with B's leave. On going to the barn in the morning to get the tools, he was met by S, B's servant, who asked what he was doing there, and, on A's explaining that he had come to get his tools, S refused to allow him to enter the barn, and on his attempt to do so shoved him aside and ordered him off of the grounds. In trover by A against B, these facts appearing, what judgment?

A. Judgment for A. It is a conversion for B, by himself or his servants acting in the course of their employment, to prohibit A from going on B's premises to get his tools, which have been duly demanded. By refusing to allow A to remove his property, B has exercised such claim and dominion over the property as amount to a conversion. *Lewis v. Ocean Nav. & Pier Co.*, 26 N. E. 301, 125 N. Y. 341.

What is the position of an owner of chattels which are on another's land without an express right to enter and remove them? If the goods are there by the chattel owner's fault, he has no right to enter

and retake the goods, and if he does he is liable for trespass. *Mt. Vernon Lumber Co. v. Shepard*, 67 So. 286, 190 Ala. 574. If the goods come on the land by the landowner's consent, or perhaps even by accident, there is no liability in trespass, as where fruit falls from adjoining trees. In the present case B should deliver the tools to A or permit him to enter to take them, and upon refusal should be held liable as a converter. S would no doubt be justified in demanding some proof of A's identity and ownership. *Donnell v. Canadian Pac. Ry. Co.*, 84 A. 1002, 109 Me. 500, 50 L. R. A. (N. S.) 1172.

For other cases see *Decennial Digests, Trover and Conversion* ¶7, 9(12).

Q. 66. D professed to be acting as agent of F, and induced P to sell and deliver to him for F certain bonds payable to bearer and certain mining stock indorsed in blank, for which he gave P the forged check of F. A, acting as broker for D, innocently sold the stock to B, and delivered it to him, and turned over the proceeds to D, less his commission. The stock trebled in value, and then went down to nothing. None of the parties had notice of D's fraud. P demands his stock of A, B, and D, and sues them in trover for its value. Who is liable?

A. In general, a person is guilty of conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one who claims to be owner. *Hollins v. Fowler*, L. R. 7 H. L. 757. P did not assent to transfer title to D, so that P remained the true owner of the stock. A, the innocent agent, who sold the certificates of stock indorsed in blank on behalf of one who had no title, is guilty of conversion, and liable for their value. *Swim v. Wilson*, 27 P. 33, 90 Cal. 126, 13 L. R. A. 605, 25 Am. St. Rep. 110; 27 Harv. Law Rev. 100. The great weight of authority is that the innocent agent, who assists the principal in converting property, is personally liable to the owner. But see *Ashcraft v. Tucker*, 215 P. 877, 73 Colo. 363, 28 A. L. R. 692; 20 A. L. R. 120, note; *J. T. Fargason Co. v. Ball*, 159 S. W. 221, 128 Tenn. 137, 50 L. R. A. (N. S.) 51.

But a stockbroker, who in good faith sells for a customer a negotiable bond, is not liable to the true owner for conversion. The innocent agent is protected in dealing with negotiable paper payable to bearer, as well as the purchaser for value. *Pratt v. Higginson*, 119 N. E. 662, 230 Mass. 256, 1 A. L. R. 714; 28 Yale Law J. 175; *Heney v. Sutro & Co.* 153 P. 972, 28 Cal. App. 698. B, the

innocent purchaser, is clearly liable for the stock, unless P can be held estopped by delivering the stock to D indorsed in blank.

For other cases see Decennial Digests, Banks and Banking ⚡194; Bills and Notes ⚡346; Chattel Mortgages ⚡138(1); Factors ⚡38; Master and Servant ⚡310; Sales ⚡234(6); Trover and Conversion ⚡34(3).

Q. 66a. A purchased a certain quantity of wheat in the open market from B, a grain company. He paid full value for the wheat, acted in good faith and resold at a loss. It afterwards turned out that B, the party that sold him the wheat, was not in fact the owner thereof. C, the owner of the wheat, brought a suit against A for the value thereof. Can he recover?

A. Yes. A is liable for conversion, as having exercised dominion over C's wheat. See question 65.

Q. 67. B took an auto from the possession of A against his protest. B later offered to restore the auto to A, but A refused to take it back, and sues for its value in trover. Can B show the tender of the goods converted as a defense or in mitigation of damages?

A. It is generally held that, when a conversion is complete, an offer to restore the goods, or their actual return to the premises of the owner, without an acceptance, will not take away his accrued right of action. If the owner accepts the chattel back, this will not act as a complete defense, but will only serve to mitigate damages. In some states, if the taking was not willful, and there is no special damage, the courts allow the converter to return the goods in mitigation of damages, in their discretion. In others it seems that converted goods can never be forced back on the original owner.

Haubrich v. Heaney, 200 N. W. 930, 161 Minn. 92.

Carpenter v. Dresser, 72 Me. 377, 39 Am. Rep. 337.

9 Minn. Law Rev. 392.

For other cases see Decennial Digests, Sheriffs and Constables ⚡139(3); Trover and Conversion ⚡22.

SECTION 11.—TRADE SECRETS—BONA FIDE PURCHASE FOR VALUE

Q. 68. The X company was engaged in the manufacture of powder by a secret process, upon which no patent had been obtained. The company employed A as its chemist, one of the terms of the contract being that all knowledge or information which might be acquired by A while connected with the company in any capacity, relative to the mode of doing business and processes of manufacture,

should be received in strict confidence by him and for the exclusive benefit of the X Company, and that no secrets of the business should ever be disclosed by him to any outsider. A, during the course of his employment, acquired knowledge of the secret process used by the X Company. He resigned his position, went to the Y Company, a rival of the X Company, and offered to sell this process which he claimed to have invented. The Y Company knew nothing of his former employment, and in perfect good faith bought the secret, and began to manufacture powder by the process. May the X Company enjoin the Y Company from using the process so obtained?

(1) Suppose that A, instead of selling the secret, had proceeded to make use of it himself; should he be enjoined?

(2) Suppose that the Y Company knew the facts in the case, or paid no value for the secret; would there be any remedy against them? Whitlock, 74 Cent. Law J. 83.

Good { A. Equity will not enjoin Y, the bona fide purchaser of a trade secret, from using it. A, the former employee, will be enjoined from its use or disclosure in breach of trust or confidence, to the prejudice of his employer, X. If Y had notice of A's breach of confidence or paid no value, it would stand in no better position than A. Rights in a trade secret, although spoken of as "property," partake more of the nature of an obligation based on the requirements of good faith.

Stewart v. Hook, 45 S. E. 369, 118 Ga. 445, 63 L. R. A. 255.

Macbeth Evans Glass Co. v. Schnellbach, 86 A. 688, 239 Pa. 76.

Pomeroy Ink Co. v. Pomeroy, 78 A. 698, 77 N. J. Eq. 293.

For other cases see Decennial Digests, Injunction §56; Master and Servant §60.

BANKRUPTCY

By EVANS HOLBROOK, Professor of Law, University of Michigan

Section

1. Effect of Bankruptcy Act on State Insolvency Law.
2. Jurisdiction of Bankruptcy Courts.
3. Persons Exempt from Bankruptcy.
4. Petitioning Creditors.
5. Fraudulent Conveyances.
6. Preferences.
7. Provable Claims.
8. Property Passing to Trustee.
9. Dissolution of Liens.
10. Effect of Discharge.

SECTION 1.—EFFECT OF BANKRUPTCY ACT ON STATE INSOLVENCY LAWS

Q. 1. A state insolvency act provides that, if an insolvent permits a preferential judgment to be entered against him, a proceeding may be begun under the act, as a result of which the judgment shall inure to the benefit of all his creditors. B is a farmer; on January 2 he, being insolvent, permitted a preferential judgment to be entered against him in favor of C; on April 10 proceedings were begun against him under the state act, to have him declared insolvent and to decree that the judgment inure to the benefit of his creditors; on June 3 he filed a voluntary petition in bankruptcy under the national Bankruptcy Act (U. S. Comp. St. § 9585 et seq. [U. S. C. tit. 11, § 1 et seq.]). What are the rights of his trustee in bankruptcy as against C?

A. B, being a farmer, was not amenable to involuntary bankruptcy under the federal Bankruptcy Act. Two opposing views are taken as to whether or not, under such circumstances, a state insolvency act may be made effective against farmers and other persons who are not amenable to involuntary bankruptcy under the federal act. One view is that Congress has not legislated as to the involuntary bankruptcy of farmers, and that the field is therefore left open for action by the states. The other view is that the exception of farmers in the federal Bankruptcy Act is a declaration that there should not be any involuntary proceedings against farmers, and that therefore the state laws providing for such proceedings are superseded. If the former view be taken, of course, the state proceeding against B is effective. If the latter view be taken, the state law has been superseded and any proceedings under it are ineffective. Upon the filing of a voluntary petition by

B on June 3, his trustee becomes entitled under section 70 (U. S. Comp. St. § 9654 [U. S. C. tit. 11, § 110]) to set aside any conveyance which any creditor of B could have set aside, and the question arises as to whether any creditor could set aside the transaction which resulted in the judgment in favor of C. If the state law is effective, B's trustee can set aside C's judgment. If the state law is not effective, B's trustee will fail. In *Stellwagen v. Clum*, 38 S. Ct. 215, 245 U. S. 605, 62 L. Ed. 507, a state statute somewhat like the above was held to be still effective, and the trustee in bankruptcy recovered under it. Contrary decisions are collected in a note in 16 Mich. Law Rev. 540.

In re *McElwain* (C. C. A.) 296 F. 112.

For other cases see *Decennial Digests, Bankruptcy* ¶9(2), 168.

SECTION 2.—JURISDICTION OF BANKRUPTCY COURTS

Q. 2. B resided and did business in Ohio until March 1, when he moved both his business and residence to Michigan; he was insolvent and on the latter date committed an act of bankruptcy. On May 15 a petition in bankruptcy was filed against him in the United States District Court in Michigan. He appeared and denied his insolvency, but made no other objection to the proceeding; a trial was had on the issue of insolvency, and on August 1 he was adjudicated bankrupt. On August 15 C, a creditor of B (but not a petitioning creditor) asks to have the petition dismissed, because B had not, on May 15, had his principal place of business, resided, or had his domicile within the district of Michigan for the greater portion of the preceding six months.

A. The petition should be dismissed. Under section 2(1) (U. S. Comp. St. § 9586 [U. S. C. tit. 11, § 11]), a court of bankruptcy has jurisdiction to adjudge persons bankrupt only if they have had their principle place of business, resided, or had their domicile within the territorial jurisdiction of the court for the greater portion of the six months preceding the filing of the petition. The court in Michigan was therefore without power to pass on the bankruptcy of B, and the defect of jurisdictional power was not cured by B's failure to raise the point at the time of his appearance; the alleged bankrupt's consent cannot confer jurisdictional power on the court.

Finn v. Carolina Portland Cement Co., 232 F. 815, 147 C. C. A. 9.

For other cases see *Decennial Digests, Bankruptcy* ¶14.

SECTION 3.—PERSONS EXEMPT FROM BANKRUPTCY

Q. 3. B had been a merchant, but sold his business on July 1, 1924; he then owed debts amounting to \$800, contracted in his business, and was and continued to be insolvent. Until June 30, 1925, his only occupation was tutoring students for examinations, and his income from this work was \$1,200. During this year he contracted a further indebtedness of \$900, and paid none of his old debts, except \$200, which he paid to X on June 1, 1925. On July 1, 1925, he rented a farm and began to work on it as his sole occupation. On August 1, 1925, a petition in involuntary bankruptcy was filed against him by three creditors, whose claims amounted to \$1,100. Should he be adjudicated a bankrupt?

A. B would contend that he is not amenable to involuntary bankruptcy, because he was a farmer at the time of the filing of the petition against him. It has been held, however, that a person may not avoid bankruptcy proceedings by taking refuge within an exempted class, and that the susceptibility to bankruptcy is to be determined, not by the occupation of the alleged bankrupt at the time of the filing of the petition against him, but either at (1) the date of the commission of the act of bankruptcy alleged, or (2) the time of the contracting of the debts which are the basis of the petition. If the date of the commission of the act of bankruptcy (the preference of X) is to be taken as the decisive date, B could contend that he was at that date also exempt from bankruptcy as being a wage-earner, and that therefore there should be no adjudication against him. If, however, the date of the contracting of the debts is to be taken as the decisive date, he would be amenable to bankruptcy, because at the time of the contracting of such debts he was engaged in merchandising, which is not one of the exempt occupations.

Flickinger v. Bank, 145 F. 162, 76 C. C. A. 132.

In re Crenshaw (D. C.) 156 F. 638.

For other cases see *Decennial Digests, Bankruptcy* ¶68.

SECTION 4.—PETITIONING CREDITORS

Q. 4. B, insolvent, owes \$10,000 to 25 creditors, and on July 1 he assigns all of his property to A for the benefit of 24 of his creditors (X, to whom he owes \$5,000, being excluded). A sold the property, paid a 50 per cent. dividend to 20 of the 24 creditors, and has a considerable sum still in his hands on September 1, when X files a petition in involuntary bankruptcy against B. Should B be adjudicated a bankrupt?

A. If the total number of B's creditors is 12 or more, there must be 3 petitioning creditors. If the total number of B's creditors is less than 12, one creditor (holding a claim for more than \$500) may be the sole petitioner. Section 59b (U. S. Comp. St. § 9643 [U. S. C. tit. 11, § 95]). But, in computing the number of B's creditors, the courts exclude any who have participated in and consented to an assignment for the benefit of creditors, and, as it appears that 24 of B's 25 creditors have participated in the benefits of the assignment, there is only one creditor who is to be counted as such, and therefore A's petition against B is proper, and B should be adjudicated a bankrupt, because he has committed an act of bankruptcy under section 3a (4), being U. S. Comp. St. § 9587 (U. S. C. tit. 11, § 21).

Stevens v. Nave-McCord Mercantile Co., 150 F. 71, 80 O. C. A. 25.
For other cases see Decennial Digests, Bankruptcy ¶76(2).

SECTION 5.—FRAUDULENT CONVEYANCES

Q. 5. In 1915, B conveyed land to G by deed containing covenants (1) that the premises conveyed "are free and clear of all incumbrances" and (2) that the grantor would "warrant and defend the title against the lawful claims of all persons whomsoever." In truth, there was then outstanding a mortgage, of whose existence B was ignorant. In 1920 B became a bankrupt, and in 1921 received his discharge; the covenants were scheduled as liabilities owing to G. B is now sued by G for breach of the covenants in the above deed; the holder of the mortgage having foreclosed in 1923 and had the premises sold to X, who is now in possession. B sets up as a defense his discharge in bankruptcy. What result?

A. At the time of B's bankruptcy the two covenants were clearly "claims arising upon contract," as defined in section 64 (U. S. Comp. St. § 9648 [U. S. C. tit. 11, § 104]). It is generally held that a covenant against incumbrances is broken if, at the time of the covenant, an incumbrance was outstanding, as was the case here. It could therefore be held that the claim arising out of the covenant against incumbrances was a provable claim at the time of B's bankruptcy, and would therefore be discharged. The liability arising out of the covenant of warranty did not arise until there was an eviction by paramount title, and therefore it had not been broken at the time of B's bankruptcy. The contract was, however, in existence at the time of B's bankruptcy, and it would be urged that it was a provable claim under section 64. If this view be taken, however, we are

confronted with the difficulty that this claim was at that time a contingent claim. It could not be told at that time whether it would ever become an actual liability against B, and it has generally been held that contingent claims are not provable. It could hardly be maintained that the bankruptcy of B constituted an anticipatory breach of the covenant of warranty, and therefore the claim arising upon that covenant was not a provable claim and was not discharged.

Parker v. Bradford, 45 Iowa, 311.

Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52.

For other cases see *Decennial Digests*, *Bankruptcy* ¶421(1).

Q. 6. A statute provides that married women may own and control all kinds of property as if they were unmarried. H is insolvent, and has no property which is subject to execution. H's wife, W, organizes a corporation for the purpose of carrying on an undertaking business; she owns all of the stock, except two shares, which are owned by her brother and by her attorney. The money for the formation of the corporation and for the launching of the business is borrowed by her from her brother. H is a skilled undertaker, and could work for another undertaker at a salary of \$5,000 a year; but he gives his services to his wife's corporation, which makes large profits. These profits are paid to W and the two other stockholders in dividends; with her dividends W pays her indebtedness to her brother, and supports H in comfort, paying all of his living expenses, and supplying him with spending money whenever he wishes it. What can H's creditors do, either under the Bankruptcy Act or otherwise?

A. H's creditors will claim that the arrangement by which H gives his services to the corporation without pay is a fraudulent conveyance. If it is held to be a fraudulent conveyance, it can either be made the basis of a bankruptcy proceeding against him, or can be made the basis of a proceeding in equity to recover the amount which has passed from H to the corporation, instead of being used by H to pay his creditors. The difficulty is that a debtor's personal services are not considered to be property such as can be fraudulently conveyed by him. There would, of course, be a further difficulty in assessing the amount of the property conveyed if the services were considered to be property. It seems, therefore, that H's creditors are remediless.

Most Worshipful Grand Lodge of Alabama, A. F. & A. M., v. Allen, 94 So. 343, 208 Ala. 292, 28 A. L. R. 1043.

For other cases see *Decennial Digests*, *Fraudulent Conveyances* ¶104(4).

BAL. PROB. LAW

Q. 7. In February, 1915, A borrowed of B \$1,000, giving a note therefor due in five years. In August of the same year a house and lot were conveyed to the wife of A, \$100 of the purchase price being paid by the wife out of money received by her from her father. The balance of the price, about \$1,000, was raised by a mortgage to a loan association, in which the wife joined. At this time and thereafter A was insolvent. The weekly payments to the association, \$2.30, were made by the wife out of money which she saved in the management of the house. From August, 1915, to the present time, A has been earning about \$40 per week, all of which he turned over to his wife, who, with this money, paid all the expenses of the house and family, which consisted of herself and husband and two children, and was able to save out of it a few dollars each week, with which she was able to pay off the above mortgage. This she did only by the most careful management and frugal living. B has recovered judgment on the note of February, 1915, and, not being able to make the judgment out of A's property, sues to reach the house and lot. Has he a remedy?

A. B is clearly such a creditor as is entitled to set aside any fraudulent conveyance of A's property. He will contend that the transactions here outlined amount to a fraudulent conveyance by A to his wife. It is clear that the \$100 paid by the wife from her own money is not to be included in any interest which A may have in the house and lot. As to the remainder of the purchase price, however, it may be contended that the weekly payments to the building and loan association were made with A's money, and that his creditor, B, is therefore entitled to subject the house and lot to his claim against A. The wife of A will, of course, contend that the payments were made by her out of her savings, which became her property by reason of her services in the household. It has generally been held, however, that a wife's services in the household are the property of her husband, and therefore the payments would be considered as having been made from the property of A, and B is accordingly entitled to subject the house and lot to the payment of his claim against A, subject, of course, to the wife's interest in the house, represented by her \$100 contribution.

Milkman v. Arthe, 223 F. 507, 139 C. C. A. 55.

For other cases see *Decennial Digests, Bankruptcy* ¶172.

Q. 8. A, thinking he was about to be sued by X for damages for libel, conveyed all his property, real and personal, without consideration, to his son. A, at that time, owed few debts, and was subject to few liabilities, except as aforesaid. X never sued, and the

statute of limitations has run against X. Twelve years after the said transfer, the B Bank obtained a judgment on a note against A, an accommodation signer, which note was given only a few years before the judgment. The bank now seeks to reach the property conveyed to the son in satisfaction of the said judgment. Is there any remedy?

A. At the time of A's conveyance of his property, X had a cause of action against him for libel, and A's conveyance left A unable to pay any judgment that might have been obtained against him as a result of the enforcement of X's right of action. X was, therefore, a creditor of A, and A's voluntary conveyance of his property to his son was one which could have been set aside by X as being in fraud of him. B Bank is a subsequent creditor of A, and now seeks to set aside the conveyance, made many years before the bank became A's creditor, on the ground that such conveyance was fraudulent as to X, and therefore can be set aside by a subsequent creditor. Three views have been taken as to the rights of B Bank in such circumstances: First, that the conveyance may be set aside by any creditor, existing or subsequent, if it was fraudulent when made; second, that a subsequent creditor can set aside such a conveyance only if there is in existence a creditor whose claim was in existence at the time of the fraudulent conveyance; third, that a subsequent creditor cannot set aside any conveyance, unless it can be shown that the conveyance was made with an intent to defraud the subsequent creditor who strives to set it aside.

The weight of authority is with the third view, and under this view B Bank would not be entitled to set aside the conveyance from A to his son, as there was certainly, at the time of that conveyance, no intent on A's part to defraud the bank.

Brundage v. Cheneworth, 70 N. W. 211, 101 Iowa, 256, 63 Am. St. Rep. 382.
For other cases see Decennial Digests, *Fraudulent Conveyances* ¶209.

SECTION 6.—PREFERENCES

Q. 9. B is a merchant, who is generally believed to be in prosperous circumstances. On January 15 he gives \$1,000 to a community charitable fund. On February 1, X sues B for \$5,000 on a note which B claims is a forgery; B defends the suit, but unsuccessfully, and judgment for \$5,000 is rendered against him, and becomes a lien on his realty, on March 1. On July 15, B discovers that a trusted employé has embezzled large sums, and that he (B) has actually been insolvent for a year past. B immediately files a

petition in bankruptcy. What are the rights of his trustee as against the fund? As against X? What can X do?

A. At the time of both transactions mentioned, B was clearly insolvent. The gift to the community fund is clearly a voluntary conveyance, and therefore could be recovered by B's trustee under section 70e (U. S. Comp. St. § 9654 [U. S. C. tit. 11, § 110]). The judgment obtained by X is more than four months old at the time of B's bankruptcy, and therefore cannot be made the basis of a petition against him, nor can it be set aside under the provisions of section 67 (U. S. Comp. St. § 9651 [U. S. C. tit. 11, § 107]). X is therefore safe from any attack by B's trustee. He may prove his judgment as a claim against B's estate, and receive whatever dividend is payable out of such estate. His judgment lien survives the bankruptcy proceedings, being more than four months old, and he may proceed to enforce it for whatever amount is still owing after the payment of the dividend. Here, however, he will meet the difficulty that his sale under the judgment may amount to a preference, and be the basis of a new petition against B, based upon the transfer which is effected by the execution sale of B's realty and the payment of the proceeds to X. Any sum thus received by X could then be recovered by B's trustee in the second proceeding, and divided among B's creditors as a voidable preference, under section 60b (U. S. Comp. St. § 9644 [U. S. C. tit. 11, § 96]).

Kehr v. Smith, 87 U. S. (20 Wall.) 31, 22 L. Ed. 313.

In re Resnek (D. C.) 167 F. 574.

Anderson v. Bank, 159 P. 1033, 82 Or. 357.

For other cases see Decennial Digests, Bankruptcy ☞ 165(1), 168, 178(1), 288(3).

Q. 10. B is a manufacturer, and is insolvent, being unable to pay even his pay roll. On March 1 he calls all his employees together and tells them of his situation; he asks them to accept, for the next six months, only two-thirds of their regular wages, and promises that, if this enables him to keep the factory going, he will "see that they are treated right for sticking by him," in addition to paying them the postponed part of their regular wages. They agree to proceed on this basis, and the factory is kept going until June 1, when B decides that he cannot go on, and closes the factory. He collects some money and pays to each employee the unpaid one-third of his wages for the past three months; he also pays each employee one week's extra wages as a reward for loyalty. If B becomes bankrupt, either voluntarily or involuntarily, what can his trustee do as to the payments to the employees? X, one of

B's employees, goes into bankruptcy on April 1. Is his trustee in bankruptcy entitled to any of the money paid to X by B on June 1?

A. B's trustee in bankruptcy will doubtless claim that the payments to the employees were preferences, recoverable under section 60b (U. S. Comp. St. § 9644 [U. S. C. tit. 11, § 96]). But, as each of the employees was paid in full, and as their claims were all entitled to priority under section 64b (4), being U. S. Comp. St. § 9648 (U. S. C. tit. 11, § 104), there has been no payment resulting in a greater proportion being paid to one creditor than to another creditor of the same class, and therefore the payments of the wages to the employees were not preferences, under section 60a, and cannot be recovered under section 60b. As to the extra week's wages paid to the employees, these were voluntary transfers by an insolvent, and the trustee may recover such payments as fraudulent conveyances under section 70e (U. S. Comp. St. § 9654 [U. S. C. tit. 11, § 110]). In re Belknap (D. C.) 129 F. 646.

X's trustee in bankruptcy will claim that the money paid to X on June 1 was owing to X at the time of X's bankruptcy on April 1, and therefore should pass to X's trustee under section 70a(5), being U. S. Comp. St. § 9654 (U. S. C. tit. 11, § 110). It is clear, however, that only one month's wages were owing to X at the date of his bankruptcy, and therefore the title of his trustee is limited to one-third of the back wages paid to X on June 1. As to the extra week's wages paid to X, his trustee has no right, as it was a mere gratuity, and could not have been sued for by X at the date of his bankruptcy. In re Evans (D. C.) 253 F. 276.

For other cases see Decennial Digests, Bankruptcy ⇨57, 58, 138(1).

Q. 11. B, engaged in a prosperous business, borrows \$5,000 from his niece, paying her 6 per cent. interest on the sum regularly on January 1st of each year. He later becomes insolvent; wishing to protect his niece, he sends her on June 1st a check for \$5,300, saying in an accompanying letter: "I no longer need the money you loaned me, so I send you the principal and interest to December 31st, thus covering the time it will take you to reinvest it." On July 1st his creditors file a petition against him, alleging this payment as an act of bankruptcy. Is it? Assuming that B had filed a voluntary petition on June 15th, could his trustee in bankruptcy recover anything from the niece?

A. The payment by B to his niece is clearly made with intent to prefer her over his other creditors, and is therefore an act of bankruptcy under section 3a (3), being U. S. Comp. St. § 9587 (U.

S. C. tit. 11, § 21), and he should therefore be adjudicated a bankrupt. In case of his voluntary bankruptcy, his trustee could not recover the amount of \$5,150, which was owing to the niece and was paid to her on June 1st, because she did not at that time have reasonable cause to believe that the payment to her would effect a preference, under section 60b (U. S. Comp. St. § 9644 [U. S. C. tit. 11, § 96]). As to the \$150 which was not owed to her at that time, the trustee can recover; a voluntary conveyance, made at a time when the donor is insolvent, is a conveyance with intent to defraud creditors, voidable by any creditor of the donor, and B's trustee may therefore recover, under section 70e (U. S. Comp. St. § 9654 [U. S. C. tit. 11, § 110]).

In re Condon, 209 F. 800, 126 C. C. A. 524.

Wright v. Sampter (D. C.) 152 F. 196.

For other cases see *Decennial Digests, Bankruptcy* ⇨58, 166(3, 4), 175.

Q. 12. B was trustee under the will of K, and had misappropriated some stocks belonging to K's estate. S was surety on B's bond as trustee, and, on learning of the misappropriation, insisted on B's replacing the stock, which B did. B became a bankrupt within four months, and his trustee in bankruptcy now seeks to recover the stocks or their value from X, who has succeeded B as trustee of K's estate, and who still has some of the stocks in his possession as part of that estate. Can B's trustee in bankruptcy recover from X?

A. When B misappropriated the stocks belonging to K's estate, he became a debtor of that estate, and the estate was, of course, his creditor to the amount of the value of the misappropriated stocks. When B replaced the stock within four months of his bankruptcy, he therefore transferred his own property to the estate of K, or to himself as trustee for the estate of K. And inasmuch as he, as trustee for K, knew that this transaction would result in a preference of the estate of K over B's other creditors, B's trustee in bankruptcy can now recover the value of the stocks so transferred from X, who has succeeded B as trustee of K's estate.

Clarke v. Rogers, 33 S. Ct. 587, 228 U. S. 534, 57 L. Ed. 953.

For other cases see *Decennial Digests, Bankruptcy* ⇨163.

Q. 13. B is a depositor in X Bank. He owes the bank \$10,000, and his balance on deposit varies from \$3,000 to \$8,000. He becomes insolvent on February 1, and this is known to the officers of the bank on that date. They ask him to reduce his indebtedness, and on that date he gives the bank his check for \$5,000, which is a little less than the amount of his deposit balance at that time. The

amount of this check is credited on his note. The cashier of the bank continues to press B, and B raises all the money he can and deposits it in the bank; in this way \$6,000 is deposited between February 1 and February 10, and during that time the bank pays B's checks in various sums to the total amount of \$1,000. On February 10 a petition is filed against B, and he is later adjudicated a bankrupt. His balance at the bank on February 10 is \$5,120, and he then owes the bank \$5,000 on his note. What are the rights of the bank and of B's trustee in bankruptcy?

A. B's trustee will contend that the transactions between B and the bank amount to a preference of the latter, and that, as the bank, during the whole period of B's insolvency, had notice as to his condition, the preferences are recoverable by the trustee under section 60b (U. S. Comp. St. § 9644 [U. S. C. tit. 11, § 96]). First, as to the check for \$5,000: This seems to be a clear payment of the sum to the bank, in reduction of B's indebtedness to the bank, and should therefore be considered as a preference. Second, as to the \$6,000 deposited by B: If this money had been deposited in the usual course of business, it would not have been considered as a preference of the bank, because it resulted in the creation of a debtor-creditor relationship, which increased B's assets to the same extent as it subtracted from his cash on hand. If the deposits were not in the regular course of business, however, and were made solely for the purpose of enabling the bank to charge the balance of B's note off against the deposits thus made, it has generally been held that the deposits amount to a preference. On this point, the payment by the bank of the \$1,000 worth of checks is an indication that the deposits were made in the ordinary course of business, and should not, therefore, be considered as a preference. The question, therefore, becomes one of fact, as to whether the deposits were or were not made in the ordinary course of business. If they were so made, the bank can charge off the balance of B's note against his deposit. If the deposits were not made in the ordinary course of business, B's trustee is entitled to recover them as a preference.

Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 33 S. Ct. 829, 229 U. S. 435, 57 L. E. 1268.

For other cases see Decennial Digests, Bankruptcy ⇨ 159, 164.

SECTION 7.—PROVABLE CLAIMS

Q. 14. X is a manufacturer, and B a retailer, of cotton goods. On June 1, 1924, X agrees to sell, and B to buy, a specified amount of such goods at a specified price each month for the following two years. The price falls, but B continues to receive and pay for the

agreed amount each month, until an involuntary petition in bankruptcy is filed against him, and a receiver is put in charge of his property, on March 2, 1925; he is adjudicated bankrupt on March 20, 1925. After the appointment of the receiver, X does not deliver any more goods, but files a claim for the total damages to accrue for the nonperformance of the remaining part of the contract. What, if anything, should be allowed against B's estate?

A. X's claim against B for the damages is one arising out of the breach of the contract between them. The difficulty is that there has been no express breach of the contract up to the time of B's bankruptcy. X must therefore rely upon the contention that B's bankruptcy amounted to an anticipatory breach of the contract, and that X is therefore entitled to treat the contract as broken by B's bankruptcy, and to assess his damages as if there had been an express breach at the date of B's bankruptcy. This contention is in line with the decision in *Central Trust Co. of Illinois v. Chicago Auditorium Association*, 36 S. Ct. 412, 240 U. S. 581, 60 L. Ed. 811, L. R. A. 1917B, 580, and has been applied to a case of sale of goods in *Re Portage Rubber Co. (C. C. A.)* 296 F. 289.

For other cases see *Decennial Digests, Bankruptcy* ¶318(2).

Q. 15. B borrows \$5,000 from X Bank, giving his note, signed by S as indorser. B becomes insolvent, and S persuades him to pay the bank \$4,000 on February 1.

- (a) Has B committed an act of bankruptcy?
- (b) Can S be a petitioner to have B adjudicated bankrupt?
- (c) If B files a voluntary petition on May 1, can his trustee recover anything from the bank or from S?
- (d) If B is discharged in bankruptcy, can S later sue him to recover the amount that S, as indorser of B's note, has to pay to the bank?

A. (a) B has certainly committed an act of bankruptcy under section 3a (3) being U. S. Comp. St. § 9587 (U. S. C. tit. 11, § 21), because he has transferred his property to the bank with intent to prefer the same.

(b) S cannot be a petitioner to have B adjudicated a bankrupt, unless he is a creditor holding a provable claim against B. It has generally been held that S is not such a creditor as can petition to have B adjudicated a bankrupt. *Phillips v. Dreher* (D. C.) 112 F. 404.

(c) B's trustee cannot recover from the bank the payment made to it, unless he can show that it had reasonable cause to believe

that the payment amounted to a preference. B's trustee, in attempting to recover from S, is met with the difficulty that nothing has been paid to S by B, and by the further difficulty that S, as shown above, is not considered as a creditor holding a claim provable against B. The courts have, however, overridden both of these objections, and have held that S, by being relieved of the obligation to pay money to the bank on his indorsement of B's note, has been advantaged by the payment to the bank, and must give up to the trustee the advantage that he has thus obtained over B's other creditors. The courts hold, also, that the relationship between B and S, by which B agrees to indemnify S for any sum that S may be compelled to pay on B's account, is a contract relation between them, resulting in the creation of a provable claim on the part of S against B, and that S is therefore a creditor of B. Under this view, B's trustee may recover from S the amount of the payment made by B to the bank, whereby S's liability to the bank was decreased. *Kobusch v. Hand*, 156 F. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660.

(d) After B is discharged in bankruptcy, the courts take the same view of his liability to S as has been expressed in the above paragraph. They hold that B's liability to S is ancillary to the primary liability on the note, and that, inasmuch as the primary liability has clearly been discharged by B's bankruptcy, the ancillary liability to S is also discharged. *Williams v. United States Fidelity & Guaranty Co.*, 35 S. Ct. 289, 236 U. S. 549, 59 L. Ed. 713.

For other cases see *Decennial Digests, Bankruptcy* 76(1), 159, 164, 316(3).

Q. 16. B has borrowed \$1,000 from his bank, giving his note therefor, and transferring to the bank as collateral security, with the usual power of sale, shares of stock worth \$1,800. B has also indorsed X's note to the bank for \$500, due November 1. B becomes bankrupt on October 1, and the bank claims the right to hold, out of the \$800 excess value of the collateral, \$500 to meet the liability of B as indorser for X, whose note is unpaid, and who is wholly insolvent. Decide the case.

A. The bank clearly has a provable claim for \$1,000 against B, based upon his note, and may prove it in the bankruptcy proceedings. It also has a claim to hold the collateral to insure the payment to it of the total amount of B's indebtedness. As to the \$800 of collateral which is in excess of the bank's claim against B, however, there are two difficulties: First, the liability against B arising from his indorsement of X's note was not absolutely owing at the

date of B's bankruptcy, and it may therefore be contended that it was not a provable claim at that time. Under *Moch v. Market Street Nat. Bank*, 107 F. 897, 47 C. C. A. 49, however, claims of this sort are considered as provable, if they become absolute during the time specified for the filing of claims in the bankruptcy proceedings. This time is six months from the date of the adjudication, and therefore, under this doctrine, the bank's claim of \$500 against B, arising out of the indorsement of X's note, would be a provable claim. The second difficulty arises out of the fact that B's deposit of collateral was only for the purpose of securing his \$1,000 liability on his own note, and was not for the purpose of securing any liability arising out of his indorsement of X's note. The bank's right to hold the excess collateral as security for the \$500 liability is decided differently in different jurisdictions, and a decision on this point would therefore depend upon the state of the law in the state where the case arose.

In re Searles (D. C.) 200 F. 893.

Furber v. Dane, 89 N. E. 227, 203 Mass. 108.

Morris v. Windsor Trust Co., 106 N. E. 753, 213 N. Y. 27, Ann. Cas. 1916O, 972.

For other cases see *Decennial Digests, Bankruptcy*, ¶154, 316(4), 326; *Banks and Banking* ¶179.

Q. 17. X, who owes \$200 to his physician, Y, for past services, calls Y to treat him for a broken finger. Y treats the finger so unskillfully that amputation is necessary, and X claims that he has been injured to the amount of \$1,000 by Y's negligence.

X becomes bankrupt; what are the rights of X, of Y, and of the trustee?

Y, instead of X, becomes bankrupt; what are the rights of the same parties?

A. If X becomes bankrupt, his trustee will doubtless claim that X's right of action against Y passes to the trustee under section 70a (6), being U. S. Comp. St. § 9654 (U. S. C. tit. 11, § 110), as being a right arising out of the implied contract of Y to use reasonable care and skill in the treatment of X. It has generally been held, however, that the only rights of action arising out of implied contracts which pass to the trustee are such as arise out of the unjust enrichment of the implied contractor. If this view be taken, the right of action would, of course, not pass to X's trustee, and X would still be in a position to enforce it against Y, notwithstanding the bankruptcy. Y's claim against X for services would clearly be a provable claim, Y would be entitled to receive a dividend from X's estate, and the claim would be discharged by X's bankruptcy.

If Y becomes bankrupt, the same question will arise as to whether X's right of action against Y is a provable claim. It would generally be held that it is not a provable claim, because it has not resulted in the unjust enrichment of Y; it would therefore not be discharged, and Y would remain liable to X. Y's right of action against X for services clearly passes to his trustee, being a claim "arising out of contract," under section 70a (6), being U. S. Comp. St. § 9654 (U. S. C. tit. 11, § 110), and Y's trustee can sue X to recover the \$200 as a part of Y's estate.

Schall v. Camors, 40 S. Ct. 135, 251 U. S. 239, 64 L. Ed. 247.

For other cases see Decennial Digests, Bankruptcy ⇨318(1).

SECTION 8.—PROPERTY PASSING TO TRUSTEE

Q. 18. B has an insurance policy for \$10,000, payable to his wife, W. On February 1 it has a surrender value of \$2,000, and on that day he borrows \$1,500 from the insurance company; both he and W joining in the execution of the assignment of the policy to secure the loan. The policy contains a provision by which B can change the beneficiary at any time. On May 1 B becomes bankrupt. What are the rights of the insurance company? Of B? Of W? And of B's trustee?

A. The insurance company clearly has a claim against the insurance policy for the \$1,500 borrowed by B, as the transfer of the policy was based upon a present consideration, and therefore does not amount to a preference. W, having joined in the assignment of the policy to secure the loan, cannot do anything to diminish the right of the insurance company to recover the \$1,500 loaned to B. Under the provisions of section 70a (5), being U. S. Comp. St. § 9654 (U. S. C. tit. 11, § 110), B may pay the surrender value of the policy to his trustee, and will thereupon be entitled to retain the policy, as if there had been no bankruptcy. W will claim that the policy belongs to her, because it is payable to her, and that B's trustee, therefore, has no right to any portion of the policy; but, inasmuch as B has the right to change the beneficiary at any time, and as this right passes to B's trustee under section 70a (3), "a power which he may exercise for his own benefit," the trustee may insist upon a transfer of the policy to him, and thereupon B's right will be only to retain the policy by the payment of the surrender value as above stated.

Cohen v. Samuels, 38 S. Ct. 36, 245 U. S. 50, 62 L. Ed. 143.

For other cases see Decennial Digests, Bankruptcy ⇨143(12).

Q. 19. A died in 1900, leaving by will all his property "to my wife, Mary, for her life, and on her death to such of my children as may be

then living." B is a son of A, and on June 1, 1921, a petition in bankruptcy is filed against him; he is adjudicated bankrupt on June 20, and a trustee is appointed on June 30. On June 5 Mary dies intestate, and B thereupon becomes entitled to \$50,000 under the will of A, and to \$10,000 as heir of Mary. What interest does B's trustee in bankruptcy have in the two sums of money?

A. The \$10,000 which B inherits as heir of Mary is clearly not part of the assets of his estate, and his trustee in bankruptcy has no claim against it, because it does not come within any of the provisions of section 70 (U. S. Comp. St. § 9654 [U. S. C. tit. 11, § 110]). The \$50,000 to which he becomes entitled under the will of A is a contingent remainder. If, under the law of the state of his domicile, B could have transferred this contingent remainder before the death of Mary, it would pass to his trustee in bankruptcy under section 70a (5). If, under the law of the state, he could not have transferred it, it would not pass to the trustee, but would remain the property of B, despite the bankruptcy.

Earle v. Maxwell, 67 S. E. 962, 86 S. C. 1, 138 Am. St. Rep. 1012.

Van Heusen v. Van Heusen Charles Co., 131 N. Y. S. 401, 74 Misc. Rep. 292.

Lucas v. McNeill, 231 F. 672, 145 O. C. A. 558.

For other cases see Decennial Digests, Bankruptcy ⇨ 143(1); Wills ⇨ 616(8).

SECTION 9.—DISSOLUTION OF LIENS

Q. 20. A state statute gave to vendors of agricultural products a lien upon such products to secure the purchase price "for and during the space of five days only after the day of delivery, within which time the vendor shall be entitled to seize the same in whatsoever hands or place it may be found." V sold cotton to B, receiving B's check in payment; the check was not honored by the bank, and V sought to find the cotton to subject it to his lien. Before V located the cotton, it had been sold by B to X, who is an innocent purchaser for value; but V seized it in the hands of X within five days, and now holds it. B was adjudged a bankrupt within a month, and his trustee in bankruptcy and X both attempt to recover the cotton from V. What decision?

A. B's trustee in bankruptcy will claim that V's lien upon the cotton, which V enforced by seizing the cotton, is one which arose "through legal proceedings," and that it was therefore avoided by section 67 (U. S. Comp. St. § 9651 [U. S. C. tit. 11, § 107]), and that the cotton passed to B's trustee under section 70 (U. S. Comp. St. § 9654 [U. S. C. tit. 11, § 110]). V, however, will contend that his

lien is not one arising out of legal proceedings, and that it is therefore not avoided by section 67. The courts have generally held that this kind of lien is not one arising out of legal proceedings, but is like a landlord's lien, or a mechanic's lien, and that it therefore is good, in spite of the provisions of section 67. *Norris v. Trenholm*, 209 F. 827, 126 C. C. A. 551; *Henderson v. Mayer*, 32 S. Ct. 699, 225 U. S. 631, 56 L. Ed. 1233.

If it were held that the lien arose out of legal proceedings, and was therefore avoided by section 67, it would appear that B would have no right to the cotton because of the fact that he had sold it to X, who claims as an innocent purchaser. Section 67 provides, however, that liens which may be set aside under its provisions may be retained for the benefit of the bankrupt's estate, and, under the circumstances indicated here, the lien would preserve its efficiency so far as to exclude the rights of X, and the cotton would therefore pass to B's trustee, to be divided among his creditors. *First Nat. Bank v. Staake*, 26 S. Ct. 580, 202 U. S. 141, 50 L. Ed. 967.

For other cases see *Decennial Digests, Bankruptcy* ⇨188(1), 191(1/2), 191(1).

SECTION 10.—EFFECT OF DISCHARGE

Q. 21. A, an employee of D Railroad Company, to secure P for a loan, assigned to him all the wages thereafter to become due from said company. P has sued D Company for the recovery of a sum of money earned by A since the said assignment. In defense D Company relied upon a discharge in bankruptcy duly granted A before the commencement of the action. The proceedings in bankruptcy were instituted after the loan from P to A. P did not prove his claim against A's estate, though it was included in A's schedule of liabilities. Is the defense good?

A. The debt owed by A to P was, of course, discharged by A's bankruptcy, as it was clearly a provable claim against A. The question arises, however, as to whether the lien on A's future wages is affected by A's discharge. On this point there are two views—some courts holding that the lien survives the bankruptcy, and may therefore be made effective as to A's future wages; other courts taking the view that the lien does not arise until the future wages are earned, and that therefore, as the debt has been discharged before the earning of the future wages, there is no basis for the lien's attaching to the future wages.

Citizens' Loan Ass'n v. Boston & M. R. R., 82 N. E. 696, 196 Mass. 528, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365.

Hupp v. Union Pac. Ry. Co., 157 N. W. 343, 99 Neb. 654, L. R. A. 1916E, 247. For other cases see *Decennial Digests, Bankruptcy* ⇨433(1).

CARRIERS

By FREDERICK GREEN, Professor of Law, University of Illinois

Section

1. The Nature of Carriage and of Carrier's Liability.
2. Exceptions to Common Carrier's Liability in Loss Without Fault.
3. Effect of Provisions in Tariffs and Bills of Lading.
4. Duty as to Delivery.
5. Passengers.

SECTION 1.—THE NATURE OF CARRIAGE AND OF CARRIER'S LIABILITY

Q. 1. A sued B. The declaration stated that B was engaged in the business of carrying goods for hire, that he accepted from A for hire goods to be carried to and delivered at Y, and that while B was carrying the goods in his vehicle it came into collision with a street car, whereby the goods were damaged in the sum of \$100. Demurrer. Judgment for whom?

A. For B. It is not alleged that B was a common carrier or was at fault. Private carriers, like bailees in general, are not liable for damage suffered by the goods intrusted to them, unless the damage is caused by their failure, or that of their servants or sub-contractors, to take such care as prudence requires under the circumstances. *Bell v. Pidgeon* (D. C.) 5 F. 634. Being in the business of carrying does not make one a common carrier, any more than running a boarding house makes one an innkeeper. One is not a common carrier, unless he holds himself out within the lines of his business to carry for the public, or a part of the public, indiscriminately. *Faucher v. Wilson*, 38 A. 1002, 68 N. H. 338, 39 L. R. A. 431.

For other cases see Decennial Digests, Carriers ¶4, 107.

Q. 2. While a steamship operated by a common carrier was on the ocean beyond the territorial limits of any country, a fire broke out by spontaneous combustion in her coal bunkers and burned up her cargo. The carrier was in no wise negligent. Is he liable for the loss?

A. Yes. If goods are put into the control of a common carrier to be carried for hire, he is bound at his peril to see that they be not lost, destroyed, or damaged by external sources of harm, other than so-called acts of God, acts of the public enemy, and acts done in good faith by color of authority of law. But, if he has used all due care to keep them safe, he is not liable for harm pro-

ceeding from their own nature, from the participation of the shipper in matters incident to the carriage, or from the prolongation of the time of transportation without the carrier's fault. "By the custom of the realm—that is, by the common law—a carrier is in the nature of an insurer." *Forward v. Pittard*, 1 T. R. 27. Though the liability has been said to be founded on the custom of the realm, it is enforced, in common-law countries, in respect to carriage without as well as within the realm, even though the conveyance be a foreign vessel, except so far as, under the principles of conflict of laws, a different foreign law is applicable. *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398.

For statutes limiting to value of vessel and freight the liability of carriers by water, and conditionally exonerating them from fault of agents in management of the vessel, see *The City of Norwich*, 6 S. Ct. 1150, 118 U. S. 468, 30 L. Ed. 134; *The Silvia*, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241.

For other cases see *Decennial Digests, Carriers* ⇐46; *Shipping* ⇐134, 136, 138, 209(1).

Q. 3. Cattle in course of transportation from Texas to Chicago were tendered at the Illinois line to a railroad for carriage to Chicago. The railroad refused to accept them because an Illinois statute, which had twice been upheld by the state Supreme Court, made it a crime to bring Texas cattle into Illinois. Afterwards in a third case it was settled that the statute was an unconstitutional interference with interstate commerce and void. Is the railroad liable in damages for having refused to accept the cattle?

A. Yes. One who holds out to serve the public as a carrier for hire is under a duty at common law to serve all applicants, to the extent of his facilities, adequately and without unjust discrimination, and at reasonable rates. An unconstitutional law, being void, will afford no excuse for a refusal or delay in receiving and shipping such cattle when offered. *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70.

Note.—The duty to serve is not confined to common carriers, but extends to all public utilities. It depends in its fundamentals on public utility law in general. But since a profession of readiness to serve the public in a business other than a public utility, such, for instance, as an amusement enterprise (*Woollcott v. Shubert*, 111 N. E. 829, 217 N. Y. 212, L. R. A. 1916E, 248, Ann. Cas. 1916B, 726 (1916)), does not impose a duty to serve, and since the strict liability of a common carrier does not exist, unless the service is both public and a service of carrying, there is need to dis-

tinguish carriage from other services which resemble it, as well as to distinguish public from private carriage.

For other cases see Decennial Digests, Carriers ⚡213; Theaters ⚡4.

Q. 4. A shipped goods by an express company, knowing that they would be transported chiefly by railroad train, and that the express company would have no control over the running of the train. By the sole negligence of the train hands, a collision occurred, which damaged the goods. Is the express company liable for the damage?

A. Yes. The essence of carriage is an undertaking to take charge of articles, or persons, and to cause them to be delivered at a particular destination. One who enters on the performance of such an undertaking is a carrier, though he delegates the work of transportation to others, and has no vehicle of his own, or any fixed route. *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68. "Whether the defendant used the term 'carry,' or 'transport,' or 'forward,' is wholly immaterial, so long as he undertook the reception of the goods here and their delivery there." *Read v. Spaulding*, 18 N. Y. Super. Ct. 395, 404.

For other cases see Decennial Digests, Carriers ⚡4.

Q. 5. A corporation was chartered with exclusive right to run logs down a certain river, subject to a statutory duty to serve all who tendered logs to be run. The company took due care of all the logs it received, but some of them were lost in transit. Is it liable in damages?

A. No. Though engaged as a public utility in a work of transportation, the company is not a carrier, and therefore not a common carrier, for it did not undertake to get the logs to destination, but only to render services in running them down stream. *Mann v. White River Log & Booming Co.*, 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141. So a tug is usually not a carrier, though in exclusive possession of the tow (*Brown v. Clegg*, 63 Pa. 51, 3 Am. Rep. 522), since it contracts only to perform labor in towing (*The Steamer Webb*, 14 Wall. 406, 414, 20 L. Ed. 774). But a contract to transport by towing to a given destination at all events is a contract of carriage. *Bussey v. Mississippi Valley Trans. Co.*, 24 La. Ann. 165, 13 Am. Rep. 120. So, though hauling a circus train on special schedule is a public service, which a railroad may be bound to perform (*Southern Pac. Co. v. Arizona*, 39 S. Ct. 313, 249 U. S. 472, 63 L. Ed. 713), a railroad is not, under a simple haulage contract,

a common carrier (*Coup v. Wabash Co.*, 22 N. W. 215, 56 Mich. 111, 56 Am. Rep. 374). Public truckmen (*Stevenson v. Hartman*, 132 N. E. 121, 231 N. Y. 378, 18 A. L. R. 1314), public cabmen (*Terminal Taxicab Co. v. Public Utility Commission of District of Columbia*, 36 S. Ct. 583, 241 U. S. 252, 60 L. Ed. 984, Ann. Cas. 1916D, 765), and furniture movers (*Lawson v. Connolly*, 141 N. W. 623, 175 Mich. 375, 45 L. R. A. [N. S.] 1152) are generally held to contract as carriers.

For other cases see *Decennial Digests, Carriers* Ⓒ2, 4, 147; *District of Columbia*, Ⓒ22; *Logs and Logging* Ⓒ13; *Towage* Ⓒ4, 11(1).

Q. 6. A built a flatboat to carry his cotton down a river to Mobile, intending to break up the boat at Mobile and sell the lumber. Finding that his own cotton was 30 bales short of filling the boat, he advertised in a newspaper that he would accept shipments of cotton for Mobile up to a total of 30 bales at a stated freight. Five persons tendered 10 bales each in response to the advertisement. A arbitrarily refused all but the last shipment tendered, and that was destroyed in transit by an incendiary fire without his fault. Is A liable for the loss?

A. Yes. It is immaterial that the holding out was to carry on a single occasion, to carry goods of one kind, or to carry incidentally to transporting goods of his own. *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516. By professing readiness to carry for all, he made himself a common carrier as to all who shipped goods in reliance upon his profession, though never ready to carry for the public in fact. *Lloyd v. Haugh*, 72 A. 516, 223 Pa. 148, 21 L. R. A. (N. S.) 188.

For other cases see *Decennial Digests, Carriers* Ⓒ4.

SECTION 2.—EXCEPTIONS TO COMMON CARRIER'S LIABILITY FOR LOSS WITHOUT FAULT

Q. 7. As a common carrier's boat was passing under a bridge, a sudden gust of wind, not reasonably to have been expected, carried it against a pier of the bridge. The impact crushed its side, and water, entering, spoiled the cargo. The boat was fit, but, had it been more strongly built, or had the carrier shot the bridge a moment earlier, the damage would not have happened. Is the carrier liable?

A. No. The loss is of the class called loss by act of God, for which a common carrier is not liable. *Amies v. Stevens*, 1 Str. 127. It was said in a leading case: "'Act of God' is merely a short way

of expressing this proposition: A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected from him." *Nugent v. Smith*, 1 C. P. D. 423, 444. This definition seems inexact, in that no loss occurs by natural causes exclusively or without human intervention. Acts of man, such as bringing goods to the place where disaster overtakes them, always contribute. It may therefore be said that a loss is of the class called act of God, if directly produced solely by a manifestation of natural force, whose happening man cannot prevent (such as wind, rain, flood, or cold, or, probably, an overwhelming swarm of locusts or the visitation of an uncontrollable epidemic), sufficiently unusual to be regarded as extraordinary, operating in combination with normal and proper incidents of carriage. Thus, unless a common carrier has, as by deviation or by delay of such character as to be deemed equivalent to deviation, become an insurer even against loss by act of God (see question 15), he is not liable for loss caused by such a natural happening, provided that neither his negligence nor any other cause which is at his risk proximately contributes to the loss.

For other cases see *Decennial Digests, Damages* ⇨119.

Q. 8. A common carrier's ship was driven by a violent gale against the pier at which she lay, and her side was pierced by a timber, which the builder of the pier had long before, but without reason, left projecting from the pier, though so far under water that it would not have been dangerous, except that the unusual force of the wind had on this occasion made the tide extraordinarily low. Water entered and spoiled the cargo. Is the carrier liable?

A. Yes. The loss was not caused by act of God alone, since a defective condition of the pier was one of the causes directly contributing to the loss, and, whether it was due to the builder's negligence or not, it is a peril for which the carrier is responsible. The carrier, being liable in respect to one of the causes, is liable for the result, tho contributed to by act of God.

New Brunswick Steamboat Co. v. Tiers, 24 N. J. Law, 697, 64 Am. Dec. 394.

For other cases see *Decennial Digests, Carriers* ⇨119.

Q. 9. Fruit shipped in late summer was nipped by an early frost. The carrier had no reason to expect frost or to guard against it. Is he liable?

A. No; such a frost is accidental, and the loss is by act of God. It is not true that an act of God must be violent. Thus the spoiling of poultry by unusually hot weather may be loss by act of God.

Vernon v. American Railway Exp. Co. (Mo. App.) 222 S. W. 913.

For other cases see *Decennial Digests, Carriers* ¶119.

Q. 10. A common carrier's river boat had to shoot rapids in the course of her journey. On one occasion the wind and current happened so to strike the boat as to drive her upon the rocks. Is the carrier liable for resulting damage to cargo?

A. Yes. *Craig v. Childress, Peck* (7 Tenn.) 270, 14 Am. Dec. 751. There was no accidental action of a natural force, but only an accidental result from its normal and expected action. *Oakley v. Portsmouth, etc., Co.* 11 Ex. 618.

For other cases see *Decennial Digests, Carriers* ¶119.

Q. 11. A shipper of horses by railroad rode in the car with the horses to look after them. He took a lantern with him. In an unexplained manner, the hay in the car caught fire from the lantern and the horses were burned. Is the carrier liable?

A. No; a common carrier's strict liability does not extend to sources of harm introduced by or under control of the shipper. If the loss was produced solely by the presence of the lantern, in combination with ordinary incidents of carriage, the carrier is not responsible. *Hart v. Chicago, etc., R. Co.*, 29 N. W. 597, 69 Iowa, 485. Thus the carrier would not be liable if the lantern were knocked over by jarring incident to the ordinary operation of the train. Nor if it were knocked over by a sudden windstorm would he be liable. But if the shock caused by some accident, such as a collision, knocked the lantern over, the carrier would be liable for damage done by the resulting fire.

For other cases see *Decennial Digests, Carriers* ¶108.

Q. 12. A valuable picture was tendered to a common carrier, wrapped only in paper. The carrier took it without objection, but delivered it damaged. If properly packed, it would not have been damaged. The shipper sued. The evidence conflicted as to whether the carrier could have avoided the damage by care. What instructions should the judge give the jury as to degree of care owed?

A. A carrier is bound to take such care of an article carried as its apparent condition requires, and as is reasonable, in view of the carrier's own interests and those of his other customers, though the care

exceeds that requisite if the article were properly packed. *Union Exp. Co. v. Graham*, 26 Ohio St. 595. But, since it is the shipper's work to pack the article to meet the ordinary incidents of the journey, the carrier ordinarily need not repack it, unless some accident occurs or threatens which is likely to cause it harm, because of its insufficient packing. *Ross v. Troy & B. R. Co.*, 49 Vt. 364, 24 Am. Rep. 144; *Ames v. Fargo*, 99 N. Y. S. 994, 114 App. Div. 666.

For other cases see *Decennial Digests, Carriers* ☞ 121, 215(1).

Q. 13. A common carrier undertook to transport a heavy wagon to a given destination by means of horses. He hitched his horses to the wagon shaft. The strain of pulling caused the shaft to break, because it had a latent defect. The breaking of the shaft frightened the horses and made them plunge and upset and damage the wagon. Is the carrier liable for the damage?

A. No; a common carrier is not liable for damage which proceeds from the "inherent vice or quality" of the thing carried; in other words, from its inability to withstand the ordinary incidents of the contemplated carriage. Given the condition of the shaft, and the expected presence of the horses and their pulling on the shaft, then the breaking, the fright of the horses, and their upsetting the wagon followed in natural sequence as of course. "The county judge thought that * * * it was necessary to show that the damage would equally have happened if the thing had not been carried at all. Therein he was wrong. * * * The self-inflicted injury of a restive animal, or the damage caused to overripe fruit in the course of transit by railway, is contributed to by the act of the carriers, inasmuch as they cause the noise that frightens the animals or the vibration that shakes the fruit together; but the noise and vibration are reasonably necessary and part of the ordinary incidents of carriage, and for that reason the carriers are excused."

Lister v. Lancashire & York R. Co., [1903] 1 K. B. 878.

For other cases see *Decennial Digests, Carriers* ☞ 110, 111, 121, 216.

Q. 14. The New York Central Railroad advertised that it would for a higher rate carry perishable goods in refrigerator cars attached to a passenger train which was due in New York 24 hours after leaving Chicago. A so shipped perishable goods, and went as a passenger on the same train, expecting to reach New York in the advertised time, which was also the time shown in the time-table. After the train had started, the railroad's servants engaged in track repairing went on a strike, and with violence which the railroad could

not resist tore up the track, stopped the train, broke into the cars, and stole part of the goods. The train was consequently 30 hours late in getting to New York. Because of the delay the remaining goods deteriorated, and also the market price had fallen when they arrived. A part of the deterioration was due to the fact that the strikers, in breaking open the cars, had admitted warm air. A sues the railroad for the loss of the goods stolen, for the shrinkage in value of the rest by reason of the deterioration and of the fall in market price, and for his own loss of time. For what items may he have judgment?

A. For the value of the goods stolen, based on their market value at New York at the time the train arrived; also for so much of the deterioration as would not have occurred, if the cars had not been broken open. As to dispatch, a carrier, unless he specially contracts otherwise, undertakes only to use reasonable efforts to perform the transportation in his usual or scheduled time. Even on a common carrier the law imposes no further obligation. *Taylor v. Great Northern Ry. Co.* (1866) L. R. 1 C. P. 385; *Cormack v. New York, N. H. & H. R. Co.*, 90 N. E. 56, 196 N. Y. 442, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949. Therefore A can recover nothing for loss of time or fall of market. A common carrier is not liable for the consequences of mere delay, unless caused by his fault. His strict liability does not extend to damage, though due to accident, so far as the accident takes effect on the goods only by delaying the carriage, as distinguished from exposing them to an external source of harm. Hence A cannot recover for so much of the deterioration of his goods as was produced by a combination of prolongation of time of transit and perishability of the goods. *Conger v. Hudson River R. Co.*, 13 N. Y. Super. Ct. 375. Though the quitting of work by his striking servants may under some circumstances constitute fault on the part of the carrier, the acts of strikers after they have quit work are not in the course of employment, and are not attributable to the carrier. *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Dec. 422.

For other cases see *Decennial Digests, Carriers* ⇐95, 99, 264.

Q. 15. An unprecedented flood, caused by cloudbursts in the mountains, swept through Pueblo and destroyed a freight train with its contents. Some of the goods destroyed had been shipped with instructions to carry by a route which did not pass through Pueblo. Others had been shipped for carriage via Pueblo a long time before

the flood; but there was a car shortage, and the carrier saw fit without justification to hold them back until after goods shipped later by favored shippers had gone forward. A third lot of the goods had been sent forward as soon as shipped, but by a train which broke down and was delayed because, by the carrier's negligence, its engine was out of order. The bills of lading and tariff schedules provided that the carrier should not be liable for loss by flood. Except for the misrouting and delay, the goods would have escaped the flood. For what loss, if any, is the carrier liable?

A. The carrier is liable for the first and second shipments, but not for the third. As risk varies with route and time of exposure to accident, it is of the essence of the undertaking of a carrier, public or private, to carry by the expected route, if practicable. A carrier who, by taking unnecessarily a route which is in fact different from that appointed, substitutes a different risk, invalidates the shipper's insurance, and renders himself liable for all loss, though directly caused by act of God (*Davis v. Garrett*, 6 Bing. 716), except such as would have occurred in the same way, even if he had not deviated (*International, etc., Co. v. MacAndrew*, [1909] 2 K. B. 306). To the substituted risk, a contract exemption is inapplicable. *O. K. Transfer, etc., Co. v. Neill*, 159 P. 272, 59 Okl. 291, L. R. A. 1917A, 58. The principle is like that which makes one who, hiring a horse for one journey, drives him on another an insurer against loss. 26 L. R. A. 366, note. Willful and prolonged delay is by the better view equivalent to deviation. *Wald v. Pittsburgh, etc., R. Co.*, 44 N. E. 888, 162 Ill. 545, 35 L. R. A. 356, 53 Am. St. Rep. 332. It prolongs the risk and changes the locality of the goods at each point of time. Thus it invalidates insurance. *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 3 L. Ed. 414. And thus the delay incident to deviation renders a carrier liable, by the better view, for loss by act of God, even after he returns to the original route. *Joseph Thorley, Limited, v. Orchis S. S. Co.*, [1907] 1 K. B. 660. But the breakdown of the engine is a case of ordinary negligence, a risk within the contemplation of the shipper, which happens to operate by delay, rather than by direct damage. No new risk has been substituted. There is therefore no absolute liability. That the damage happened by act of God is a defense to an action based on liability as a common carrier. If sued as an ordinary bailee for negligence in having a bad engine, it is a defense that the negligence was not the proximate cause of the loss. *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909. However, the cases on liability where negligent delay subjects goods to loss by flood or other act of God are in some confusion and con-

flict. *Ithaca Roller Mills v. Ann Arbor R. Co.*, 186 N. W. 516, 217 Mich. 348.

For other cases see *Decennial Digests*, Carriers ⇨119, 123, 180(6), 402; Insurance ⇨314.

Q. 16. An express company accepted a shipment of fresh eggs addressed to L. Singer, Iuka, Iowa. The company looked up Iuka on a map, found a town of that name in Keokuk county, Iowa, and sent the eggs to it, but there was no L. Singer there. It then discovered that there was an Iuka in Tama county, Iowa, and sent the eggs to that place. At that Iuka were two L. Singers. The express company heard of one only, and delivered to him. The shipper knew of the other only, and intended him. The express company used reasonable care throughout. If the eggs had been sent directly to Iuka, Tama county, they would have been worth \$100 when delivered. Because of the delay caused by missending them, they were worth only \$40 when delivered. Is the carrier liable, and for how much?

A. The carrier is probably liable for \$40. It is not liable for more. "L. Singer, Iuka, Iowa," are words of the shipper. They are designations of a certain person and place, which the shipper has in mind. The carrier, accepting the goods, agrees, and, as a common carrier, is bound by law, to carry and deliver as directed. Carriage to the first Iuka was not a performance of its duty. It was bound to carry to the destination intended by the shipper, without reconsignment or additional freight. But in respect to time it was only bound to act reasonably under the circumstances. The inadequacy of the direction, which caused the delay, was the shipper's act. As a cause of damage, the carrier is not responsible for it. *Congar v. Chicago, etc., R. Co.*, 24 Wis. 157, 1 Am. Rep. 164.

The misdelivery stands on a different footing. It was a breach of the carrier's undertaking to deliver to the person intended and designated by the shipper by the name "L. Singer," and the carrier is liable, unless excused. If the designation is inaccurate and misleads the carrier, the shipper is estopped or the carrier excused. *Singer v. Merchants' Dispatch Co.*, 77 N. E. 882, 191 Mass. 449, 114 Am. St. Rep. 635. If accurate, but equivocal, the risk would seem to be the carrier's who has accepted the designation as sufficient, without requiring a description of the consignee. See *Pacific Exp. Co. v. Shearer*, 43 N. E. 816, 160 Ill. 215, 37 L. R. A. 177, 52 Am. St. Rep. 324; *Myers v. American Ry. Exp. Co.*, 137 N. E. 654, 243 Mass. 390. But it would be possible to hold the shipper to warrant the sufficiency of the designation to enable the carrier to identify the con-

signee with due care. See *Singer v. Merchants' Dispatch Co.*, supra; *Weisberger Co. v. Savings Bank*, 95 N. E. 379, 84 Ohio St. 21, 34 L. R. A. (N. S.) 1100 (bank paid draft to person of same name as drawee).

For other cases see *Decennial Digests, Banks and Banking* ¶148(3); *Carriers* ¶82, 93, 121.

SECTION 3.—EFFECT OF PROVISIONS IN TARIFFS AND BILLS OF LADING

Q. 17. A common carrier by steamship issued, and the shipper accepted, a bill of lading which contained this clause: "It is agreed that the carrier shall not be liable for loss by fire." What effect has the clause?

A. The clause relieves the carrier from liability for loss by fire not due to negligence or fault in the service of carriage. If the shipper is willing to assume the risk of accident, there is little reason why he may not do so, and his consent to carriage on such terms is effective. *Cau v. Texas & P. R. Co.*, 24 S. Ct. 663, 194 U. S. 427, 48 L. Ed. 1053. Many courts, however, require a special consideration to support the release from liability, which consideration is generally presumed to exist in the carrier's charging a lower freight rate than he would otherwise have charged. *Wehmann v. Minneapolis, etc., R. Co.*, 29 N. W. 546, 58 Minn. 22. But, if the carrier refused to carry on terms of common-law liability, the agreement is invalid, as extorted.

It is common knowledge that a bill of lading contains not only a receipt for the goods, but a contract of carriage. Hence, by the great weight of authority, acceptance of a bill indicates acceptance of whatever agreements germane to the carriage it contains. *McMillan v. Michigan Southern R. Co.*, 16 Mich. 79, 93 Am. Dec. 208. This doctrine is given statutory effect by the state Uniform Bills of Lading Act, which binds to the lawful terms of a bill issued by a common carrier the consignor and all who accept delivery under or seek to enforce the bill. It is also the common-law doctrine of the federal courts, and thus is made binding on state courts as to interstate railroad transportation by the Carmack Amendment of 1906 to the Interstate Commerce Act, now embodied in the Cummins Amendment of 1920, 41 Stat. 494; Interstate Commerce Act, § 20 (11), being U. S. Comp. St. Ann. Supp. 1923, §§ 8604a, 8604aa; U. S. C. tit. 49, § 20. See answer to question 27, post, p. 130; *Adams Exp. Co. v. Croninger*, 33 S. Ct. 148, 226 U. S. 491, 506, 507, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

But it is an essential part of a common carrier's duty to serve with care, and an agreement not to hold it liable for negligence in service is void as against public policy. *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627.

For other cases see *Decennial Digests, Carriers* ⇐ 108, 150, 153, 154, 155.

Q. 18. Mules worth \$200 each were shipped by railroad under a bill of lading which stated in print: "It is agreed that the animals shipped are worth not more than \$100 each if horses or mules, \$20 if hogs, and \$10 if sheep." The carrier had higher freight rates, if the shipper would not accept these valuations. The shipper took the bill without knowing what it contained. By negligence of the railroad's servants the mules were destroyed in transit by fire. The shipper sues the railroad. How much may he recover?

A. Federal courts and many state courts hold the agreed valuation binding at common law on the theory that it is, like a liquidation of damages, an agreement as to a fact, and not an attempt to alter the rule of law that holds a carrier liable for its negligence, and it is said, also, that it includes a statement of value which the shipper is estopped to deny. *Hart v. Pennsylvania R. Co.*, 5 S. Ct. 151, 112 U. S. 331, 28 L. Ed. 717; *Adams Exp. Co. v. Croninger*, 33 S. Ct. 148, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. Other states hold it binding, in case of negligence, only if actually understood as a statement or agreement as to value, *Central of Georgia R. Co. v. Hall*, 52 S. E. 679, 124 Ga. 322, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; others only when it fairly approximates the real value, *Southern R. Co. v. Jones*, 31 So. 501, 132 Ala. 437; others hold it wholly invalid, as taking effect, if at all, by way of relieving from negligence, *Weiller v. Pennsylvania Co.*, 19 A. 702, 134 Pa. 310, 19 Am. St. Rep. 700.

As to railroad transportation between states or territories, or to an adjacent foreign country, the common law is superseded by the Cummins Amendment (41 Stat. 494 [U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.; U. S. C. tit. 49, § 71, et seq.]) to the Interstate Commerce Act, which makes the carrier liable for the full amount of loss or damage caused by it, notwithstanding any limitation by contract, rule, or tariff, or any representation or agreement as to value, any such limitation being declared unlawful and void. *Adams Exp. Co. v. Dardens*, 44 S. Ct. 502, 265 U. S. 265, 68 L. Ed. 1010; *New York Cent. R. Co. v. Goldberg*, 39 S. Ct. 402, 250 U. S. 85, 63 L. Ed. 857 (shipper got lower rate by innocently misstating value). But the Cummins Amendment excepts baggage and prop-

erty, other than ordinary live stock, as to which the carrier has been authorized by the Interstate Commerce Commission to make rates dependent on value, as declared or agreed upon in writing.

For other cases see *Decennial Digests, Carriers* 35, 110, 158(1), 218(2).

Q. 19. In an action against a railroad company for loss of goods carried in interstate transportation, the shipper proved that the goods were worth a dollar a pound and were lost by the negligence of the carrier's servants. The carrier proved that it had had on file for a year a low rate for goods agreed to be worth not more than 50 cents a pound, and a higher rate for other goods, that the goods were shipped at the low rate, and that the shipper took a bill of lading in which the carrier had inserted an agreement that the goods were worth not more than 50 cents a pound. How much may the shipper recover?

A. At the rate of 50 cents a pound only. The fact of keeping on file a rate declared unlawful and void, unless authorized by the Commission, raises a presumption that authority has been given. The acceptance, without knowledge of its contents, of a bill of lading containing words of agreement as to value, constitutes an agreement in writing as to value, within the meaning of the Cummins Amendment.

American Railway Exp. Co. v. Lindenburg, 43 S. Ct. 206, 260 U. S. 584, 67 L. Ed. 414.

For other cases see *Decennial Digests, Carriers* 35.

Q. 20. A railroad filed a rate for the interstate carriage of grain, and also put into effect a practice of refusing to equip its grain cars with inner grain doors, except at the shipper's expense. An interstate shipper of grain sued in a United States court for damages, alleging that the freight rate exacted was excessive and the refusal to supply grain doors unreasonable. The railroad moved to dismiss the suit for lack of jurisdiction. What decision?

A. Motion granted. The Interstate Commerce Act prescribes that rates, rules, and practices shall be reasonable and not discriminatory, and requires that they be uniformly adhered to. It empowers the Interstate Commerce Commission, after hearing, on complaint that the act has been violated, to order reparation for the past by the way of damages, and on complaint, or on its own motion, to give protection for the future, by prescribing proper rates, rules, and practices. It is a main purpose of the act to secure uniformity of treatment to the public. Uniformity could not be secured if, when a rate, rule, or practice were attacked as unreasonable or dis-

criminary, it might be held good in one case and bad in another, according to the evidence and the decision thereon in each case. In light of such considerations, the act is construed to make an established rate, rule or practice, though unreasonable or discriminatory (at any rate unless palpably and indubitably so), the measure of the public's rights, until by some order of the Commission it has been set aside for the past or for the future, as the case may be. Though the rule may be in a sense illegal, and so subject to being set aside, yet, until and except in so far as it has been set aside, the shippers' rights are dormant, and no court has jurisdiction to give redress against a carrier subject to the act for acting in accordance with an established practice. *Loomis v. Lehigh Valley Co.*, 36 S. Ct. 228, 240 U. S. 43, 60 L. Ed. 517. In substance, the act, in order to prevent discrimination and uncertainty, abolishes the common carrier's duty to give reasonable service, and entitles it to enforce in court against shippers its scheduled rates and rules, subject only to the duty of the Commission to put into effect the inchoate right of the shipper by displacing, prospectively or retroactively, unreasonable rules by reasonable ones, such as the carrier should have made.

Many state public service acts, similarly worded, have been construed in the same way. *Frank A. Graham Ice Co. v. Chicago, M., & St. P. R. Co.*, 140 N. W. 1097, 153 Wis. 145. And see *Terminal R. Ass'n v. Public Utilities Co.*, 136 N. E. 797, 304 Ill. 312. Some state commissions cannot make reparation awards, and in such cases it has sometimes been held that, when (but only when) a rule has been set aside for the future, a court may give damages for past exactions under it. *Fletcher Paper Co. v. Detroit, etc., R. Co.*, 164 N. W. 528, 198 Mich. 469; *Doney v. Northern Pac. R. Co.*, 199 P. 432, 60 Mont. 209. But compare *Miller Mill Co. v. Louisville & N. R. Co.*, 92 So. 797, 207 Ala. 253; *Murphy v. New York Cent. R. Co.*, 122 N. E. 700, 225 N. Y. 548.

For other cases see *Decennial Digests*, Carriers ⇨12(1,5), 13(1), 200, 201; Commerce ⇨89.

Q. 21. A railroad had long exacted from all shippers an interstate rate, duly filed and published, of \$2 a ton. A complained to the Interstate Commerce Commission, which ordered the railroad within 30 days to reduce the rate to \$1 a ton, and to refund to A 50 cents a ton on each ton he had already shipped. The railroad disregarded the order. Six months later B sued the railroad in a state court, claiming damages at \$1 a ton for freight exacted at the filed rate on each of 1,000 tons he had shipped over a period beginning before

A's first shipment and ending after the order to reduce the rate became obligatory, and offered to prove that the rate had always been \$1 higher than was reasonable. May he maintain his suit, and what damages may he recover?

A. B may maintain his suit. His damages will be 50 cents a ton on all shipments delivered to him within two years before he sued, up to the time the order to reduce the rate became obligatory, and \$1 a ton on all shipments made thereafter.

A reparation order, unlike other orders of the Commission, imposes no obligation, and can be enforced only by bringing an action in court for the same wrong which formed the basis of the complaint on which the reparation order was made. In this action the order is only *prima facie* evidence of the transactions between the parties; but it is conclusive that the practice for which reparation was awarded was unreasonable to the extent, and only to the extent, to which the Commission determined that it was unreasonable. In effect, the carrier establishes the law by its practices; but the Commission has power retroactively, by reparation order, or prospectively, to set them aside and establish in their place what it finds to be the reasonable practices which the act requires. A finding that the rate will be too high in the future is not a finding that it has been too high in the past, for a rate may become or cease to be unreasonable as conditions change. *Baer Bros. v. Denver, etc., R. Co.*, 34 S. Ct. 641, 233 U. S. 479, 488, 58 L. Ed. 1055. The Commission has held the \$2 rate to have been exactly 50 cents too high during the period of A's shipments. All courts must now treat \$1.50 as having been for that period the reasonable rate which the act requires, as they must treat \$1 as the rate for the future. *Pennsylvania R. Co. v. Stineman Coal Co.*, 37 S. Ct. 118, 242 U. S. 298, 61 L. Ed. 316. Thus the reparation order to A enables all other shippers as well to sue for past exaction of an excessive rate. *Phillips Co. v. Grand Trunk R. Co.*, 35 S. Ct. 444, 236 U. S. 662, 59 L. Ed. 774. And, at least where "the Commission's report makes it plain that the finding was not based upon any temporary or changing condition," courts must treat the rate found at one period to have been too high by 50 cents to have been too high by that amount at other periods. *Pennsylvania R. Co. v. Stineman Coal Co.*, *supra*. But it has been held that, in the absence of a distinct holding that \$1 became the highest reasonable rate at any other point of time, it cannot be held to have become such before the carrier became bound to reduce the rate to \$1 by the order going into

force 30 days after it was made. *Chicago, B. & Q. R. Co. v. Merriam & Millard Co.* (C. C. A.) 297 F. 1.

A state court has jurisdiction of an action for damages for violating the Interstate Commerce Act. *Pennsylvania R. Co. v. Stineinan Coal Co.*, *supra*. The two-year limitation for applying to the Commission for a reparation order for a violation of the Interstate Commerce Act bars the right, as well as the particular remedy, for violations of the act. *Kansas City So. R. Co. v. Wolf*, 43 S. Ct. 259, 261 U. S. 133, 67 L. Ed. 571. An action to recover damages for exacting a rate higher than that which the Commission has found to have been reasonable is solely for violating the act, and therefore is barred in two years. *Phillips Co. v. Grand Trunk R. Co.*, *supra*. By Act of June 7, 1924, c. 325 (U. S. Comp. St. Supp. 1925, § 8584 [3e]; U. S. C. tit. 49, § 16) the cause of action in respect to a shipment of property is deemed to accrue upon tender of delivery by the carrier.

For other cases see *Decennial Digests, Carriers* ⚭31, 34, 202; *Commerce* ⚭87, 88, 89; *Limitation of Actions* ⚭180(3).

Q. 22. A sued a railroad to get back demurrage on a car of iron ore, exacted under color of an interstate tariff provision which required payment of demurrage on cars not unloaded within 48 hours, except when they could not be unloaded sooner because frozen. Two cars of frozen ore came to A in the same shipment. He unloaded one car within 48 hours, but because the ore was frozen could not unload both. The railroad exacted demurrage on the other car, contending that the tariff meant that, if any car taken by itself could have been unloaded within 48 hours and was not, demurrage was due for that car. A disputes this construction. The Commission has not ruled on the point. Has the state court jurisdiction?

A. Yes; but the railroad is right that the single car is the unit in applying demurrage charges. *Pennsylvania R. Co. v. Kittanning, etc., Co.*, 40 S. Ct. 532, 253 U. S. 319, 64 L. Ed. 928. Whether the railroad was entitled to demurrage depends upon what tariff it has filed and what the tariff means. What tariff has been filed is an ordinary question of fact. What it means presents, in this case, only a question of construction of an ordinary nature, however doubtful. The Interstate Commerce Act requires the carrier to stick to its tariff, and there is nothing to indicate an intent to give the carrier's interpretation of its tariff the force of law, or to leave

the carrier at liberty to act thereon until the commission has set it aside.

For other cases see Decennial Digests, Carriers ⇨100(1).

Q. 23. A sued a railroad for refusing to carry oak cross-ties tendered for interstate carriage. The defense was that the railroad, having no reason to expect interstate shipments of cross-ties, had filed no rate for carrying them. A joined issue, and proved that the railroad had filed an interstate rate for lumber. The evidence conflicted as to whether "lumber" was understood by dealers and carriers to include cross-ties. It did not appear that the Interstate Commerce Commission had ruled on the point. How should the court deal with the case?

A. When the need of evidence to show the meaning of "lumber" became manifest, the court should dismiss the case for lack of jurisdiction. *Texas & P. R. Co. v. American Tie Co.*, 34 S. Ct. 885, 234 U. S. 138, 58 L. Ed. 1255. The act forbids carriage unless rates have been filed. Whether a rate has been filed depends on what the tariff means. "Where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words, or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the commission, and not until this determination has been made can a court take jurisdiction of the controversy." *Great Northern R. Co. v. Merchants' Elevator Co.*, 42 S. Ct. 477, 259 U. S. 285, 66 L. Ed. 943. Otherwise decisions might vary with the evidence in each case, and discriminations between shippers would result. Hence the act is construed to place the carrier's interpretation of rules of this character and its unscheduled practices (*Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 33 S. Ct. 916, 230 U. S. 247, 57 L. Ed. 1472) on the same footing as its scheduled practices.

For other cases see Decennial Digests, Commerce ⇨89.

Q. 24. A sold goods to B, to be delivered to B in another state, freight prepaid. He shipped the goods by railroad, paid \$50 freight, and received a bill of lading stamped "Freight \$50, prepaid in full," by which the railroad agreed with him to carry and deliver to B. He forwarded the bill to B, who, relying on its statements, sold the goods to C, and directed the railroad to deliver to C, without telling them what interest C had. C received the goods and became insolvent. By the tariff filed with the Interstate Commerce Commission, and duly published, the freight was \$80; the \$50 rate being a negli-

gent misquotation. The railroad sued B for \$30 due as freight. What judgment?

A. Judgment for the railroad. The act forbids carriers subject to it to demand or receive a different rate from that scheduled, or to give to any one an undue advantage or preference. This imposes a duty on the carrier to collect, and on the shipper to pay, the schedule rate, though the carrier mistakenly or fraudulently contracted to carry for less. *Gulf, etc., R. Co. v. Hefley*, 15 S. Ct. 802, 158 U. S. 98, 39 L. Ed. 910. Hence the carrier had a lien for \$30. One who accepts goods on which the carrier has a lien, or directs delivery of them to a third person as if in his own interest, is understood impliedly to promise, in consideration of delivery, to pay such freight as he knows to be due. The effect of the act is to bind a consignee who accepts, or, as in his own interest, causes, delivery of the goods to pay the freight really due. If the act did not impose this obligation, he would receive an advantage over consignees who knew what was due. *New York Cent. R. Co. v. Warren Ross Lumber Co.*, 137 N. E. 324, 234 N. Y. 261, 24 A. L. R. 1160; *New York Cent. R. Co. v. York & Whitney*, 41 S. Ct. 509, 256 U. S. 406, 65 L. Ed. 1016.

For other cases see *Decennial Digests*, Carriers 35, 194; Commerce 58.

Q. 25. The Southern Pacific Railroad received goods in Mexico from a Mexican, and agreed for \$20, which was paid in advance, to carry them to New Orleans, via El Paso, and to be liable for loss as at common law. The \$20 through rate was in fact made up of a \$10 rate to El Paso and a \$10 rate from El Paso to New Orleans. By the tariff filed with the Interstate Commerce Commission, the rate from El Paso to New Orleans under common-law liability was \$12, and the \$10 rate was the rate for carriage under a bill of lading which excepted loss by fire. No copy of the tariff was posted in the stations as the Interstate Commerce Act requires. The shipper had no notice of its terms, nor of the items composing the \$20 rate. The goods were consumed by an incendiary fire, without fault on the part of the railroad, while in its possession at El Paso. Is the carrier liable for the loss?

A. No; the Interstate Commerce Act requires the filing with the rate of all regulations which affect the rate or the value of the service. It requires adherence to the rate filed and forbids discrimination between shippers. These provisions not only make the rate filed obligatory, but in other respects fix the rights of

shipper and carrier according to the regulations and terms of liability filed with the rate, unless the terms or regulations are unenforceable as against public policy or forbidden by law. *Boston & M. R. R. v. Piper*, 38 S. Ct. 354, 246 U. S. 439, 62 L. Ed. 820, Ann. Cas. 1918E, 469. Failure to post in stations is immaterial. *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 33 S. Ct. 176, 226 U. S. 441, 57 L. Ed. 290. An agreement for different terms is unenforceable. *Boston & M. R. Co. v. Hooker*, 34 S. Ct. 526, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; *Missouri, K. & T. R. Co. v. Ward*, 37 S. Ct. 617, 244 U. S. 383, 61 L. Ed. 1213; *New York Cent. R. Co. v. Lazarus (C. C. A.)* 278 F. 900.

Some state public service statutes, similarly worded, are given similar effect. *Levett v. Draper*, 185 N. Y. S. 891, 194 App. Div. 632. Under other state statutes, contract provisions prevail over terms of filed schedules unknown to the shipper. *Mosier v. American Ry. Exp. Co.*, 178 N. W. 81, 211 Mich. 19, 29.

If loss by nonnegligent fire is loss "caused by" the carrier, within the Cummins Amendment, which makes the carrier liable for such loss in spite of any provision to the contrary, then the tariff provision is invalid, and the carrier is liable. But it seems that loss not attributable to the carrier's fault is not "caused by" the carrier. *Missouri, K. & T. R. Co. v. Harriman*, 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690; *Simmons Hardware Co. v. Southern Ry. Co. (C. C. A.)* 279 F. 929; *Clemons Produce Co. v. Denver, etc., R. Co.*, 219 S. W. 660, 203 Mo. App. 100. But see *Chicago, etc., R. Co. v. McCaul-Dinsmore Co.*, 40 S. Ct. 504, 253 U. S. 97, 64 L. Ed. 801; *Orange Rice Mill Co. v. Texas & N. O. R. Co.*, 55 Interst. Com. Com'n R. 661, 663.

For other cases see *Decennial Digests, Carriers* ⇨ 30, 35, 63, 132, 147, 153, 158(1), 405(2).

Q. 26. Goods were carried in interstate transportation by the American Railway Express Company under a stipulation in the bill of lading filed with its tariff schedule by which it was not to be liable for loss unless written claim were made within six months. The goods being misdelivered, the company told the shipper he need not make written claim, and that in consideration of his not doing so they would pay him the value of the goods. Therefore he let the six months go by. Has he a remedy, either on the claim or on the promise?

A. No; even if he sues in trover for misdelivery after the transit is over, the tariff provision applies. The limitation presumably is taken into consideration in fixing the rate. It is therefore re-

quired to be filed with the rate as a condition limiting the right of all shippers. It is valid if there were a higher rate on file for carriage with unrestricted liability, and in the absence of evidence to the contrary it will be presumed that there was such a rate. A waiver of the provision in a particular case is an undue advantage to a particular person, which the act declares unlawful and thereby makes invalid. Such provisions cannot be waived. *Georgia, etc., R. Co. v. Blish Milling Co.*, 36 S. Ct. 541, 241 U. S. 190, 60 L. Ed. 948; *Metz Co. v. Boston & M. R. Co.*, 116 N. E. 475, 227 Mass. 307. The contract to pay without claim is also void for the same reason. *Chicago & A. R. Co. v. Kirby*, 32 S. Ct. 648, 225 U. S. 155, 56 L. Ed. 1033, Ann. Cas. 1914A, 501.

For other cases see *Decennial Digests*, Carriers 32(2), 159(3), 180(3).

Q. 27. A railroad accepted at New York goods destined for Denver, and issued a bill of lading by which it undertook to carry to Chicago and there deliver to the Rock Island Railroad Co., for carriage by the latter company to Denver. At Chicago the Rock Island took the goods and issued a bill of lading for Denver, which excepted damage by fire. The through tariff schedule of the first road contained no such exception, but the local tariff of the Rock Island did except damage by fire. The goods were delivered at Denver, fire-damaged, but there is no evidence as to where the damage occurred. The shipper, possessed of both bills of lading, asks you what his rights are. What shall you tell him?

A. Either carrier is liable for the damage. By the Carmack Amendment of 1906 to the Interstate Commerce Act, now embodied in the Cummins Amendment of 1920, the initial carrier must issue a through bill of lading, and is liable to the lawful holder of the bill for all loss or damage caused by it or by any connecting carrier, in spite of any agreement to the contrary. The intent is to make the initial carrier a through carrier in all respects, and not merely to make him liable for fault of connecting carriers. *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 33 S. Ct. 609, 228 U. S. 593, 57 L. Ed. 980; *Missouri, K. & T. R. Co. v. Ward*, 37 S. Ct. 617, 244 U. S. 383, 61 L. Ed. 1213. It is immaterial that no through bill of lading was issued. *Gulf, C. & S. F. R. Co. v. Hines* (Tex. Civ. App.) 239 S. W. 244. As it is through carriage, the conditions are fixed by the initial carrier, and cannot be varied by special agreement later, since this would subject the shipper to disadvantage as compared to other shippers, or others to disadvantage as compared to him. *Missouri, K. & T. R. Co. v. Ward*, *supra*;

Texas & P. R. Co. v. Leatherwood, 39 S. Ct. 517, 250 U. S. 478, 63 L. Ed. 1096 (second carrier entitled to benefits under first bill). The initial carrier is therefore liable. But it is entitled to reimbursement from any later carrier on whose line the loss occurred. *Chicago & N. W. R. Co. v. Nye Schneider Co.*, 43 S. Ct. 55, 260 U. S. 35, 67 L. Ed. 115. The final carrier is also liable, because, against any carrier which has had in damaged condition goods shipped sound, there arises a rebuttable presumption that the damage happened while it was carrying them. The Carmack Amendment, making the initial carrier liable, does not release a later carrier, or remove the presumption against it. *Chicago & N. W. R. Co. v. Whitnack Produce Co.*, 42 S. Ct. 328, 258 U. S. 369, 66 L. Ed. 665.

For other cases see *Decennial Digests*, Carriers 35, 180(1, 2) 185(1), 219 (6, 8); *Constitutional Law* 299.

Q. 28. A bought a railroad ticket from Chicago to Colorado Springs, via Denver, good for 30 days, with privilege of stop-overs. At Denver he stopped for three days, and on resuming his journey checked his trunk from Denver to Colorado Springs. The trunk contained wearing apparel necessary for the trip, worth \$300. The filed interstate tariff under which the ticket was sold limited liability to \$150, unless a greater value was declared and extra payment made. A knew nothing of the limitation, made no declaration, and paid nothing extra. The baggage was lost by the railroad's gross negligence. Assume that the state courts of Colorado hold that at common law a common carrier is liable for the full loss caused by its negligence in spite of any rule, notice, contract, or device to the contrary, and that a statute of Colorado expressly so provides. Assume, also, that by the law of Colorado damages for loss of baggage include compensation for distress at the loss of personal belongings. A sued in a state court of Colorado. How much may he recover?

A. \$150 only. Though the particular stage of the journey is wholly in Colorado, the carriage is interstate. *Galveston, etc., R. Co. v. Woodbury*, 41 S. Ct. 114, 254 U. S. 357, 65 L. Ed. 301. The Carmack Amendment of 1906, in making a railroad carrying goods in interstate transportation liable for loss caused by it, manifested intent to regulate liability in such carriage, and so occupied that field as to invalidate state legislation on the subject, and to establish throughout the United States a system of liability consisting of the nonstatutory law of the several states and the relevant acts of Congress. What this nonstatutory law is presents a question aris-

ing under the Carmack Amendment, as to which the Supreme Court of the United States has final appellate jurisdiction. Consequently all state statutes changing common-law liability are void, and state as well as federal courts are bound to enforce the rules of their nonstatutory law, as that nonstatutory law is understood and enforced in the Supreme Court of the United States. *Adams Exp. Co. v. Croninger*, 33 S. Ct. 148, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Galveston, etc., R. Co. v. Woodbury*, *supra*. By the common law, as understood in the Supreme Court of the United States, a limitation by actual notice of liability for concealed goods to a reasonable amount unless a greater value is declared is valid. *New York Cent. & H. & R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531. Therefore such a limitation is not in its effect unlawful, or contrary to public policy, and hence it may be made without actual notice by rule filed with the rate. *Boston & M. R. Co. v. Hooker*, 34 S. Ct. 526, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. Parties in state courts are entitled to state rules of procedure, but a rule of damages is a part of the substantive right, and the federal rule controls. *Western Union Tel. Co. v. Speight*, 41 S. Ct. 11, 254 U. S. 17, 65 L. Ed. 104.

For other cases see Decennial Digests, Carriers ⚡400, 405(1), (2); **Commerce** ⚡8(13), 47; **Telegraphs and Telephones** ⚡66(1).

Note.—The Carmack Amendment (now embodied in the Cummins Amendment) does not apply to the transportation of passengers. Liability in interstate transportation of passengers for hire is controlled by state statutes, and, in state courts, by state views of common law. *Chicago, etc., R. Co. v. Maucher*, 39 S. Ct. 108, 248 U. S. 359, 63 L. Ed. 294. But, in permitting the free interstate transportation of persons of certain classes, Congress has made liability in such free transportation a matter of federal law, at least so far as concerns the validity and effect of conditions in free passes. *Kansas City Southern R. Co. v. Van Zant*, 43 S. Ct. 176, 260 U. S. 459, 67 L. Ed. 348.

Telegraph companies, not being engaged in the transportation of property, are not subject to the Carmack Amendment, or to the requirement that rates for transportation and regulations affecting the rates be filed. But the provision in the act of 1910, permitting telegraph companies to make different rates for repeated and for unrepeatd messages, seems to be construed as intended to make valid limitations of liability for negligence in unrepeatd messages, and, in connection with other provisions, to be a tak-

ing possession by Congress of the entire field of liability in the transmission of interstate and foreign messages, such as to supersede state statutes and state views of common law. Consequently liability in the transmission of interstate and foreign telegrams is a matter of federal law. *Western Union Tel. Co. v. Boegli*, 40 S. Ct. 167, 251 U. S. 315, 64 L. Ed. 281; *Western Union Tel. Co. v. Speight*, 41 S. Ct. 11, 254 U. S. 17, 65 L. Ed. 104.

For other cases see *Decennial Digests, Carriers* 307(2); *Commerce* 8(12), 12.

SECTION 4.—DUTY AS TO DELIVERY

Q. 29. A, having an order from B for three carloads of flour, shipped the flour and took a separate bill of lading for each carload. By one bill the carrier undertook to deliver to A, by another to B, and by the third to A's order. A indorsed and delivered the bills to B, who paid for the flour. When the flour reached its destination, A demanded and obtained delivery of it. What, if any, are B's remedies against the carrier?

A. As to the flour deliverable to A, B has no remedy. In issuing the bill the carrier professed only to deal with the flour as bailee for A, and at A's direction. It did not profess that it would deliver only to a holder of the document. *Edelstone v. Schimmel*, 123 N. E. 333, 233 Mass. 45. Though it has delivered to a person not entitled to possession, the delivery is not tortious, for it was made at the bailor's direction, without notice to the bailee of adverse claim, and without any holding out by the bailee that it would do otherwise. *Nebraska Meal Mills v. St. Louis, etc., R. Co.*, 41 S. W. 810, 64 Ark. 169, 38 L. R. A. 358, 62 Am. St. Rep. 183.

As to the flour deliverable to B, B may recover its value in trover. Having undertaken to hold as bailee for B, the carrier delivers to any one else at its risk, as if specifically notified of B's claim. *Bailey v. Hudson River R. Co.*, 49 N. Y. 70. As to the flour deliverable to A's order, B may recover its value in trover, or, under the bills of lading acts, in contract. A carrier, who undertakes by bill of lading to deliver to the order of A, undertakes thereby to deliver, not to such person as A may orally designate, but to that person to whom A shall indorse and deliver the bill. The carrier professes to hold as bailee for that person, as if his name were written in the bill, knowing that he is likely to rely thereon. *Forbes v. Boston & L. R. Co.*, 133 Mass. 154. The state and federal bills of lading acts provide that a person to whom an order bill is duly negotiated acquires "the direct obligation of the carrier to hold possession of the goods

for him according to the terms of the bill, as fully as if the carrier had contracted directly with him." *Watts v. Norfolk Southern R. Co.*, 110 S. E. 582, 183 N. C. 12. The Uniform Sales Act contains a similar provision.

For other cases see *Decennial Digests, Carriers* ¶51, 76, 82, 83; *Trover and Conversion* ¶16.

Q. 30. A railroad issued a bill of lading for goods shipped, by which it contracted to deliver to A, the shipper. The shipper sold the goods to B, and at the same time handed B the bill of lading. B notified the railroad of these facts. The shipper afterward stole the bill from B, and, pretending to be B, presented it to the railroad and obtained delivery of the goods. What, if any, remedy against the railroad has B?

A. B may maintain trover. The railroad, having notice of B's claim, delivers at risk to any one else, even to the shipper. *Louisville, etc., R. Co. v. Hartwell*, 36 S. W. 183, 38 S. W. 1041, 99 Ky. 436. Compare *Atchison, etc., R. Co. v. International, etc., Co.*, 247 F. 265, 159 C. C. A. 359. B could, if he preferred, maintain an action of contract under the bills of lading acts, which provide that, where a sale of goods for which a straight bill of lading has been issued is accompanied by a transfer of the bill to the buyer, the transferee, on notifying the carrier of the transfer of the bill, becomes "the direct obligee of whatever obligations the carrier owed the transferor immediately before notification." The Uniform Sales Act contains a similar provision. B might also have sued in contract at common law as assignee of the contract evidenced by the bill of lading.

For other cases see *Decennial Digests, Carriers* ¶72, 93.

Q. 31. A stole B's goods, and shipped them by a carrier, who issued a bill of lading to A's order. A assumed to sell the goods to C, who bought and paid for them on faith of the indorsement and delivery to him of the bill of lading. At destination, both B and C demanded the goods, and the carrier delivered them to B. Is the carrier liable to C?

A. No; as A had no title, C acquired none from him. B had a right to possess the goods, and the carrier was bound to let him have them. It is true that, under the bills of lading acts, C succeeded to the obligation the carrier owed A under the bill of lading, but the carrier has violated no obligation to A. The carrier, in issuing a negotiable bill of lading, makes no representation that A is entitled to the goods, as does a corporation in issuing a certificate of stock. It

is a defense that the carrier has delivered to, or is holding for, the true owner at the true owner's direction.

The Idaho, 93 U. S. 575, 23 L. Ed. 978.

For other cases see Decennial Digests, Carriers ⚡82.

Q. 32. A and B owned each an undivided half interest in a horse. A shipped the horse by railroad, and took a bill of lading to his order. He indorsed the bill in blank and sent it to his agent at destination. X stole the bill, and, assuming to sell the horse, delivered the bill to Y, who gave value in good faith. The horse was burned up in an incendiary fire, while in course of carriage, before X stole the bill. What, if any, cause of action has Y against the railroad?

A. At common law Y would have no cause of action, even had the horse been in existence and the railroad refused to deliver it, for he could acquire no title from a thief, nor was he the assignee in fact of the contract evidenced by the bill of lading; but under modern statutes he may sue in contract upon the bill of lading, and recover the value of A's half interest in the horse. Under the Uniform Sales Act, as well as under the bills of lading acts, an order bill of lading may be negotiated by any person in possession of it, if it is indorsed in blank by the person to whose order the carrier has undertaken to deliver, or by a subsequent indorsee, and the negotiation of an order bill conveys such title as the person negotiating or the consignor had power to convey to a purchaser in good faith for value, as well as the direct obligation of the carrier to hold possession according to the terms of the bill. Hence Y would have acquired A's half interest in the horse, had the horse been in existence as well as the obligation of the carrier to hold possession for him. This obligation makes the carrier liable to Y for damage to the article carried, as well as for misdelivery, even though the damage occurred before the bill was negotiated. *Watts v. Norfolk So. R. Co.*, 110 S. E. 582, 183 N. C. 12. The same construction of the statutes would seem to make the carrier liable for the total destruction of the article carried, even though it occurred before the bill was negotiated.

For other cases see Decennial Digests, Carriers ⚡76.

Q. 33. A, having an order for potatoes from B in the same state, delivered 90 barrels of potatoes to a railroad, and by deceit obtained from it an order bill of lading which recited that A had shipped 100 barrels. A indorsed and delivered the bill to B, who paid for 100 barrels in reliance on its recitals. Getting only 90 barrels, B sues the railroad for 10 barrels short-delivered. May he recover?

A. At common law, no, by the rule of the federal courts and the weight of authority. *Maddock v. American Sugar Ref. Co.* (D. C.) 91 F. 166. The bill of lading is a promise to deliver what has been received, with a statement as to what that is, which, as between the parties, is open to explanation like any other receipt, and on which third persons rely at their peril. But as these statements are practically made to the buyers and lenders who, as indorsees or consignees under the bills, are expected to act upon them, it seems desirable and just to hold the carrier to warrant their correctness to such buyers and lenders.

Under the bills of lading acts, B may recover the value that the missing potatoes would have had. The uniform state act provides that, if a bill has been issued in behalf of a common carrier by an agent, whose scope of authority or apparent authority includes the issuing of bills of lading, the carrier is liable to the holder of a negotiable bill, or to the consignee of a straight bill, of lading, who has given value in reliance on its statements, for damages caused by the nonreceipt of all or part of the goods, or for their failure to correspond to the description in the bill, unless the statements are qualified by such words as "shippers' load and count," "contents unknown," or "marked as." The federal act is similar, but, among other modifications, provides that, if the carrier loads the goods, it shall be responsible for statements as to quantity, and, if bulk freight, as to kind, in spite of qualifying words. See *Joseph v. Panhandle, etc., R. Co.*, 139 N. E. 277, 235 N. Y. 306.

For other cases see *Decennial Digests, Carriers* ⚡52(2); *Shipping* ⚡116.

Q. 34. A carload of coal arrived at destination, and the railroad company placed it suitably on delivery tracks accessible to the public. The consignee, who was also owner, paid the freight, unloaded part of the coal, and carried it away in his truck. He returned promptly for the rest, but found that much of it had in the meantime been stolen. The theft occurred before any consignee with reasonable efforts could have removed the coal, and the railroad had taken due precaution against theft. Is the railroad liable for the loss?

A. Decisions conflict. A carrier is bound to take the goods to their destination, and there to put them at the disposition of the consignee, so placed that he may identify, inspect, and, on paying charges, take them. The carrier's dealing with the goods is then at an end, except that, like any bailee, it is bound to care for their safety. It was held in Massachusetts that a carrier's liability thereafter was

that of an ordinary bailee, so that it was liable only if negligent. *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423. This rule was followed in many states; but the weight of authority to-day holds that a railroad's strict liability continues until the lapse of such time as would under ordinary circumstances give a consignee reasonable opportunity to take possession, and in some states the time does not begin to run until the railroad has taken steps to give notice of arrival, as by mailing, to the consignee or to such other person as it may be directed to notify. See *Yazoo & M. V. R. Co. v. Nichols*, 41 S. Ct. 549, 256 U. S. 540, 546, 65 L. Ed. 1081.

The railroad bill of lading in common use provides that property not removed within 48 hours after notice of arrival sent or given may be kept in car subject to liability as warehouseman only. Under this provision, liability for carload lots kept in car ends when, and only when, the 48 hours has run or the consignee has taken possession. But the fact that the consignee has accepted the car, opened it, and begun to unload, does not conclusively establish that he is in possession of the part not yet unloaded. *Michigan Cent. R. Co. v. Owen*, 41 S. Ct. 554, 256 U. S. 427, 65 L. Ed. 1032.

For other cases see *Decennial Digests, Carriers* §§85, 88, 113, 140.

Q. 35. A traveling salesman took passage by railroad and checked his trunk, which contained only samples of merchandise to be shown to intending customers as a means of making sales. The carrier had no notice of the contents. Trunk and contents were destroyed in a collision with a train of another railroad company, caused by negligence of both companies. The salesman sued both companies. What should the judgments be?

A. The noncarrying company is liable for the value of both trunk and contents on ordinary principles of tort. The carrying railroad is not liable, even for the trunk. A railroad company holds itself out as ready to carry, with a passenger, for the price of his passage, a reasonable quantity of such articles of personal use, called baggage, as a passenger needs to take with him for use on the journey or at its end, as distinguished from having them sent by separate conveyance. But a railroad does not generally hold itself out as ready so to carry merchandise. For merchandise it is usual to charge freight. *Stimson v. Connecticut River R. Co.*, 98 Mass. 83. Where a trunk is tendered and accepted as baggage, the assumption that its contents are baggage is the basis upon which the relation of shipper and carrier is entered into. The trunk is a mere container, and, if none of its contents is baggage, the trunk is not baggage.

The carrier "cannot be held liable, * * * even for gross negligence, for the loss of any article not embraced within the contract." *Dunlap v. International Steamboat Co.*, 98 Mass. 371. This doctrine does not apply where samples are carried as baggage pursuant to commission order.

For other cases see *Decennial Digests, Carriers* ⇨397½, 398.

Q. 36. A shipped at Duluth, consigned to himself at Buffalo, three cargoes of wheat by vessels operated respectively by X, Y, and Z. All the vessels were so badly damaged in a storm on Lake Huron that the carriers had to unload the wheat at Detroit. X, whose vessel was beyond repair, abandoned the voyage. Y and Z were ready to repair their vessels and complete the voyage. The repairs would take three months. A, finding wheat as high at Detroit as at Buffalo, and fearing the market price would fall, demanded his wheat. X and Y refused to deliver, unless paid the full contract freight. Z delivered, saying nothing about freight. What are the rights of the parties?

A. Y need not deliver the wheat, unless paid full freight. Being able and willing to complete the voyage within a time not so remote as to make it in a commercial sense a different carriage and delivery from that contracted for, he has a lien on every part of the wheat for the freight that will be due on the whole at Buffalo. *Boggs v. Martin*, 13 B. Mon. (52 Ky.) 239; *Braithwaite v. Power*, 48 N. W. 354, 1 N. D. 455. This is so, though the wheat is so damaged by causes for which the carrier is not responsible as not to be worth the freight (*Hugg v. Augusta Co.*, 7 How. 595, 12 L. Ed. 834), but only if it is still in a commercial sense wheat (*Asfar v. Blundell*, [1895] 2 Q. B. 196).

X, not having completed the carriage, is not entitled to any freight, notwithstanding that he has nearly completed it, and has conferred on A a benefit as great as A would receive by completion. *China Ins. Co. v. Force*, 36 N. E. 874, 142 N. Y. 90, 40 Am. St. Rep. 576. Not being able and willing to complete it, he has no lien for freight that would be due on completion, and A is entitled to have the wheat. If X has any claim, it is in quasi contract for expenses incurred in attempting to perform the contract, by which A has profited.

Z might have finished the voyage and earned full freight. A has relieved him from finishing it, and in return has received his goods nearer to their destination. A is bound, as on an implied promise, to pay pro rata freight—a part of the full freight proportioned to the degree in which the goods are nearer at Detroit to

their original destination at Buffalo than they were at Duluth, the distances to be measured along the usual track of a voyage. The *Mohawk*, 8 Wall. 153, 19 L. Ed. 406.

For other cases see *Decennial Digests*, Shipping 49(1), 145, 146, 197(6); Insurance 478.

Q. 37. A shipped 400 tons of ice on B's schooner from Bath, Me., to Mobile, Ala., at a freight of \$5 a ton, payable on delivery. On such a voyage, part of a cargo of ice will necessarily melt. When the vessel reached the Florida keys, 40 tons had melted. A hurricane drove her upon the keys, and half the 360 tons she then held was unavoidably washed out and lost in the wreck. After great, but necessary, delay she was repaired. The delay increased the melting of the remaining ice. Thereafter she duly delivered at Mobile 100 tons, being all the ice shipped, less what had been washed away or melted. On what principles is the amount of freight which A owes B to be determined?

A. Where freight is payable by the ton, and nothing indicates a contrary intent, the carrier is entitled to freight for each ton carried and delivered, though the rest of the shipment has been lost, at least where the loss is not due to the carrier's fault (*Libby v. Gage*, 14 Allen [Mass.] 261); and, by what seems the better view, loss of part of the goods by the carrier's fault does not necessarily disentitle him to freight on the rest (*The Tangier* [D. C.] 32 F. 230, 232).

A carrier is also entitled to freight on goods which he was prevented from bringing to destination only by their inherent vice, or, in other words, their inability to withstand the ordinary incidents of a transportation prosecuted with dispatch reasonable under the circumstances. The character of the goods and the accidental prolongation of the time of carriage are at the shipper's risk. The loss of the goods by such causes will not of itself deprive the carrier of his hire; but, unless otherwise agreed, a carrier is not entitled to freight on goods which have perished by an external cause, though an act of God.

B is therefore entitled to \$5 for every ton of ice delivered, and for every ton that would have been delivered, but for such melting as was caused solely by the nature of the ice and the delay in carriage. Of the 40 tons that melted before the wreck, B can have freight only for so much as, if still on board, would not have been washed away in the wreck. If the fact that half the 360 tons on board survived the wreck is sufficient proof that half of a 400-ton cargo would have survived it, B may have freight on 20 tons of that which

melted before the wreck. He may also have freight on the 80 tons that melted after the wreck, and on the 100 tons delivered. *Libby v. Gage*, *supra*.

For other cases see *Decennial Digests*, *Shipping* Ⓒ49(3), 145.

SECTION 5.—PASSENGERS

Q. 38. A bought railroad tickets, with the expectation that he and his wife should travel on them. They did so travel. The wife, while a passenger, was injured by the negligent operation of the train, and A sued the railroad for breach of a contract to carry his wife with care, alleged to have been made by the sale of the ticket, claiming as damages loss of her society and expenses of her care. *Demurrer*. What judgment?

A. *Demurrer* sustained. *Aiken v. Southern R. Co.*, 44 S. E. 828, 118 Ga. 118, 62 L. R. A. 666, 98 Am. St. Rep. 107. There was no contract with the husband for the safe carriage of the wife from the mere purchase of an ordinary ticket by the husband for the wife. A husband or father might have an action of tort to recover damages he sustained by reason of injuries caused the wife or child by the negligence of the carrier.

The sale of a railroad ticket is primarily the sale of a token which the carrier holds itself out as ready to receive in payment of fare. The ticket is like a postage stamp. It is the equivalent of money for the purpose of paying fare. Thus a person who to the carrier's knowledge has lost his ticket is not entitled to be carried without paying fare (*Harp v. Southern R. Co.*, 47 S. E. 206, 119 Ga. 927, 100 Am. St. Rep. 212), in the absence of circumstances to show a different intent, e. g., sale of Pullman ticket good only for specific seat on specific train (*Pullman Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232); and thus, by weight of authority, a carrier who has sold a wrong ticket by mere mistake is not bound to accept it in payment of fare, except according to the import of the ticket itself. *Brown v. Rapid R. Co.*, 96 N. W. 925, 134 Mich. 591. *Contra*, *Indianapolis St. R. Co. v. Wilson*, 66 N. E. 950, 161 Ind. 153, 100 Am. St. Rep. 261.

The language of the cases is confused, but it seems that the only contract obligations incurred in the sale of a railroad ticket are such as arise from a warranty that the ticket is a ticket to the point for which it is sold, and an agreement to receive it in payment of fare according to its face. Whatever the obligation, it is discharged when the passenger is permitted to ride on the ticket.

For other cases see *Decennial Digests*, *Carriers* Ⓒ258, 355, 356(7), 409½.

Q. 39. A drunken man, carrying a sack of clams and a fishing pole, boarded a street car. The conductor took his fare, and, since he was not in condition to be allowed inside the car, permitted him to ride on the platform. The man was too drunk to ride safely on the platform, as the conductor should have known, when he accepted him as a passenger. Because drunk, he fell off and was hurt. He sued the carrier. Judgment for whom?

A. Judgment for the plaintiff. *Fardette v. New York & S. R. Co.*, 180 N. Y. S. 179, 190 App. Div. 543. A carrier is bound to take affirmative care of its passengers, and this includes care to protect them, not only against the negligence or the assaults of others (*Kuhlen v. Boston & N. Co.*, 79 N. E. 815, 193 Mass. 341, 7 L. R. A. [N. S.] 729, 118 Am. St. Rep. 516), but against their own inability to take care of themselves. "A carrier is not obligated to receive a helpless, imbecile, or drunken person as a passenger, when unattended; but, if it does receive him, it must give him such care as will insure him a safe passage to some proper destination." *Sullivan v. Seattle El. Co.*, 86 P. 786, 44 Wash. 53. The passenger's contributory negligence, if shown, would, of course, be a defense to an action founded on unintentional failure to take care of him.

For other cases see *Decennial Digests, Carriers* ☞280(1), 281, 326, 331(4), 347(2).

Q. 40. A railroad passenger was traveling on a free pass, which stated: "The carrier will not be liable for injury to the passenger though negligent." What is the effect of the provision?

A. State decisions conflict. By the rule of the federal courts, a common carrier carrying free may by agreement (*Northern Pac. R. Co. v. Adams*, 24 S. Ct. 408, 192 U. S. 440, 48 L. Ed. 513), or by a statement printed in the pass, though not brought to the actual notice of the passenger (*Boering v. Chesapeake Beach Co.*, 24 S. Ct. 515, 193 U. S. 442, 48 L. Ed. 742), relieve itself from liability for unintentional lack of care, but even an express agreement is void, as against public policy, in case the carelessness of the carrier or of its servants is willful (*New York Cent. R. Co. v. Mohney*, 40 S. Ct. 287, 252 U. S. 152, 64 L. Ed. 502, 9 A. L. R. 496). The effect of the Interstate Commerce Act is to make the validity of provisions in passes issued under the act depend on the federal view of common law. *Kansas City Southern R. Co. v. Van Zant*, 43 S. Ct. 176, 260 U. S. 459, 67 L. Ed. 348.

For other cases see *Decennial Digests, Carriers* ☞307(2), 280(7).

CONFLICT OF LAWS

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Section

1. Territorial Jurisdiction.
2. Concurrent Jurisdiction between Federal and State Courts.
3. Jurisdiction of Courts over Persons—Domicile.
4. Recognition of Judgments of Sister State.
5. Jurisdiction of Courts over Status—Divorce.
6. Enforcement of Penal Obligations.
7. Procedure—Statute of Frauds.
8. Movable Property—Conditional Sales.
9. Transfer of Stock.
10. Torts—Proof and Notice of Foreign Law.
11. Contracts—Capacity to Contract.
12. Succession—Validity of Wills.

SECTION 1.—TERRITORIAL JURISDICTION

Q. 1. (a) A murder is committed on a French vessel fifteen miles from the coast of the United States. The ship comes into an American port and a prosecution is instituted for murder in the federal District Court. The defense pleads lack of jurisdiction. Should the plea be allowed?

(b) Suppose the same facts, except that the vessel was within three miles of the coast.

A. The laws of a state or nation do not, in general, extend beyond its own territory. The *Apollon*, 9 Wheat. 362, 370, 6 L. Ed. 111. However, a state or nation may extend the application of its laws to its citizens or subjects beyond the limits of its territory. In the absence of express language in a statute, it will be regarded, under the rules of English and American law, as applying only within the territorial limits of the state or nation. *American Banana Co. v. United Fruit Co.*, 29 S. Ct. 511, 213 U. S. 347, 357, 53 L. Ed. 826, 16 Ann. Cas. 1047. The territorial limits include a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. *Cunard S. S. Co. v. Mellon*, 43 S. Ct. 504, 262 U. S. 100, 122, 67 L. Ed. 894, 27 A. L. R. 1306. Though an offense may be punishable when committed in territorial waters, by the nation in which it occurred, it may also be punished by the nation to which the ships belongs. In *re Wildenhuis*, 7 S. Ct. 385, 120 U. S. 1, 30 L. Ed. 565. Neither the United States nor a state of the Union would have jurisdiction to punish the crime committed on the French vessel fifteen miles from the coast of the United States.

In the case of the crime committed within the three-mile limit, the penal laws of the United States provide (Criminal Code, §§ 272, and 273 [Comp. St. §§ 10445, 10446; U. S. C. tit. 18, §§ 451, 452]) that the crime of murder shall be punished by the United States when committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state. The trial of all offenses committed upon the high seas shall be in the district where the offender is found, or into which he is first brought. Judicial Code, § 41 (U. S. Comp. St. § 1023; U. S. C. tit. 28, § 102). As to what constitute the "high seas," see *U. S. v. Smith*, 27 Fed. Cas. 1166, No. 16337; *U. S. v. Bevans*, 3 Wheat. 336, 388, 4 L. Ed. 404; *Wynne v. U. S.*, 217 U. S. 234, 30 S. Ct. 447, 54 L. Ed. 748.

For other cases see *Decennial Digests*, Admiralty ⚡23; Criminal Law ⚡97(3); Treaties ⚡8; United States ⚡2.

SECTION 2.—CONCURRENT JURISDICTION BETWEEN FEDERAL AND STATE COURTS

Q. 2. Successive assignments of the same chose in action were made by a creditor. The second assignee took for value and without notice of the prior assignment, and immediately on receiving the assignment notified the debtor of the fact. Under the law of the state in which the transactions occurred, as settled by judicial decisions, the assignee who first gives notice is entitled to the fund. The decisions in the federal courts hold that the first assignee in point of time is entitled. An action brought in the state court is removed to the federal court on the ground of diversity of citizenship. Will a different rule of law be applied in the federal from that which would have been applied in the state court?

A. The courts of the United States do not follow the decisions of the highest state court on a question of general law, not covered by legislation. *Swift v. Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865. Questions as to the effect of assignments of choses in action and of priorities between successive assignees are held to be such questions of general law. *Salem Trust Co. v. Manufacturers' Finance Co.*, 44 S. Ct. 266, 264 U. S. 182, 191, 192, 68 L. Ed. 628, 31 A. L. R. 867. The theory on which the doctrine of *Swift v. Tyson* is based is that the decisions of courts do not make law, and that the federal courts are therefore not bound to follow such decisions, even where pronounced by the highest court of the state in which the transactions involved took place. The doctrine has been criticized on principle, but is well settled. See E. C. Eliot, *The Common Law of the Fed-*

eral Courts, 36 Am. Law Rev. 498; Gray, *Nature and Sources of the Law*, pp. 233-244; dissenting opinion by Field, J., in *Baltimore & O. R. Co. v. Baugh*, 13 S. Ct. 914, 149 U. S. 368, 401, 37 L. Ed. 772. The federal courts, however, follow the decisions of state courts construing their own statutes. *Swift v. Tyson*, *supra*. Accordingly in the federal court the first assignee will succeed, although in the state court the second assignee, who first gave notice, would have succeeded.

For other cases see *Decennial Digests, Courts* ¶365, 372(1).

SECTION 3.—JURISDICTION OF COURTS OVER PERSONS—DOMICILE

Q. 3. A married woman, abandoned by her husband without cause in the state where both had always lived, took up her residence in another state, with the intention of living there permanently. She died in the last-named state, and proceedings are taken to have her will, disposing of personal estate, admitted to probate in the last-named state. Objection is made to the jurisdiction of the court, on the ground that she was not domiciled in said state at the time of her death.

A. A will disposing of personal estate must be probated at the domicile of the decedent. *Baker v. Baker, Eccles & Co.*, 37 S. Ct. 152, 242 U. S. 394, 61 L. Ed. 386. A married woman at common law takes the domicile of her husband, and under the English decisions she must retain his domicile during marriage (*Lord Justice Advocate v. Jeffreys*, [1921] A. C. 146 [House of Lords]), even though she has secured a divorce a mensa et thoro (*Attorney General for Alberta v. Cook*, [1926] A. C. 444). The United States Supreme Court and many state courts have relaxed the rule, and permit a wife, abandoned without cause, or separated from her husband by reason of his adultery, cruelty, or other marital offense, to obtain a domicile independent of her husband. *Williamson v. Osenton*, 34 S. Ct. 442, 232 U. S. 619, 58 L. Ed. 758. Some authorities go so far as to permit her to obtain a separate domicile, independent of her husband's misconduct. *Matter of Crosby's Estate*, 148 N. Y. S. 1045, 85 Misc. Rep. 679; *Shute v. Sargent*, 36 A. 282, 67 N. H. 305; *Covell v. Lee*, 235 P. 79, 71 Cal. App. 361. It is presumed, however, until clearly shown to the contrary, that a married woman, though living apart from her husband, retains his domicile. *Beale, Proof of Domicile*, 74 Univ. Pa. Law Rev. 552, April, 1926. The rule is thus stated in *Conflict of Laws, Restatement No. 1*, by the American Law Institute: "Section 30. If a

wife lives apart from her husband without being guilty of desertion, she may acquire a separate domicile."

For other cases see *Decennial Digests, Courts* 307(1); *Domicile* 5; *Judgment* 818(2).

SECTION 4.—JURISDICTION OF COURTS OVER PERSONS—RECOGNITION OF JUDGMENTS OF SISTER STATE

Q. 4. A sues B in the proper court in the state of X to recover the sum of \$1,000, due on a promissory note made by B to A. At the time the action is begun, B is a resident of the state of Y. Pursuant to the statutes of X, summons is published for the time prescribed by the statutes, and a copy is handed to B in state Y. He neglects to appear, and a judgment by default is entered against him. An action is brought upon this judgment in state Z against B, who now lives in state Z, for the purpose of securing a judgment in that state.

A. The action will not lie. Though the Constitution of the United States (article 4, § 1) provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, the provision has been construed not to require the enforcement of judgments of sister states, where there is absence of jurisdiction to pronounce the judgment. A state has no power to pronounce a personal judgment by default against a nonresident upon constructive service of process, unless he appears or consents to such service, expressly or impliedly. Statutes purporting to give such power are unconstitutional, under the due process clause of the Fourteenth Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Riverside & Dan River Cotton Mills v. Menefee*, 35 S. Ct. 579, 237 U. S. 189, 59 L. Ed. 910. Whether or not a state may pronounce such a judgment against one of its own citizens, who is temporarily absent from the state, is not settled. Probably most jurisdictions sustain the power (21 *Ruling Case Law*, § 35; *McDonald v. Mabree*, 37 S. Ct. 343, 243 U. S. 90, 61 L. Ed. 608, L. R. A. 1917F, 458; *Henderson v. Staniford*, 105 Mass. 504, 7 Am. Rep. 551), but there is authority to the contrary (*De la Montanya v. De la Montanya*, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *Raher v. Raher*, 150 Iowa, 511, 129 N. W. 494, 35 L. R. A. (N. S.) 292, Ann. Cas. 1912D, 680). The rule forbidding pronouncement of judgments against nonresidents is limited to personal judgments. A state may authorize its courts to render a default decree against such persons respecting the title or possession of land or chattels within its territory upon the basis of publication

of summons. *Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918. Such jurisdiction is spoken of as being in rem, or quasi in rem, as contrasted with personal jurisdiction, based on personal service within the state. See sections 82 and 103, Conflict of Laws, Restatement No. 2, American Law Institute.

For other cases see Decennial Digests, Constitutional Law Ⓒ309(1), (2); Divorce Ⓒ202; Procedure Ⓒ86.

SECTION 5.—JURISDICTION OF COURTS OVER STATUS—DIVORCE

Q. 5. An action for divorce is begun in state A by a woman against her husband. The parties have always lived in state B, but the plaintiff and the defendant are temporarily in state A. The husband is served with summons and files an appearance in the case. Judgment is rendered against him. He subsequently marries another woman, who, upon his death, claims to be his widow.

A. The second marriage is void under generally prevailing rules. In order that a court may pronounce a valid decree of divorce, it is essential that the parties, or at least one of them, be domiciled in the state in which the action is begun. *Andrews v. Andrews*, 23 S. Ct. 237, 188 U. S. 14, 47 L. Ed. 366. The absence of jurisdiction is not cured by the defendant appearing or contesting the action. Jurisdictional requirements cannot be waived. *David v. David* (R. I.) 132 A. 879; *Andrews v. Andrews*, 23 S. Ct. 237, 188 U. S. 14, 47 L. Ed. 366. In most of the states of this country, differing in this respect from the English law, the wife may acquire a separate domicile for the purpose of securing a divorce. In New York, however, and in some other states, the courts require that the parties should have a matrimonial domicile in the state granting the divorce, where there is merely service by publication of summons. *Haddock v. Haddock*, 26 S. Ct. 525, 201 U. S. 562, 50 L. Ed. 867, 5 Ann. Cas. 1. Curiously the New York courts, which demand something more than domicile to authorize a court to pronounce a divorce, on service by publication or personal service without the state, are satisfied with a judgment pronounced by a court of a state or nation in which neither party is domiciled, provided there be an appearance in the jurisdiction. *Gould v. Gould*, 138 N. E. 490, 235 N. Y. 14. The New York doctrine is not adopted by most states. For a full discussion, see Beale, *Haddock Revisited*, 39 Harv. Law Rev., 417; *Constitutional Protection for Decrees of Divorce*, 19 Harv. Law Rev., 586.

For other cases see Decennial Digests, Divorce Ⓒ62(1), 65, 326, 327.

SECTION 6.—ENFORCEMENT OF PENAL OBLIGATIONS

Q. 6. A statute of state A provides that directors of corporations must file annual statements showing certain facts concerning the financial condition with the corporation commission, and provides that, in the event of failure to file such statement, each director shall become personally liable for all debts of the corporation, and actions may be brought by any creditor against any director. The directors fail to file the statement. An action is brought by a creditor of the corporation in state B against a director to recover a corporate debt. Should he succeed?

A. He probably can recover. Actions based on penal statutes cannot be maintained outside the state creating the penalty. *Symes v. Sierra Nevada Mining Co.*, 153 P. 710, 171 Cal. 427; *Taylor v. Western Union Telegraph Co.*, 64 N. W. 660, 95 Iowa, 740. As to what constitutes a "penal statute," see *Huntington v. Attrill*, 13 S. Ct. 224, 146 U. S. 657, 36 L. Ed. 1123. The test there declared is that a law is penal "in the international sense," so that it cannot be enforced in the courts of another state, where its purpose is to punish an offense against public justice, as contrasted with a law affording a private remedy to a person injured. Under this definition the plaintiff would recover. Some states, however, have adopted a distinction between statutes of this character imposing liability upon stockholders and those imposing liability on directors. The first have been held contractual, the latter delictual, and where, as in this statute, the damages imposed bear no relation to the injury, courts have refused to enforce the liabilities extraterritorially. *Derrickson v. Smith*, 27 N. J. Law, 166; *Commercial Nat. Bank v. Kirk*, 71 A. 1085, 222 Pa. 567, 128 Am. St. Rep. 823. The better view would seem to be that other states should enforce such liability. *Great Western Machinery Co. v. Smith*, 124 P. 414, 87 Kan. 331, 41 L. R. A. (N. S.) 379, Ann. Cas. 1913E, 243.

For other cases see Decennial Digests Corporations ⚡216, 263(2), 351, 355; Courts ⚡8; Mines and Minerals ⚡106; Telegraphs and Telephones ⚡27.

SECTION 7.—PROCEDURE—STATUTE OF FRAUDS

Q. 7. A contract of employment for two years is entered into in state A, and is broken by the employer. The employer lives in state B, and is sued there by the employee for damages for breach of the contract. The Statute of Frauds of state A provides that no action shall be brought on a contract that may not be performed within one year; there is no such provision in the statute of state B.

A. The action will lie in state B. In general, the law governing the validity and performance of a contract is the law of the place of making and performance. The Statute of Frauds, especially where it is expressed in procedural terms, as where it provides that "no evidence shall be received," is regarded as dealing with procedure rather than with substantive law, and falls within the principle that the law governing procedure is that of the forum. *Halloran v. Jacob Schmidt Brewing Co.*, 162 N. W. 1082, 137 Minn. 141, L. R. A. 1917E, 777. A distinction has been made in some cases, where the Statute of Frauds of the place in which the contract was made and was to be performed provides that the contract, if not in writing, shall be "void" or "unenforceable." *Franklin Sugar Refining Co. v. William D. Mullen Co.* (D. C.) 7 F.(2d) 470. But the distinction has been repudiated. *Straesser-Arnold Co. v. Franklin Sugar Refining Co.* (C. C. A.) 8 F.(2d) 601. On the whole subject, see *Hotel Woodward Co. v. Ford Motor Co.*, 258 F. 322, 169 C. C. A. 338.

For other cases see Decennial Digests, Frauds, Statute of  120.

SECTION 8.—MOVABLE PROPERTY—CONDITIONAL SALES

Q. 8. Goods situated in California are sold under a contract whereby the seller retains the title until the purchase price is fully paid. The goods are taken by the purchaser to New York, where they are sold by him to a bona fide purchaser without notice that the seller has retained the title. The law of New York requires registration of conditional sales in a public office for the protection of subsequent purchasers. There is no law in California requiring registration. The California vendor sues the New York purchaser in New York.

A. The California seller recovers the goods. *Goetschius v. Brightman*, 211 N. Y. S. 763, 214 App. Div. 158. The law that governs the validity and effect of sales and mortgages of chattels is now generally held to be the law of the situs of the chattels. *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599; *Id.*, 7 Wall. 139, 19 L. Ed. 109. The New York court therefore follows the California law, which does not require such sales to be recorded to preserve title in the vendor as against creditors and purchasers from the vendee. Reservation of title is effective, even against an innocent purchaser for value, and the vendor may replevy the goods in New York. An exception to the rule stated exists when the conditional vendor or chattel mortgagee consents expressly or impliedly to the removal of the chattels. In that event they become subject to the laws of the

state to which they are removed. *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Moore v. Keystone Driller Co.*, 163 P. 1114, 30 Idaho, 220, L. R. A. 1917D, 940.

For other cases see *Decennial Digests*, Assignments for Benefit of Creditors, Ⓒ2; Chattel Mortgages Ⓒ89, 192; Sales Ⓒ451.

SECTION 9.—MOVABLE PROPERTY—TRANSFER OF STOCK

Q. 9. A stock certificate for 100 shares in the X corporation, created by state A, indorsed in blank, was placed by O, the owner, in a safe deposit box in state B. It was lost or stolen from the box. The certificate is sold to P, an innocent purchaser for value, in state B by the thief or finder. In state B certificates of stock in foreign and domestic corporations have by statute been made negotiable. In state A, the state of incorporation, they have not been made negotiable, and there is no ground of estoppel against the true owner, O. P sues O and the X corporation to be registered as owner of the shares. What result?

A. The validity, requisites, and effect of a transfer of shares are governed by the laws of the state or country in which the corporation was created, although the transfer may be made in another state or country. *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690; *United Cigarette Mach. Co. v. Canadian Pac. Ry. Co. (C. C. A.)* 12 F.(2d) 634. But this rule is subject to the qualification that certificates of stock are treated as representatives of the shares, and may be transferred under the statutes of other states. Jurisdiction is founded on power, and the state of incorporation controls the transfer of shares. But state A will recognize as owner of the shares any one who has acquired title to the certificate, wherever the transaction takes place, unless the shares have been transferred on the books of the corporation under proceedings taken against O. The transaction was sufficient by the law of state B to transfer title to P, and he may demand registration as owner upon the corporation books. *Direction der Disconto-Gesellschaft v. U. S. Steel Corporation*, 45 S. Ct. 207, 267 U. S. 22, 69 L. Ed. 495.

As Hand, J., says: "I have to decide what person the company must recognize as shareholder. In deciding that question I can only follow the law of the place where I sit. It is commonly said that, when a court must consider the legal effect of events happening elsewhere, it enforces foreign law. * * * Of necessity no court can enforce the law of another place. It is, however, the general law of all civilized peoples that, in adjusting the rights of suitors,

courts will impute to them rights and duties similar to those which arose in the place where the relevant transaction occurred." Per L. Hand, J., *Direction der Disconto-Gesellschaft v. U. S. Steel Corporation* (D. C.) 300 F. 741, 744.

The American Law Institute, in its Restatement No. 2 of Conflict of Laws, says: "Section 57. (1) Shares in a corporation are subject to the jurisdiction of the state in which the corporation was organized. (2) The certificate of stock is subject to the jurisdiction of the state within whose territory it is. (3) To the extent to which the state in which the corporation was organized merges the share in the certificate, the share is exclusively subject to the jurisdiction of the state which has jurisdiction over the certificate."

For other cases see Decennial Digests, Assignments for Benefit of Creditors, ¶2; Corporations ¶116, 126, 640; Courts ¶512; Sales ¶2.

SECTION 10.—TORTS—PROOF AND NOTICE OF FOREIGN LAW

Q. 10. A brakeman was injured in Quebec by the negligence of a Canadian railway. The facts showed contributory negligence on his part, but under the law of Quebec contributory negligence did not constitute a bar to recovery. An action was brought against the railroad company in Vermont, and jurisdiction obtained by service of process on a proper officer and agent of the company doing business in Vermont. Under Vermont law the plaintiff's contributory negligence would constitute a defense to the action. The Quebec law is proved by the plaintiff in the Vermont court.

A. The plaintiff should recover. The general rule in this country is to the effect that the liability of a defendant in tort is governed by the law of the place where the acts occurred which gave rise to the injuries. *Morrisette v. Canadian Pac. Ry. Co.*, 56 A. 1102, 76 Vt. 267. Applying the law of Quebec, the plaintiff may therefore recover in Vermont. The doctrine that the *lex loci delicti* (the law of the place of the tort) governs the right of recovery applies to all the substantive elements of the tort. There has been some conflict of opinion as to whether the measure of damages should be governed by the general rule, or whether it is not a matter of remedy rather than of right, in which case it would be governed by the law of the forum. The better view, however, is to regard the measure of damages as part of the right. *Northern Pac. R. Co. v. Babcock*, 14 S. Ct. 978, 154 U. S. 190, 38 L. Ed. 958. The foreign law must, however, be pleaded and proved as a fact. *Cuba Railway Co. v. Crosby*, 32 S. Ct. 132, 222 U. S. 473, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

State courts decline to take judicial notice of the law of a sister state or foreign country. *L. & N. Ry. Co. v. Greene*, 149 N. E. 876, 113 Ohio St. 546. A few states do take notice of foreign law without proof. *Warneke v. Preissner*, 131 A. 25, 103 Conn. 503, under statute of Connecticut. The federal courts take judicial notice of the laws of the several states (*Allen v. Alleghany Co.*, 25 S. Ct. 311, 196 U. S. 458, 49 L. Ed. 551). Various rules are invoked where the foreign law is not proved. In some jurisdictions the common law is applied; for an extreme application of this view see *Woodbury v. U. S. Casualty Co.*, 120 N. E. 8, 284 Ill. 227. In others, the statutory law of the forum is held to govern the case. *Cavallaro v. Texas & Pac. Ry. Co.*, 42 P. 918, 110 Cal. 348, 52 Am. St. Rep. 94. But nearly all states refuse to presume that a statutory action for wrongful death similar to that given in the forum exists in the foreign state. *Ryan v. North Alaska Salmon Co.*, 95 P. 862, 153 Cal. 438.

For other cases see *Decennial Digests*, Courts ⚡394(1); Death ⚡8; Evidence ⚡35, 37, 80(2), 81; Master and Servant ⚡86, 227(2).

SECTION 11.—CONTRACTS—CAPACITY TO CONTRACT

Q. 11. A married woman signs a note as surety for her husband and delivers it to the payee of the note in state A. Her domicile is in state B, and she is spending a vacation in state A at the time of the incident. Under the law of state A, a married woman is not bound by a contract as surety for her husband; under the law of state B, her domicile, she would be bound. Action is brought against her on the note in state B.

A. She will not be held liable under the prevailing doctrine, which determines the validity of a contract, with respect to capacity, by the law of the state of making. *Burr v. Beckler*, 106 N. E. 206, 264 Ill. 230, L. R. A. 1916A, 1049, Ann. Cas. 1915D, 1132; *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. There is some authority supporting the law of the domicile (*Union Trust Co. v. Grosman*, 38 S. Ct. 147, 245 U. S. 412, 62 L. Ed. 368), while a few cases would hold her liable if the note were made payable in state B (*Poole v. Perkins*, 101 S. E. 240, 126 Va. 331, 18 A. L. R. 1516). The last-named case is criticized in 33 Harv. Law Rev. 726. The general principle, no doubt, is that the validity of a contract is determined by the law of the place where it is made, but the intent of the parties to create a binding obligation may perhaps be regarded as an element influencing a court possessed of the litigation to enforce the obligation, if it is sustainable by the law of the place of performance. The

various theories are set forth by Professor Beale, of Harvard, in 23 Harv. Law Rev. 79, supporting the "territorial theory," the law of the place of making, and by Professors Cook and Lorenzen, of Yale, in 30 Yale Law J. 655, and 33 Yale Law J. 457, criticizing that theory.

For other cases see Decennial Digests, Contracts §2, 101(2); Husband and Wife §56.

SECTION 12.—SUCCESSION—VALIDITY OF WILLS

Q. 12. A will disposing of the testator's whole estate is executed in state A according to the formalities of the Statute of Wills in that state. At the time of the execution, the testator is domiciled in state A, but he subsequently moves to state B and dies domiciled in that state, leaving real and personal property in both states. The will does not comply with the Statute of Wills of state B as regards form of execution. To what extent will the will be given effect?

A. The will constitutes a valid disposition of the immovable property belonging to the testator in state A, but is invalid with respect to immovables in state B. The universal rule is that the conveyance of immovables, whether by deed or will, is governed by the law of their situs. Lorenzen, *The Validity of Wills as Regards Form in the Conflict of Laws*, 20 Yale Law J. 427. But the will is invalid as regards movables, whether tangible or intangible. The law of the domicile of the testator at the time of death controls the testamentary disposition of such property. In *re Beaumont's Estate*, 65 A. 799, 216 Pa. 350, 9 Ann. Cas. 42. The place of execution has no bearing upon the question of the validity of the will. The general rule has been modified by statute in England, and in some other states. On the whole subject, see Goodrich, *Inheritance Problems in the Conflict of Laws*, 24 Mich. Law Rev. 558.

For other cases see Decennial Digests, Wills §70.

CONSTITUTIONAL LAW

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Section

1. In General.
2. Separation of powers.
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12. Contract Clause.

SECTION 1.—IN GENERAL

Q. 1. The Eighteenth (Prohibition) Amendment provided that its various prohibitions should become effective one year after its ratification. It required ratification by 36 states to make it a part of the Constitution. The thirty-sixth state ratified it on January 16, 1919. Assume that no other state ratified it thereafter. The proclamation that it had been ratified was made January 29, 1919. The law providing for its enforcement was enacted October 28, 1919, but by its terms its provisions were to become effective one year after ratification of the amendment. D, on January 17, 1920, did an act contrary to the provisions of said law. On his trial he moved to quash the indictment on the grounds (a) that he had not violated the law, because it did not go into effect until one year after the date of the proclamation of ratification; (b) that Congress had, at the time it acted, no power to enact said law; and (c) that the amendment had not been validly ratified, because of the inclusion with the ratifying states of state A, in which the ratification had been made by a Legislature, in violation of provisions of the state Constitution.

A. Article V of the Constitution provides that amendments shall be valid as parts of the Constitution when ratified by the Legislatures of three-fourths of the states. It is that date, not the date on which ratification is proclaimed, that fixes the time when an amendment becomes a part of the Constitution. The powers conferred upon Congress by the amendment could be exercised at any time thereafter. Hence the law enacted on October 28, 1919, was enacted at a time when Congress had the requisite legislative power, unless the reason assigned in (c) prevents the amendment from having

been validly ratified. The power of state Legislatures to ratify is derived from the federal Constitution, and no state has any power to modify or limit the powers thus conferred. D's act on January 17, 1920, therefore, violated a law validly enacted and in force on that date.

Dillon v. Gloss, 41 S. Ct. 510, 256 U. S. 368, 65 L. Ed. 994.

Leser v. Garnett, 42 S. Ct. 217, 258 U. S. 130, 66 L. Ed. 505.

Hawke v. Smith, 40 S. Ct. 495, 253 U. S. 221, 64 L. Ed. 871, 10 A. L. R. 1504.

For other cases see Decennial Digests, Constitutional Law ¶10.

Q. 2. A and B sued R Co. for damages resulting from the death of C, A's husband, caused by R Co.'s negligence while C was engaged in the course of his employment for B. The state Workmen's Compensation Act subrogated B to A's rights against R Co., and authorized B to join with A as plaintiff in this action. R Co. attacked the constitutionality of these provisions. Is it entitled to raise this issue?

A. Courts have developed certain rules to govern their exercise of the power to declare legislation unconstitutional. It will be exercised only as part of their judicial function of determining the law in deciding cases before them. Constitutional issues can be raised by a party only if his rights turn upon their decision. It can make no difference to R Co. whether its liability to A is discharged by payment of the damages due from it to A or to B. The provisions in question do not enhance its liability, nor prevent satisfaction of a judgment based on A's claim by payment to either from relieving it of that original liability. Hence R Co. cannot raise the constitutional issue.

Gentile v. Philadelphia & R. Ry. Co., 118 A. 223, 274 Pa. 335.

Erie R. Co. v. Williams, 34 S. Ct. 761, 233 U. S. 685, 58 L. Ed. 1155, 51 L.

R. A. (N. S.) 1097.

For other cases see Decennial Digests, Constitutional Law ¶42.

Q. 3. State A enacted a law conferring upon a board the power to fix house rents. The law was enacted during a period of acute housing shortage. It had been sustained as valid because of the existence of that emergency. Thereafter the emergency disappeared, but the law remained unrepealed. B thereupon sued to restrain said board from enforcing a rent order thereafter made on the sole ground of the unconstitutionality of said statute. Is he entitled to a decree?

A. B is entitled to a decree if the action of the board is unconstitutional. The fact that said board acted under a statute theretofore

held constitutional does not alone make its act valid. The constitutionality of the law in question depended upon the existence of an emergency, a particular state of fact. It is unconstitutional to apply it, if such emergency ceases, or the facts change, even though valid when passed. The board's action was based on a statute that could not constitutionally apply at the time it acted. Hence B is entitled to a decree.

Chastleton Corp. v. Sinclair, 44 S. Ct. 405, 264 U. S. 543, 68 L. Ed. 841.

Central Nat. Bank of Lincoln v. Sutherland (Neb.) 202 N. W. 428.

For other cases see *Decennial Digests, Constitutional Law* ¶38; *Landlord and Tenant* ¶200(1½).

Q. 4. The Legislature of state A made a grant of state lands to R Co. in aid of railway construction. R Co. sold a part of said lands to D. Thereafter the proper state officials sold the same parcel to P. After D's purchase, but before the sale to P, the grant to R Co. had been held unconstitutional. Is P entitled to recover said parcel from D?

A. P is entitled to recover possession. An unconstitutional law is usually considered no law at all. A judicial determination of its unconstitutionality is but a declaration that it was void from its inception. No rights accrue under it, nor does it afford any protection to those who act in reliance upon it. R Co. acquired no title, and could give none to D. P, who acquired a valid title, is entitled to possession as against D. The doctrine that such a statute affords no protection is not always consistently applied.

Peters v. Gilchrist, 32 S. Ct. 122, 222 U. S. 483, 56 L. Ed. 278.

State v. Godwin, 31 S. E. 221, 123 N. C. 697.

For other cases see *Decennial Digests, Courts* ¶366(24); *Officers* ¶121; *Statutes* ¶63.

SECTION 2.—SEPARATION OF POWERS

Q. 5. A statute of state A provided that in no case of actual controversy should an action be dismissed solely because no relief was prayed for other than the declaration of the rights of the parties thereto. Discuss the validity of this statute.

A. The statute in question provides for the so-called declaratory judgment. The political theory of the separation of powers has become a principle of American constitutional law. This principle is generally held to prevent the imposition of nonjudicial functions upon courts, although their imposition on inferior courts is frequently

sustained. The function of courts is to decide cases. The important elements of a case are the assertion of opposing claims and a prayer for relief. The latter element is in essence no more than a prayer for the determination of the present legal relations of the parties in the light of such claims. Such a determination usually confers rights and imposes duties. The statute in question is applicable only where there is an actual assertion of opposing claims. The prayer for a declaration of rights is one for the determination of present legal relations as between such claims. This form of relief differs materially from a judgment for damages, which creates new rights and imposes new duties, but is very similar to that granted in an action to quiet title. The statute, therefore, imposes on the courts a duty to decide cases, and is valid. It should be noted, however, that there is a sharp conflict on the validity of such statutes.

State v. Grove, 201 P. 82, 109 Kan. 619, 19 A. L. R. 1116.

Anway v. Grand Rapids Ry. Co., 179 N. W. 350, 211 Mich. 592, 12 A. L. R. 26.
For other cases see *Decennial Digests*, *Constitutional Law* ¶56, 67.

Q. 6. D was cited for contempt of court for violating an injunction issued by a federal court. D's acts also constituted violations of the criminal laws of state A, in which said court sat, but not of any federal criminal law. A federal statute required the court to grant a jury trial on demand of the defendant, if his acts were of such a character as to constitute also a criminal offense under any federal statute or the law of the state in which the act was committed. The court refused D's demand for a jury trial. Was its ruling justified?

A. No; the doctrine of the separation of powers prevents a Legislature, not only from itself performing judicial functions, but also from interfering with the effective performance of their duties by the courts. The power to punish for contempts is an important part of a court's machinery for insuring the effective performance of its functions and protecting itself therein. It is inherent in the court, but is subject to legislative regulation. Such regulation cannot abrogate the power, nor render it practically inoperative. The validity of the statute in question depends on whether it is so extreme a regulation as to render the power practically inoperative. It is of narrow scope, and does not interfere with the power to deal summarily with contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice. The fact that the accused would be entitled to a jury trial, if prosecuted criminally for such act, is a factor to be considered. The statute effects but

a slight impairment of the court's inherent power, and is valid. Hence the court erred in refusing D's demand for a jury trial.

Michaelson v. U. S., 45 S. Ct. 18, 266 U. S. 42, 69 L. Ed. 162, 35 A. L. R. 451.
Pacific Live Stock Co. v. Ellison Ranching Co., 213 P. 700, 46 Nev. 351.

In re Judicial Ditch No. 2, 182 N. W. 168, 148 Minn. 347.

For other cases see Decennial Digests, Constitutional Law ¶55, 56, 57;
Jury ¶13(21).

Q. 7. D was enjoined by a federal court from maintaining a liquor nuisance, as defined in the National Prohibition Act. He was adjudged in contempt for violating said injunction and ordered committed to prison. On the hearing of a petition to have the order set aside, D offered in evidence a pardon from the President of the United States, forgiving the jail sentence. The court refused to set aside the order, and D appeals. Decide the case.

A. The power to grant pardons for offenses against the United States is specifically conferred upon the President. D's right to have the order set aside depends on the extent of the pardoning power. The only express limit is that it does not extend to cases of impeachment. There is the implied limit that it does not extend to offenses that are not offenses against the United States. The term "offense" is used in the Constitution in a more comprehensive sense than is the term "crime," and includes criminal contempts. The contempt in question is such, and hence is within the President's pardon power. The independence of the judiciary, resulting from the theory of the separation of powers, must be deemed qualified to this extent by the express grant of the power to pardon conferred upon the President.

Ex parte Grossman, 45 S. Ct. 332, 267 U. S. 87, 69 L. Ed. 527, 38 A. L. R. 131.

State v. Magee Publishing Co., 224 P. 1028, 29 N. M. 455, 38 A. L. R. 142.
For other cases see Decennial Digests, Pardon ¶3.

Q. 8. State A brought an action to enjoin the Secretary of the Treasury from carrying out the provisions of a federal law appropriating stated sums to such states as should comply with its provisions. The appropriations were for the purpose of securing federal co-operation with such states to reduce maternal and infant mortality and to protect the health of mothers and infants. State A's sole contention was that said law invaded and infringed upon the powers reserved to it by the Tenth Amendment. Does this present a question on which courts can pass?

A. There are certain types of cases in which the courts refuse to take jurisdiction, either because of the character of the parties or

because of the nature of the question involved. These principles represent one aspect of the legal doctrine of the separation of powers. The sole right here asserted by state A is that of having its political sovereignty maintained within the limits prescribed by the Constitution. The court is not here called upon to adjudicate rights of person or property, but an abstract question of political power. This question, thus presented, is a political question, that does not admit of the exercise of the judicial power.

Massachusetts v. Mellon, 43 S. Ct. 597, 262 U. S. 447, 67 L. Ed. 1078.

For other cases see *Decennial Digests, Constitutional Law*, ¶68(1).

Q. 9. (a) Does the decision in *Massachusetts v. Mellon*, *supra*, mean that the court will never pass on the question of whether federal legislation invades the reserved powers of the states?

(b) Will courts decide so-called political questions in every case in which rights of person or property turn on their decision?

A. (a) It does not. They will pass upon it whenever rights of person or property turn upon its determination. It was the form in which the question was raised in that case that induced the court to hold it a political question. For a case in which the same question was passed on in determining rights of property, see *Bailey v. Drexel Furniture Co.*, 42 S. Ct. 449, 259 U. S. 20, 66 L. Ed. 817, 21 A. L. R. 1432.

(b) No. It appears that a question may be political, not because of the form in which it is raised, but also because of its essential character. No adequate definition of the latter type has yet been framed, although it includes those in which the Constitution has expressly or impliedly placed the final decision with another department than the judicial. Examples of such questions are the existence of a treaty, who is the duly accredited representative of a foreign government, and which is the validly recognized government of a foreign country or of one of the states. Courts refuse to make independent decisions on such questions under all circumstances. See *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

For other cases see *Decennial Digests, Constitutional Law* ¶68(1); *Internal Revenue* ¶2; *States* ¶4.

Q. 10. D was convicted for violating a statute of state A, which provided that it should go into effect on such date as the sale of intoxicating liquors within such state should become illegal by virtue of any lawful act of Congress or presidential proclamation, and that it should remain in effect only so long as such act of Congress

or presidential proclamation should be in force. D's violation of such state law occurred during the period when the sale of intoxicating liquors within the state had been made illegal by a lawful act of Congress. D appeals, on the ground that the state law was invalid as a delegation of legislative power.

A. The doctrine of the separation of powers requires each department to perform the functions belonging to it, as well as to permit the other departments to perform those belonging to them. It prohibits the Legislature from delegating to others its law-making powers. The act of legislation involves determining both what the rule shall be and that such rule shall have the force of law. A statute that is to become effective upon the happening of a contingency defined by the Legislature itself is generally considered as deriving its force as law from the original legislative action as fully as if the Legislature had unconditionally fixed the time at which it should take effect. The law is complete as law when it leaves the Legislature. It is immaterial that the defined contingency may be the act of another government. The statute of state A did no more than this, and is not invalid as delegating legislative power. It should be noted that if, in the case of general laws, the defined contingency is approval by popular vote, there is held to be an invalid delegation of legislative power. There is no logical basis for the distinction.

State v. Brothers, 175 N. W. 685, 144 Minn. 337.

Field v. Clark, 12 S. Ct. 495, 143 U. S. 649, 36 L. Ed. 294.

Opinion of the Justices, 36 N. E. 488, 160 Mass. 586, 23 L. R. A. 113.

For other cases see *Decennial Digests*, Constitutional Law 62, 65, 66.

Q. 11. A statute of state A prohibits the sale of cigarettes in any county of the state which shall have accepted said act by a majority vote of qualified voters voting at an election called for the purpose. Does this violate the rule against the Legislature delegating its powers?

A. It is an invalid delegation of legislative power to give to a general rule prescribed by the Legislature the force of law only if approved by a vote of people of the state. The law is otherwise if the rule relates to matters of local police. The Legislature can validly leave to a local referendum the question of whether it shall be in force therein. The sale of cigarettes bears a close analogy to the sale of intoxicating liquors, which has been held to be a proper subject for local police regulation. Hence the statute in question provides only for a local option in respect of a local matter,

and is valid. The validity of such local option statutes is limited to such local police matters, and cannot be applied to determine whether general rules should be locally applicable.

Eckerson v. Des Moines, 115 N. W. 177, 137 Iowa. 452.

For other cases see Decennial Digests, Constitutional Law ¶63(1), 65.

Q. 12. A state statute conferred on courts the power to order bawdyhouses closed for such period of time as seems just and wise to the court. D, whose house has been ordered closed under an order based on said statute, contends that the order is illegal, because of the invalidity of said statute. Is his contention valid?

A. The statute confers upon the courts the power to determine punishment with no standard other than the court's own discretion. The power to fix the punishment of offenses is legislative in its character. The Legislature can delegate to the courts the power to determine what punishment shall be inflicted in a case before them, provided the limits or standard to be applied are fixed by the Legislature. The statute in question fails to fix any such standard, and is invalid as a delegation of legislative power to the courts.

State ex rel. Orr v. Kearns, 264 S. W. 775, 304 Mo. 685.

U. S. v. Cohen Grocery Co., 41 S. Ct. 298, 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045.

For other cases see Decennial Digests, Constitutional Law ¶61; Criminal Law ¶13.

SECTION 3.—THE FEDERAL SYSTEM

Q. 13. A, an employee of a municipality of state B, is employed as a motorman on the municipally owned and operated street railway. Could the federal government impose an income tax on his salary?

A. The existence of our federal system itself operates as an implied limit on the powers of both the state and the federal government. Neither can so exercise any of its powers as to interfere with or materially impair the exercise by the other of its powers. This principle prevents federal taxation of the state, its political subdivisions, its agencies and instrumentalities. It does not prevent a federal tax on their nongovernmental activities. A tax on the income received from a municipality by its employees is invalid, if such employee is engaged in the performance of governmental functions. It has been held in a tax case that the operation of street railways by a municipality is the exercise by it of

governmental functions. Hence the federal government cannot impose an income tax on A's wages.

Collector v. Day, 11 Wall. 113, 20 L. Ed. 122.

Frey v. Woodward (D. C.) 2 F.(2d) 725.

For other cases see *Decennial Digests, Taxation* ¶18.

Q. 14. A Co. is a corporation of state B and does business therein. State B assessed A Co. for a property tax on a claim due A Co. from the United States on a war contract, and included the same property in measuring A Co.'s franchise tax. Discuss the validity of these taxes.

A. A state property tax on United States bonds is considered a tax on its power to borrow, and is invalid. There is no valid reason for distinguishing between a claim evidenced by a bond and one evidenced by a book entry. To tax as property the claim due A Co. under the war contract is a tax on the war powers of the United States, and is invalid. The claim can, however, be included in measuring the franchise tax, since that is a tax on a privilege conferred by the state, and is not considered as affecting any interference with or material impairment of any federal function. The form of the tax prevents the existence in legal contemplation of the prohibited effect. The same factor validates state inheritance taxes on United States bonds, and federal inheritance and estate taxes on state and municipal bonds.

People ex rel. Astoria Light, Heat & Power Co. v. Cantor, 141 N. E. 901, 236 N. Y. 417, 30 A. L. R. 1453.

Home Ins. Co. v. New York, 10 S. Ct. 593, 134 U. S. 594, 33 L. Ed. 1025.

Greiner v. Lewellyn, 42 S. Ct. 324, 258 U. S. 384, 66 L. Ed. 676.

For other cases see *Decennial Digests, Internal Revenue* ¶8; *Taxation* ¶7; *War* ¶2.

Q. 15. Is a state entitled to condemn a right of way in lands situated within its boundaries, belonging to the United States and not used by it for any specific governmental purpose, for the purpose of constructing thereover a state highway?

A. The public lands of the United States are held by it, not as an ordinary individual proprietor, but in trust for all the people of all the states for public uses. The exclusive right to control and dispose of them is vested in the United States. No state can interfere with this right or embarrass its exercise. Condemnation of such lands by a state, or by another under its authorization, is a direct interference with this federal right, and is invalid. The right of a state to condemn such lands under the circumstance stated in the question received some apparent recognition in earlier

cases. The rule stated above would be clearly applicable, if the state sought to condemn property used by the federal government in connection with the performance of its governmental functions.

Utah Power & Light Co. v. U. S., 230 F. 328, 144 C. C. A. 470, 4 A. L. R. 535.

U. S. v. Chicago, 7 How. 185, 12 L. Ed. 660.

For other cases see Decennial Digests, Eminent Domain Ⓒ46; Municipal Corporations Ⓒ646, 650.

Q. 16. B Bank, a national bank, was appointed executor under the will of a citizen of state A. The bank, after testator's death, applied to the proper probate court for letters testamentary, but was denied appointment on the ground that, by the laws of state A, national banks were not authorized to act as executors. The federal law, under which B Bank operated, in substance authorized a federal board to confer upon national banks the power to act as executors, if corporations competing with national banks were permitted so to act under the laws of the state in which such national bank operated. Such was the situation in state A. B Bank had secured the required permission from such federal board. Was the court's action in denying B Bank's appointment for the reason given valid?

A. No; national banks are instrumentalities created by the federal government for effectuating its powers. They are none the less so because of their character as private enterprises. Congress can confer upon them such powers as are reasonably necessary to enable them to perform the federal purpose they were intended to subserve. The power to act as executor is reasonably necessary to put them on an equality with their competitors in state A, and Congress can confer upon them powers necessary to establish such competitive equality. The law of state A forbidding national banks to act as executors is an invalid interference with the exercise of a federal power validly conferred. The court was in error in refusing to appoint B Bank.

Missouri ex rel. Burnes Nat. Bank v. Duncan, 44 S. Ct. 427, 265 U. S. 17, 68 L. Ed. 881.

First Nat. Bank v. California, 43 S. Ct. 602, 262 U. S. 366, 67 L. Ed. 1030.
Federal Land Bank of New Orleans v. Crosland, 43 S. Ct. 385, 261 U. S. 374, 67 L. Ed. 703, 29 A. L. R. 1.

For other cases see Decennial Digests, Banks and Banking Ⓒ233, 234; Taxation Ⓒ6.

Q. 17. D, an employee of the Post Office Department of the United States, was convicted for violating a law of state A that forbade the driving of motor vehicles within the state by unlicensed driv-

ers. D's violation of said law consisted in driving within the state a government truck while engaged in transporting the mails. D had not obtained a license. Can D's conviction be sustained?

What would your answer be if D had been convicted of violating the speed laws of state A?

A. The statute in question has the effect of making the competence of federal employees to perform their duties dependent on the action of state A. It imposes qualifications in addition to those that the federal government itself has pronounced sufficient. Such a requirement does not merely touch the federal employees remotely by a general rule of conduct, but it lays hold of them in their specific attempt to obey orders. It is an invalid interference with the powers of the United States, and D's conviction cannot be sustained.

D's conviction for violating the speed laws would be valid. Subjecting federal employees to reasonable regulations generally applicable is not an interference with federal functions.

Johnson v. Maryland, 41 S. Ct. 16, 254 U. S. 51, 65 L. Ed. 126.

Com. v. Closson, 118 N. E. 653, 229 Mass. 329, L. R. A. 1918C, 939.

For other cases see *Decennial Digests, Criminal Law* ¶97(4); *Licenses* ¶5.

SECTION 4.—FEDERAL POWERS

Q. 18. A treaty between the United States and Great Britain provided for specified closed seasons and other forms of protection for migratory birds, and that each party would propose to its law-making body necessary measures for carrying the treaty into effect. Congress carried out this provision by enacting a law prohibiting the killing of migratory birds within the United States. Is said law constitutional?

A. Yes. Congress has authority to make all laws that shall be necessary and proper for carrying into execution all powers vested by the Constitution in the government of the United States. The power to make treaties is one such power. Carrying that power into execution reasonably implies a power to enact such laws as may make effective within the United States the policy agreed upon by the United States and a foreign power by the terms of a valid treaty. The law in question is therefore valid, if the treaty is valid. The subject-matter of the treaty and the legislation involves a national interest, that can be protected only by national action in concert with another power. It is a proper subject for the exercise of the treaty-making power. It is imma-

terial that the subject is one with which Congress could not deal, but for the treaty. The statute in question is valid.

Missouri v. Holland, 40 S. Ct. 382, 252 U. S. 416, 64 L. Ed. 641, 11 A. L. R. 984.

For other cases see *Decennial Digests, Treaties* ⇨2, 7.

Q. 19. A federal statute imposed a tax of 10 per cent. of the annual net profits upon every employer who should, during any portion of such year, knowingly employ a child within the age limits therein prescribed. A knowingly employed a child within the defined age limits, and has paid the tax under protest. He sues to recover the tax so paid. Decide the case.

A. A is entitled to recover the tax, if the law imposing it is unconstitutional. The validity of the law depends on whether it is a proper exercise of the federal taxing power. The primary purpose of an exercise of that power is to raise revenue. A tax act does not lose its character as such because its incidental effect is the promotion of some police power end, nor because the securing of that end was an incidental motive in its passage. Where, however, it appears from the face of the statute that the primary purpose is regulation, and that what is described as a tax is in fact a penalty, the law is not a valid exercise of the taxing power. The fact that the law in question makes liability dependent upon scienter shows that it imposes a penalty, not a tax. The acts penalized are local matters, whose regulation is within the reserved power of the states, and beyond those of Congress. The statute is invalid, and A is entitled to recover the tax paid.

Bailey v. Drexel Furniture Co., 42 S. Ct. 449, 259 U. S. 20, 66 L. Ed. 817, 21 A. L. R. 1432.

Hill v. Wallace, 42 S. Ct. 453, 259 U. S. 44, 66 L. Ed. 822.

For other cases see *Decennial Digests, Internal Revenue* ⇨2.

Q. 20. A federal statute required dealers in certain narcotics to register with a designated federal officer and to pay a nominal excise tax, prohibited them from selling said narcotics to any person, except in pursuance of a written order of the person to whom sold on forms to be issued for that purpose by said officer, and made it unlawful for any person to obtain such narcotics by means of such order forms for any purpose other than their use, sale, or distribution by him in the conduct of a lawful business in such narcotics or the legitimate practice of his profession. The constitutionality of this statute is attacked by D, who is on trial for its violation. Is it a valid exercise of the federal taxing power?

A. The statute imposes a tax upon and prescribes detailed regulations affecting the sale of narcotics. The regulations have a reasonable tendency to keep the traffic in such narcotics above board and open to inspection by the tax officials, and thus to prevent their sale without the payment of the tax. They are a reasonable aid in the enforcement of the tax, and have a definite relation to the raising of revenue. They are therefore a valid exercise of the taxing power. In such case it is immaterial that they accomplish results that might also be secured under the police power of the states, or that they were enacted from moral motives. The statute is a valid exercise of the federal taxing power.

U. S. v. Doremus, 39 S. Ct. 214, 249 U. S. 86, 63 L. Ed. 493.

McCray v. U. S., 24 S. Ct. 769, 195 U. S. 27, 49 L. Ed. 78, 1 Ann. Cas. 561.

For other cases see Decennial Digests, Internal Revenue 2; Poisons 2.

SECTION 5.—INTERSTATE COMMERCE

Q. 21. A and B were both engaged in business within the United States. A received an order from C, a resident of a foreign country, to purchase for C certain goods. A purchased said goods from B, instructing the latter to deliver same to export carrier. B billed the goods to A, who paid therefor, but delivered same to the export carrier. B sues to recover a federal excise tax on sales within the United States, which he has paid under protest. Can he recover said tax?

A. The Constitution provides that no tax shall be laid by the federal government on articles exported from any state. The act that passed the title to these goods, and that would have incurred the tax, had the transaction been domestic, committed the goods to the carrier that was to take them to the foreign country for export thereto. The expected and accomplished effect of that act was to start them for that foreign country. The liability for the tax accrued at the very moment the goods became an export. Hence the tax was on exports, and invalid. It is immaterial that the law under which the tax was imposed was a general law, taxing all sales and not aimed at exports. Its application to the instant case effects a result prohibited by the Constitution. B can recover the tax.

Spalding & Bros. v. Edwards, 43 S. Ct. 485, 262 U. S. 66, 67 L. Ed. 865.
Thames & Mersey Marine Ins. Co. v. U. S., 35 S. Ct. 496, 237 U. S. 19,
59 L. Ed. 821, Ann. Cas. 1915D, 1087.

William E. Peck & Co. v. Lowe, 38 S. Ct. 432, 247 U. S. 165, 62 L. Ed. 1049.
For other cases see Decennial Digests, Commerce 77.

Q. 22. A Co., a corporation of state B, made a contract in state C for the purchase of wheat from D. The contract called for delivery on board cars at X, in state C. The wheat was intended for transportation to state B. A Co. sued D for breach of said contract. D claimed that the contract was void under a statute of state C, which declared void contracts made within the state by foreign corporations that had not qualified to do business there. A Co. had failed to comply with this statute. Judgment for D, and A Co. appeals. Decide the case.

A. The right to engage in interstate commerce is one conferred by the federal Constitution and no state can prohibit its exercise within its borders. This right belongs, not only to natural persons, but to corporations. A Co., therefore, had a right to engage in interstate commerce within state C. The act of contracting within a state for the purchase of goods therein for shipment outside the state is interstate commerce. The statute of state C is invalid as applied to A Co.'s act, since it unreasonably burdens A Co.'s right to engage in interstate commerce. Judgment for D reversed.

Dahnke-Walker Milling Co. v. Bondurant, 42 S. Ct. 106, 257 U. S. 282, 66 L. Ed. 239.

Lemke v. Farmers' Grain Co., 42 S. Ct. 244, 258 U. S. 50, 66 L. Ed. 458.
For other cases see *Decennial Digests, Commerce* §§12, 16, 37, 40(1), 46, 50.

Q. 23. State A contains deposits of natural gas, which its owners have been for years distributing by pipe lines to consumers within and without the state. State A enacted a law requiring producers of natural gas to give consumers within the state a preferred right of purchase over consumers in other states, and that the needs of the former should be fully supplied before any should be sold and delivered to the latter. Is said law constitutional?

A. Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law which by its necessary operation prevents, obstructs, or burdens such transmission is a prohibited interference with interstate commerce. The law in question will necessarily and directly compel the diversion to local consumers of a large part of the natural gas, and may thus effect a compulsory prohibition upon its transmission outside the state. It is invalid, because it constitutes a serious interference with in-

terstate commerce, which is not justified by the desire to conserve for its own people its natural resources.

Pennsylvania v. West Virginia, 43 S. Ct. 658, 262 U. S. 553, 67 L. Ed. 1117, 32 A. L. R. 300.

West v. Kansas Natural Gas Co., 31 S. Ct. 564, 221 U. S. 229, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

Sligh v. Kirkwood, 35 S. Ct. 501, 237 U. S. 52, 59 L. Ed. 835.

For other cases see *Decennial Digests, Commerce* ⇨15, 16, 55, 57, 61(1).

Q. 24. The principal business of a street railway company, operating in adjoining cities located in different states, is the transportation of passengers between said cities. One of said cities passed an ordinance prohibiting said company from carrying passengers on the platforms of its cars, unless specified protective equipment was installed. The company sues to enjoin said ordinance, on the ground that it violates the federal commerce clause. Discuss this objection.

A. The transportation of passengers between the two cities is interstate commerce. The ordinance in question does affect the carriage within the said city of even interstate passengers, and thus affects interstate commerce. States may, however, subject to local police regulation those engaged therein in interstate commerce, and the acts therein that constitute such commerce. Such regulations are valid, if not in conflict with regulations prescribed by or under the authority of Congress, and if they do not impose upon interstate commerce an unreasonable burden. Whether a given regulation imposes such a burden depends, not only on its character, but also on the reasonable necessity therefor. The ordinance imposes a relatively slight burden, and, considering the importance of safety in carrying passengers, is reasonable. That it incidentally affects interstate commerce does not invalidate it.

South Covington & C. St. Ry. Co. v. Covington, 35 S. Ct. 158, 235 U. S. 537, 59 L. Ed. 350, L. R. A. 1915F, 792.

St. Louis & S. F. Ry. Co. v. Public Service Com'n, 43 S. Ct. 380, 261 U. S. 369, 67 L. Ed. 701.

For other cases see *Decennial Digests, Commerce* ⇨47, 58, 62.

Q. 25. A Co. transports natural gas from state B into state C, in which it sells to local distributing companies, who retail it to local consumers. A Co. also sells part of its gas in state C directly to consumers therein. Can state C regulate the prices charged by A Co. (a) to the distributing companies; and (b) to the ultimate consumers?

A. The sale and delivery to the distributing companies is an inseparable part of a transaction in interstate commerce, and the enforcement of a selling price by state C in such a transaction places a direct burden upon such commerce, inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. State C cannot regulate prices on that sale.

The sale and delivery direct to the ultimate consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains. Its character is not changed by the fact that such distribution is made by the transporting company. State C can regulate the prices of those sales.

Missouri *ex rel. Barrett v. Kansas Natural Gas Co.*, 44 S. Ct. 544, 265 U. S. 298, 68 L. Ed. 1027.

Pennsylvania *Gas Co. v. Public Service Commission*, 40 S. Ct. 279, 252 U. S. 23, 64 L. Ed. 434.

Port Richmond & Bergen Point Ferry Co. *v. Board of Chosen Freeholders*, 34 S. Ct. 821, 234 U. S. 317, 58 L. Ed. 1330.

For other cases see Decennial Digests, Commerce ⇨ 10, 33.

Q. 26. A state law prohibits the sale within it of certain animal foods, unless they have been inspected by its officials, and a disclosure made of their ingredients. An inspection fee is charged, which does not exceed the cost of the inspection. A federal statute prohibits introduction into one state from another state of adulterated or misbranded animal foods of the same kind as those included within the state law. Nothing in the state law would interfere with the successful operation of the federal act. The federal act does not require disclosure of ingredients of such foods. Can the state law constitutionally apply to original package sales within it of goods brought into it from another state? What effect has the federal law upon this question?

A. The state could not entirely prohibit original package sales of such foods introduced from another state, since they are a legitimate article of commerce. It can, with the exceptions hereinafter stated, subject such sales to reasonable regulations, since their effect upon interstate commerce is indirect and incidental. The requirements imposed by the state law are reasonably adapted to prevent frauds in the sale of such foods, and are valid. The charge of an inspection fee not in excess of cost is valid. The state law would be invalid, if repugnant to the federal law, and the test thereof is whether it interferes with the realization of the purposes of

the federal act. The state act is not invalid for this reason. It would be invalid, also, if the very enactment of the federal law indicated an intention to exclude state action. The intent to supersede the state police power as to matters not directly covered by federal legislation is not to be inferred from the assumption by Congress of a limited control.

Savage v. Jones, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.

Illinois Cent. R. Co. v. De Fuentes, 35 S. Ct. 275, 236 U. S. 157, 59 L. Ed. 517.

For other cases see *Decennial Digests*, Commerce §8(10), 50, 51, 58.

Q. 27. A imported from a foreign country two paintings. The paintings were transported from said country in a private storeroom, without being packed. This method was adopted, because of their great value. Upon their arrival in the United States, A hung them in his galleries for public sale. He gave B a chattel mortgage on one of them as security for a loan. Can these paintings be taxed by the state in which A resides and conducts his art business?

A. A state cannot impose property taxes upon imports as long as they retain their character as imports. They do not lose that character by being offered for sale in the original package in which imported. In the instant case, the paintings themselves were the original packages. They do lose that character when they become incorporated with the general mass of property of the state. They become thus incorporated if the importer makes thereof a beneficial use, other than offering them for sale. Their mortgage to secure a loan is such a use. The painting thus mortgaged can be taxed; the other cannot be taxed. This doctrine is limited to technical imports, and does not extend to goods brought into one state from another, in which they were a part of the general mass of property.

Low v. Austin, 13 Wall. 29, 20 L. Ed. 517.

Southern Pac. Co. v. Callexico (D. C.) 288 F. 634.

For other cases see *Decennial Digests*, Commerce §31, 77.

Q. 28. A Co., a corporation of state D, owns and operates a pipe line extending from state C, through state B, and into state D, where it operates a refinery. It neither receives nor delivers in state B any crude oil, but it maintains therein its principal office, where it keeps its books and bank accounts and carries on various activities connected with and in furtherance of its pipe line opera-

tions. It has obtained from state B a license to engage therein exclusively in the business of transporting crude oil by pipe line. By obtaining said license it acquired the right of eminent domain under the laws of state B. Can state B constitutionally impose on A Co. an annual franchise tax for the privilege of engaging therein in business?

A. The tax is one upon the privilege or right to do business. A state cannot lay a tax on interstate commerce in any form, whether on the act of transportation, the receipts derived therefrom, or the occupation or business of carrying it on. The transportation of crude oil through state B was interstate commerce, and all of A Co.'s activities in said state, including the maintenance therein of its principal office, were directly connected therewith, and with no other business. A Co. is therefore engaged in state B in interstate commerce exclusively, and the tax in question as a practical matter directly burdens interstate commerce. Hence it is invalid as applied to A Co. It is immaterial that state B has conferred upon A Co. the right of eminent domain, since that cannot confer upon the state authority to impose an unconstitutional burden on interstate commerce.

Ozark Pipe Line Co. v. Monier, 45 S. Ct. 184, 266 U. S. 555, 69 L. Ed. 439.
Heyman v. Hays, 35 S. Ct. 403, 236 U. S. 178, 59 L. Ed. 527.

For other cases see *Decennial Digests*, Commerce 63, 64, 69.

Q. 29. A Co., a corporation of state B, with nonpar stock, is engaged in state C in both interstate commerce and local business. It has issued only a portion of its authorized capital stock. A statute of state C imposes on it an annual franchise tax of five cents per share on that proportion of its total authorized capital stock that its property within the state bore to all its property wherever situated. The law prescribes no reasonable maximum tax. Is that tax valid as applied to A Co.?

A. The doctrine that a state can exclude foreign corporations from doing intrastate business therein and can impose conditions thereon is somewhat limited in the case of such corporations engaged therein in both interstate and local business. It cannot impose a franchise tax on the doing of local business, which results in imposing a direct tax burden on interstate commerce. The inevitable effect of those provisions of this law that measure the tax on the basis of the authorized capital stock is, in those cases where that is in excess of shares actually issued, to tax a part at least of A Co.'s interstate business, and thus to impose a direct burden on

interstate commerce. The tax is invalid on that account, although it would probably be valid if a reasonable maximum had been fixed.

Baltic Mining Co. v. Mass., 34 S. Ct. 15, 231 U. S. 68, 53 L. Ed. 127.

Kansas City, M. & O. R. Co. v. Stiles, 37 S. Ct. 58, 242 U. S. 111, 61 L. Ed. 176.

Airway Electric Appliance Corp. v. Day, 45 S. Ct. 12, 266 U. S. 71, 69 L. Ed. 169.

For other cases see *Decennial Digests*, Commerce ¶69; Taxation ¶53.

Q. 30. Which of the following state taxes would be invalid taxes upon interstate commerce: (a) A tax on gross receipts from interstate commerce; (b) a tax on the net income from interstate commerce; (c) a tax on the property within the state employed in interstate commerce, the tax being measured by gross receipts from interstate commerce apportioned to the state on some fair basis?

A. (a) A tax on the gross receipts from interstate commerce, or any portion thereof, in effect withholds a part of the proceeds of such commerce, thus imposing thereon a direct burden, and is invalid. *Crew Levick Co. v. Pennsylvania*, 38 S. Ct. 126, 245 U. S. 292, 62 L. Ed. 295.

(b) The difference in effect between a tax measured by gross receipts and one measured by net income affords a convenient basis for distinguishing between a direct and indirect burden on interstate commerce. Hence a tax on net income from such commerce is valid. *Atlantic Coast Line R. Co. v. Daughton*, 43 S. Ct. 620, 262 U. S. 413, 67 L. Ed. 1051.

(c) Taxes on property employed in interstate commerce are valid, and such a tax may be measured by gross receipts, including those derived from interstate commerce apportioned to the state on a fair basis, unless the result is a tax greatly in excess of what would result from taxing such property by the ad valorem method. *United States Express Co. v. Minnesota*, 32 S. Ct. 211, 223 U. S. 335, 56 L. Ed. 459.

For other cases see *Decennial Digests*, Commerce ¶64, 70, 72.

Q. 31. R Co. is a railroad corporation of state B, with property in states A and B. State A taxed its property, by allocating to it that proportion of the value of R Co.'s property, wherever situated, that its road mileage within state A bore to its total road mileage. The total value of R Co.'s total property was determined by taking the market value of its stocks and bonds. R Co. owned some securities not connected with or used in its railroad business. Its line in state A was single-tracked, and in state B double-tracked. It

also owned in state B valuable terminal properties, that had no counterpart in state A. R Co. objects to a tax imposed on its property in state A by this method, on the grounds that the tax violates the commerce clause. Is its objection sustainable?

A. Yes; a state can tax the property employed in interstate commerce. If such property within it is an integral part of a larger unit of property located in several states, it can take account of such unity of use in determining the amount of property within it. No property can be included in the unit base whose use does not contribute to the value of the property within the taxing state. The inclusion in the base of the securities not connected with R Co.'s railroad business is invalid, since they do not affect the value of its railroad property in state A. The tax is also invalid, because road mileage is not a fair basis of allocation, because of the differences between its road in states A and B, and the existence of the terminals in the latter. The tax is therefore invalid, as imposing a direct burden on interstate commerce.

Fargo v. Hart, 24 S. Ct. 498, 193 U. S. 490, 48 L. Ed. 761.

Wallace v. Hines, 40 S. Ct. 435, 253 U. S. 66, 64 L. Ed. 782.

For other cases see *Decennial Digests*, Commerce ⚡72; Taxation ⚡397.

Q. 32. A state statute exempts from property taxes flour made from wheat grown within the state while said flour is in the hands of the miller. A, a miller within said state, has in his possession therein flour made from wheat grown in another state. Can A be validly taxed on said flour?

A. No; the tax on A's flour is in substance a tax thereon because of its origin without the state. The necessary effect of this discrimination against the products of other states is to discourage their importation into the state and thus obstruct interstate commerce therein. It is therefore invalid.

Darnell & Son Co. v. Memphis, 28 S. Ct. 247, 208 U. S. 113, 52 L. Ed. 413.

Boyce v. French (D. C.) 293 F. 43.

For other cases see *Decennial Digests*, Commerce ⚡54, 64.

Q. 33. A federal law provided for the supervision and regulation by federal authority of the business of commission men and live stock dealers in the stockyards. A stockyard was defined as a place conducted for profit as a public market, where live stock are received and kept for sale or shipment in interstate commerce. The law forbade those furnishing stockyard services and those buying and selling live stock thereat on a commission basis from engaging in unfair or discriminatory practices, and required all charges for

their services to be just, reasonable, and nondiscriminatory. Is said law a valid exercise by Congress of its power to regulate interstate commerce?

A. The stockyards are an agency of interstate commerce. The power to regulate interstate commerce includes the power to regulate such agencies in so far as they constitute an instrumentality of such commerce. This power is not limited to regulating only such acts thereat as are in themselves acts of interstate commerce, but extends to acts associated therewith if they affect interstate commerce. The business done at such stockyards between the receipt of the live stock and their shipment therefrom, which was the business regulated, has a direct relation to and effect upon the interstate movement of live stock. Congress can therefore regulate its practices, so as to prevent them from obstructing or burdening such commerce, and hence the law is a valid exercise of its regulatory power.

Stafford v. Wallace, 42 S. Ct. 397, 258 U. S. 495, 66 L. Ed. 735, 23 A. L. R. 229.

Board of Trade v. Olsen, 43 S. Ct. 470, 262 U. S. 1, 67 L. Ed. 839.

For other cases see *Decennial Digests, Commerce* ¶3, 37, 38.

Q. 34. The Transportation Act of 1920 confers upon the Interstate Commerce Commission the power to regulate intrastate railway rates whenever it shall find that the effect of intrastate rates is to produce an unreasonable discrimination against interstate commerce. Discuss the validity of this provision.

A. The federal commerce power includes the power to promote the development of an adequate national transportation system. This includes the power to regulate intrastate commerce in so far as necessary to accomplish that end. Congress may therefore remove discriminations against interstate commerce resulting from the exercise by the states of their control over intrastate commerce, since the federal power is supreme in the field of interstate commerce. The effect of a state requiring or permitting rates that do not result in making intrastate commerce contribute a just proportion to the cost of maintaining an adequate railway system is to discriminate against interstate commerce by throwing a disproportionate burden thereon. Congress can prevent the imposition of such a direct burden on interstate commerce. The law in question does this, and is therefore valid.

Railroad Com'n v. Chicago, B. & Q. R. Co., 42 S. Ct. 232, 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086.

New York v. U. S., 42 S. Ct. 239, 257 U. S. 591, 66 L. Ed. 385.

For other cases see *Decennial Digests, Commerce* ¶8(14), 61(3), 85, 88.

Q. 35. To what extent can Congress prohibit the movement of goods manufactured by child labor, in interstate commerce?

A. The power to regulate includes the power to prohibit such movement only where the goods shipped are themselves harmful, such as lottery tickets or diseased cattle. The prohibition may, in such cases, be absolute, or take the more limited form of depriving them of their interstate character and thus remove them from the protection against state action that the commerce clause affords. To prohibit such movement in the case of goods in themselves harmless, because of conditions affecting their production, is invalid as an infringement on the reserved powers of the states.

Lottery Cases, 23 S. Ct. 321, 188 U. S. 321, 47 L. Ed. 492.

Clark Distilling Co. v. Western Maryland R. Co., 37 S. Ct. 180, 242 U. S. 311, 61 L. Ed. 326, L. R. A. 1917D, 1218, Ann. Cas. 1917B, 845.

Hammer v. Dagenhart, 38 S. Ct. 529, 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724.

For other cases see *Decennial Digests*, Commerce ¶14, 33, 61(1).

SECTION 6.—PROTECTION OF PERSONAL RIGHTS

Q. 36. The statute of state A authorized a person fined upon conviction for a misdemeanor to confess judgment with surety for such fine and costs; that said person might contract with said surety, in consideration of the latter's payment of the fine and costs, to reimburse him on terms approved by the court by working for the surety; and made the breach of such contract a misdemeanor punishable in the same manner as above outlined. The alternative upon conviction for the original offense was imprisonment at hard labor for specified periods. B was convicted for violating a federal statute prohibiting any person to hold another in involuntary servitude. B's violation consisted in employing C under a contract made under said law of State A. Is B's conviction sustainable?

A. Yes; the Thirteenth Amendment provides that no involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States and confers upon Congress the power to enforce that provision. The act under which B was convicted is therefore valid, and the legality of B's conviction depends on whether employing C under the contract authorized by the state statute amounts to holding C in involuntary servitude of the prohibited kind. The state statute contemplates and effects the result that C is practically compelled to continue in such employment against his will since his only al-

ternative is imprisonment at hard labor. It is immaterial that C had an original choice between entering into such a contract and imprisonment at hard labor, since in practice this amounts to no choice at all. The validity of such a state law is to be determined by the practical results most likely to follow from it, not its formal possibilities. Nor is C's condition within the constitutional exception, since his servitude is not punishment for his offense, for which a fine has already been paid, but a servitude to B to satisfy a claim due the latter. B's conviction sustained.

U. S. v. Reynolds, 35 S. Ct. 86, 235 U. S. 133, 59 L. Ed. 162.

Bailey v. Alabama, 31 S. Ct. 145, 219 U. S. 244, 55 L. Ed. 191.

Robertson v. Baldwin, 17 S. Ct. 326, 165 U. S. 275, 41 L. Ed. 715.

For other cases see Decennial Digests, Constitutional Law ¶83(2).

Q. 37. A federal statute enacted in 1907 provided for the deportation of alien women found practicing prostitution within the United States at any time within four years of their entrance into the United States. This was amended in 1910, so as to remove the time limit of four years. An alien woman, who legally entered the United States in 1904, was threatened with deportation for practicing prostitution within the United States during the year 1909. She alleges that the amendment of 1910 is unconstitutional, as applied to her case, as an ex post facto law. Is her claim well founded?

A. The effect of the 1910 amendment is to subject the alien woman to deportation for an act for which she could not have been deported under the law as it existed at the time that act was committed. That amendment would be ex post facto as applied to her, if deportation can be considered as punishment for a crime, since it would make criminal an act not such at the time of its commission. Deportation is not, however, punishment for a crime, but a mere refusal by the United States to harbor persons whom it does not want within its borders. Making deportation depend on acts that may also constitute a crime is not inflicting punishment for a crime. Since the doctrine of ex post facto laws, which applies to both the states and the federal government, is limited to criminal laws, the amendment in question is not within its prohibition.

Bugajewitz v. Adams, 33 S. Ct. 607, 228 U. S. 585, 57 L. Ed. 978.

Johannessen v. U. S., 32 S. Ct. 613, 225 U. S. 227, 56 L. Ed. 1066.

For other cases see Decennial Digests, Constitutional Law ¶197, 199.

Q. 38. A committed a crime at a time when the punishment provided therefor was imprisonment for not less than five nor more

than ten years. Before his conviction the law had been amended to change the punishment therefor to imprisonment for not less than three nor more than fifteen years. Can the amendment constitutionally apply to A's crime? Could it so apply to a crime committed by B after its enactment?

A. A law is *ex post facto* if it annexes to a crime a greater punishment than the law annexed to it when committed. There is such a disadvantageous change in punishment if the subsequent law either requires a penalty more severe than the least one that could be imposed under the old law, or permits a penalty more severe than the heaviest one authorized by the old law. The law in question permits a heavier punishment than the severest penalty permitted by the old law, and is *ex post facto* as applied to A's crime, even though it also permits a lesser punishment than the minimum prescribed by the old law. Though invalid as applied to A's crime it is constitutional as to B's crime, which was committed after its enactment.

Rooney v. North Dakota, 25 S. Ct. 264, 196 U. S. 319, 49 L. Ed. 494, 3 Ann. Cas. 76.

Jaehne v. New York, 9 S. Ct. 70, 128 U. S. 189, 32 L. Ed. 398.

For other cases see Decennial Digests, Constitutional Law ¶201, 203.

Q. 39. Is a law that permits conviction by less than a unanimous verdict of a jury *ex post facto* as applied to a crime committed before its enactment, at a time when a unanimous verdict was required?

A. The accused has no vested right in any particular rule of procedure or evidence, and changes therein can be applied to prior crimes, unless their effect is to deprive the accused of some substantial right given him by the law when his offense was committed. Rules of procedure and evidence affect the amount of protection that the accused has, and changes therein inevitably affect the degree thereof. Certain protective devices are considered fundamental, and the right thereto substantial rights. There is no single test for determining which are of that character, although the fact that a slight diminution thereof will materially increase the burden of the accused or lighten that of the state is a factor in determining whether a given right of the accused is a substantial one. The right to be convicted only by a unanimous jury is such a right, and the law in question considerably increases the state's chances of conviction, and lessens the protection enjoyed by the accused at the

time his allege offense was committed. The law is *ex post facto* as applied to prior crimes.

Thompson v. Utah, 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061.

Thompson v. Missouri, 18 S. Ct. 922, 171 U. S. 381, 43 L. Ed. 204.

Mallett v. North Carolina, 21 S. Ct. 730, 181 U. S. 589, 45 L. Ed. 1015.

For other cases see *Decennial Digests, Constitutional Law* ¶199, 202.

Q. 40. Certain federal officers procured a search warrant directing the search of A's house. The search warrant was procured for the sole purpose of searching for evidence against A, who was under indictment for violating a federal statute. Said officers executed said warrant, and seized thereunder certain papers belonging to A, which are offered in evidence at A's trial. Can A successfully object to their introduction? Can A secure their return?

A. The Fourth Amendment prohibits the violation of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, but permits the issuance of search warrants upon probable cause. Search warrants may not be resorted to for the sole purpose of procuring evidence to be used against a person in a criminal or penal proceeding. A search and seizure under such a warrant is an unreasonable search and seizure and violative of the Fourth Amendment. The use of evidence obtained by an illegal search and seizure against the person subjected thereto is a violation of that provision of the Fifth Amendment that provides that no person shall be compelled in any criminal case to be a witness against himself. Hence A's objection to the introduction of said papers in evidence should be sustained. A can also secure the return to him of said papers. Note that this provision of the Fifth Amendment is not violated by using evidence obtained by an illegal search by state officers without the co-operation of federal officers, and turned over to the federal government.

Gould v. U. S., 41 S. Ct. 261, 255 U. S. 298, 65 L. Ed. 647.

Federal Trade Com'n v. American Tobacco Co., 44 S. Ct. 336, 264 U. S. 298, 68 L. Ed. 696, 32 A. L. R. 786.

For other cases see *Decennial Digests, Searches and Seizures* ¶7.

Q. 41. Can a corporation decline to produce its books and records in response to a subpoena *duces tecum* solely on the grounds that they would incriminate it? Can a corporation officer, in whose custody such books and records are, object to their production in response to a subpoena *duces tecum* directed to him, on the sole grounds that they will incriminate him? Assume in the second

question that the corporation had been dissolved, and had transferred said books and records to said officer.

A. The protection against self-incrimination, provided for in the Fifth Amendment, does not extend to corporations, and hence the corporation could not successfully resist producing said books and records on the grounds stated. Nor could its officer, in whose custody said books and records are, resist their production on that ground, since they are not his property, and their production by him does not constitute making him incriminate himself. This is true, even in the case put in the last question, since the books and records, though now owned by said officer, are still impressed with the incidents attending corporate documents, and thus subject to inspection and investigation.

Wilson v. U. S., 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

Wheeler v. U. S., 33 S. Ct. 158, 226 U. S. 478, 57 L. Ed. 309.

Silverthorne Lumber Co. v. U. S., 40 S. Ct. 182, 251 U. S. 385, 64 L. Ed. 319.

For other cases see *Decennial Digests, Searches and Seizures* ¶7; *Witnesses* ¶298.

Q. 42. A person accused of violating a federal criminal law was, before conviction, offered a pardon by the President of the United States which he declined to accept. Can he be compelled to give self-incriminating testimony?

A. The privilege against self-incrimination continues as long as there exists the possibility of criminal liability for or on account of any transaction, matter, or thing to which the evidence relates. An unaccepted offer of a pardon does not relieve from such liability. Hence the person in question cannot be compelled to give self-incriminating evidence. An accepted pardon, or a statutory immunity sufficiently broad in their terms to relieve one of criminal liability for or on account of any transaction, matter, or thing concerning which he may testify, gives the constitutional degree of protection, and the person thus protected can be forced to testify.

Burdick v. U. S., 35 S. Ct. 267, 236 U. S. 79, 59 L. Ed. 476.

Hale v. Henkel, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652.

For other cases see *Decennial Digests, Witnesses* ¶303, 304(3).

Q. 43. A federal statute authorized the extradition of persons found within the United States who were accused of crime committed in a foreign country. D was accused of having committed a crime in a foreign country, whose criminal procedure did not per-

mit trial by jury. Discuss D's contention, made in the course of his extradition proceedings, that said statute is unconstitutional, because it did not secure to him, when surrendered to said foreign country, trial by a jury.

A. The provisions of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to a jury trial apply only to criminal prosecutions in the federal courts. The statute in question does not infringe upon that amendment. A citizen who commits a crime in a foreign country cannot complain if compelled to submit to trial and punishment according to the methods provided by its laws, though those differ from our own.

Neely v. Henkel, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448.

Callan v. Wilson, 8 S. Ct. 1301, 127 U. S. 540, 32 L. Ed. 223.

For other cases see *Decennial Digests, Constitutional Law* ¶82; *Extradition* ¶4; *Jury* ¶11(3).

Q. 44. D does an act which constitutes a crime, under the federal statute enacted under the Prohibition Amendment, and under the prohibition law of the state in which the act occurred. He is first convicted and punished by said state therefor. Can he be thereafter tried and convicted under the federal law?

A. The Fifth Amendment provides that no person shall be subject to be twice put in jeopardy for the same offense. This limits the federal government only. The act of the state in convicting and punishing D is not the act of the federal government. The state prohibition law and the federal act derive their force from separate sources, and each government acts as an independent sovereign in the matter. Each can declare the identical act a violation of its laws. There are, therefore, two offenses. Hence trial and conviction under the federal law relates to a different offense, and the constitutional provision against double jeopardy is not violated thereby.

U. S. v. Lanza, 43 S. Ct. 141, 260 U. S. 377, 67 L. Ed. 314.

U. S. v. Oppenheimer, 37 S. Ct. 68, 242 U. S. 85, 61 L. Ed. 161, 3 A. L. R. 516.

For other cases see *Decennial Digests, Criminal Law* ¶177, 201.

Q. 45. Would a statute enacted by Congress be constitutional that made combinations of manufacturers of an article a crime, if the purpose or effect of such combinations were to fix a price for such article greater than its market value under fair competition and normal market conditions? Would such statute, enacted by a state Legislature, be constitutional?

A. The statutes in question prescribe a standard of conduct in which the principal factor is not an ascertainable fact, but what that fact, market value, would have been under conditions indefinitely defined as normal market conditions. Criminal liability is thus made to depend on a vague and indefinite standard, that it is practically impossible to ascertain in advance. This subjects conduct to an unreasonable risk, and constitutes a deprivation of liberty or property without due process of law. The state statute would violate the due process clause of the Fourteenth Amendment; the federal statute the similar provision of the Fifth Amendment, and also that provision of the Sixth Amendment which gives an accused person the right to be informed of the nature and cause of the accusation against him, since the absence of any reasonably definite standard prevents him from knowing in advance with what he is being charged.

U. S. v. Cohen Grocery Co., 41 S. Ct. 298, 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045.

International Harvester Co. v. Kentucky, 34 S. Ct. 853, 234 U. S. 216, 58 L. Ed. 1284.

For other cases see Decennial Digests, Criminal Law ¶13; Monopolies ¶29.

SECTION 7.—DUE PROCESS AND EQUAL PROTECTION

Q. 46. A corporation of state A is engaged in transacting a local business in state B under a license granted by the latter. A statute of state B, which was in force at time said corporation procured its license, provides for a revocation thereof as a penalty for removing to a federal court under the provisions of a federal statute actions against it commenced in the courts of state B. The corporation, having so removed such an action, sues to enjoin the revocation of its license therefor. Decide the case.

A. The right to resort to the federal courts is a constitutional right, of which a state cannot deprive the corporation. The right of a state to exclude foreign corporations from doing therein a local business includes the lesser right to admit them conditionally, except that it may not impose unconstitutional conditions upon their right to enter or remain. The statute in question in effect makes the waiver of the constitutional right to resort to the federal courts a condition of a foreign corporation's right to remain in the state to do a local business. The condition is invalid, and cannot be enforced by revoking the license. Hence the corporation is entitled to an injunction. The decision would have been the same, had the corporation upon admission agreed not to resort to the federal

courts. The case does not turn on whether the corporation is doing a local or interstate business, but on the principle that no state may curtail the free exercise of constitutional rights.

Terral v. Burke Construction Co., 42 S. Ct. 188, 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365.

For other cases see *Decennial Digests*, Constitutional Law ⚡307; Corporations ⚡636; Courts ⚡259; Removal of Causes ⚡3.

Q. 47. A statute of state A imposes upon corporations that insure their property situated within the state with insurance companies not authorized to do business therein a so-called tax equal to a stated per cent. of the gross premiums paid for such insurance. Suit to recover said amount from a foreign corporation doing business within state A, which had insured its property therein with an insurance company not authorized to do business in state A. The policy had been written in state B, the state in which defendant was incorporated. Decide the case.

A. The sum, though called a tax, is in substance a penalty, imposed for the purpose of discouraging insuring in companies that do not procure the state's authorization to do business therein. It subjects to such penalty an act not performed within the state, and is an attempt to give the state laws extraterritorial effect. This violates the due process clause of the Fourteenth Amendment. Hence the state cannot recover said penalty.

St. Louis Cotton Compress Co. v. Arkansas, 43 S. Ct. 125, 260 U. S. 346, 67 L. Ed. 297.

Dewey v. Des Moines, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

For other cases see *Decennial Digests*, Constitutional Law ⚡283, 290(8); Corporations ⚡636.

Q. 48. Are the following state laws constitutional: (1) A law requiring all children between the ages of 5 and 16 to attend the public schools; (2) a law forbidding the teaching of any foreign language in any school, public or private, in the first eight grades?

A. The validity of these laws depends on whether they are a valid exercise of the state's police power. Their necessary effect is to curtail liberty, and each may affect disadvantageously existing property rights. The infliction of such consequences is justified under the police power, if a sufficient public interest is served thereby, and if reasonable means are adopted to secure that interest. The state has a legitimate interest in having an educated citizenry, which justifies it in regulating education and educational institutions. The realization of that interest can rea-

sonably be said to depend primarily upon insuring certain educational standards, rather than that it shall be given solely by the state. The first law is invalid, because the means adopted to secure the state's interest in education are arbitrary. The second law aims to secure a homogeneous population. This is a legitimate police power end, but the means adopted is unreasonable. It is not enough that the means adopted be adapted to secure the legitimate end, although the fact that they are is a factor in testing their reasonableness.

Society of Sisters, of the Holy Names of Jesus and Mary v. Pierce (D. C.) 296 F. 928, affirmed 45 S. Ct. 571, 268 U. S. 510, 69 L. Ed. 1070, 39 A. L. R. 468.

Meyer v. Nebraska, 43 S. Ct. 625, 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446.

For other cases see *Decennial Digests, Constitutional Law* ¶255, 274, 278(1,4); *Schools and School Districts* ¶160, 164.

Q. 49. A state statute forbids the mining of coal in such manner as to cause the subsidence of, among other things, buildings used for human habitation. A had acquired the land on which his home is situated from B Co., which had reserved the mineral rights and the right to mine thereunder free from liability for injuries caused thereby to A. The statute had been enacted after that transaction. A sues to enjoin B Co. from mining so as to cause his house to subside, basing his rights on said statute. B Co. contends that the statute is unconstitutional. Discuss its contention.

A. The statute regulates the use of property. Its effect is to limit those uses, and cut off uses that could be made of it prior to the enactment of said law. Its effect in the instant case is to destroy rights of property and contract previously existing. This is a taking of property in fact, which is in law a taking without due process, unless it can be justified as a valid exercise of the state's police power. One fact for determining whether it is such is the extent of the diminution; another the importance of the public interest sought to be protected. Here the extent of the taking is great, since the statute makes it commercially impracticable to mine certain coal, and the public interest, which consists in the maintenance of houses in their existing locations, small. Hence the statute is not a valid exercise of the police power, and is void as taking property without due process of law.

Pennsylvania Coal Co. v. Mahon, 43 S. Ct. 158, 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321.

Plymouth Coal Co. v. Pennsylvania, 34 S. Ct. 359, 232 U. S. 531, 58 L. Ed. 713.

For other cases see *Decennial Digests, Constitutional Law* ¶118, 280, 318; *Eminent Domain* ¶2(1); *Mines and Minerals* ¶92.

Q. 50. A state statute forbids the operation for profit of private employment agencies. The laws of another state require such agencies to be licensed, and make compliance with certain reasonable rules a condition to procuring such license. Discuss the constitutionality of these laws.

A. The state can, under its police powers, regulate the conduct of even lawful occupations. The right to engage in a lawful occupation is, however, a property right. Such regulation must therefore be reasonable. It is reasonable to impose conditions adapted to protect the public against evils incident to carrying on such occupations. The right to engage in an occupation or profession may be regulated to insure public safety, health, morals, or welfare. The business of an employment agency is a lawful one, and not of itself injurious to the public. Licensing is one form of regulation, and, if licenses can be procured upon compliance with reasonable conditions, is constitutional. Absolute prohibition is an unreasonable form of regulation, as applied to this business, and deprives those who wish to engage therein of liberty and property without due process of law. Prohibition is a valid form of regulation only as applied to businesses inherently vicious and harmful, or those which, because of circumstances existing in a given situation, have become vicious and harmful in such situation. Hence the first statute is invalid, and the second valid.

Adams v. Tanner, 37 S. Ct. 662, 244 U. S. 590, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973.

Brazee v. Michigan, 36 S. Ct. 561, 241 U. S. 340, 60 L. Ed. 1034, Ann. Cas. 1917C, 522.

For other cases see *Decennial Digests, Constitutional Law* ⇨275(1); *Licenses* ⇨7(1).

Q. 51. A state statute provides that no employer shall pay any woman employee a wage below a minimum to be fixed from time to time by a designated board. The factors to be considered by said board in fixing such minimum are stated in the statute, and include the cost of living, on the basis of maintaining health and decent moral standards, but do not include the earning power of the employee. Discuss its constitutionality.

A. The employer-employee relation can be subjected to reasonable regulation under the police power. Every such regulation restricts individual freedom of contract. The reasonableness of such restrictions turns on factors that vary with the phase of the relation. The statute in question fixes prices, and authoritative price fixing has thus far received but limited constitutional recognition. The

wage element of the labor contract is a more vital part thereof than any other, and the test of reasonableness thus becomes an exacting one. The statute takes account of the necessities of only one party to the contract, and even these arise for the most part outside the employment. There is no requirement to consider the value of the services in fixing the minimum, or that the amount to be paid shall bear any relation to the service to be rendered. It exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business or the work the employee engages to do. The regulation is therefore unreasonable, and violative of the due process clause of the Fourteenth Amendment. Note that temporary wage fixing in a public service industry has been sustained as valid.

Adkins v. Children's Hospital of District of Columbia, 43 S. Ct. 394, 261 U. S. 525, 67 L. Ed. 785, 24 A. L. R. 1238.

Wilson v. New, 37 S. Ct. 298, 243 U. S. 332, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024.

For other cases see Decennial Digests, Constitutional Law ¶275(2), 276.

Q. 52. A state statute, enacted in 1902, gave the widow of an employee killed in the course of his employment a cause of action for such death. The statute of limitations applying to such action was two years. The state enacted a Workmen's Compensation Act in 1910. A, husband of B, was killed in course of his employment in 1915. The Compensation Act required B to proceed thereunder, instead of the statute of 1902. The Compensation Act was held invalid as applied to employees of A's class in 1918. In 1919 the state enacted a law giving persons in B's position one year from the date of its enactment to bring suit under the 1902 statute. B sues A's employer within said year on the cause of action arising in 1915. The employer alleges that the act of 1919 is unconstitutional. Discuss his contention.

A. At the time of the enactment of the 1919 law the employer had a valid defense against B's claim. Its effect was to remove that defense, and to subject the employer to a liability which might result in a taking of his property to satisfy it. The due process clause permits a certain latitude in dealing with cases where remedies have been extinguished by lapse of time, when the infraction of right is not very great and strong considerations of justice require relief. In the instant case B originally followed the course required by state law as the highest court in the state had declared it. The employer acquired his defense, not because of B's failures, but as the result of facts beyond B's control. The balance of justice is with B, and

hence the exercise of legislative power in 1919 is reasonable and valid. This principle is not applicable, where the right to interpose a bar to a right of action constitutes in effect a property right.

Robinson v. Robins Dry Dock & Repair Co., 144 N. E. 579; 238 N. Y. 271, 36 A. L. R. 1310.

Campbell v. Holt, 6 S. Ct. 209, 115 U. S. 620, 29 L. Ed. 483.

For other cases see *Decennial Digests, Constitutional Law* ¶107, 308; *Limitation of Actions* ¶4(2).

Q. 53. A state statute prohibited individuals from engaging in the business of receiving deposits of money for safe-keeping or for transmission to others without a license. It excepted from its provisions individual bankers doing business under the state banking law and individuals where the average amount received for such purposes during the preceding year was \$500 or more. There were in the state numerous persons engaged in the business of procuring immigrants and persons of small means to entrust to them their funds for safe keeping. A, on trial for its violation, claims the statute violates his right to the equal protection of the laws. Discuss his contention.

A. The statute imposes on one group that engages in the business regulated by it limitations not imposed on others engaged in the same business. This difference in treatment is valid only if reasonable grounds therefor exist. Classification must rest upon some difference having a reasonable relation to the act in respect to which it is proposed. The exception of those engaged in banking under the state banking law is reasonable, for they are already subjected to regulation thereby. The exception of those businesses in which the average received during the preceding year was \$500 or more effects a classification on the basis of size. This is a valid basis only if size is an index of the evil aimed at. The statute in question aimed at protecting immigrants and persons of small means, whose average deposits would seldom equal \$500. The size of the deposit is therefore a reasonable index of the existence of such evil. Hence this classification is valid. The equal protection clause of the Fourteenth Amendment does not prevent a state from adapting its legislation to the particular evils aimed at.

Engel v. O'Malley, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128.

Prudential Ins. Co. v. Cheek, 42 S. Ct. 516, 259 U. S. 530, 66 L. Ed. 1044, 27 A. L. R. 27.

For other cases see *Decennial Digests, Banks and Banking* ¶4; *Constitutional Law* ¶230(3), 275(2); *Licenses* ¶7(2).

Q. 54. A state Workmen's Compensation Act is made optional as regards both employers and employees. It deprives employers who refuse to come under the act of their common-law defenses in actions

by their employees for personal injuries suffered while employed, while leaving those defenses available to consenting employers in actions by nonconsenting employees. It excepts from its provisions employers, so far as employees are engaged in employments within exclusive federal admiralty jurisdiction. A nonconsenting employer attacks said act on the grounds that it denies him the equal protection of the laws.

A. The equal protection clause of the Fourteenth Amendment does not prevent reasonable classification for law-making purposes. The reasonableness of a classification cannot be determined without a reference to the policy aimed to be secured by statute. The policy of Workmen's Compensation Laws is one recognized as constitutionally valid. The state can resort to the method of conferring and withholding benefits to induce adherence to such policy, if it wishes to make that optional. There is no invalid discrimination in according an advantage to those who facilitate the realization of a legitimate state policy, or imposing disadvantages on those who oppose it, provided all are given the same choice. Hence the act is valid in so far as it confers benefits on consenting employers that it does not confer upon nonconsenting employers. The failure to include those to whom the measure could not constitutionally apply effects no invalid discrimination. The statute is valid.

Middleton v. Texas Power & Light Co., 39 S. Ct. 227, 249 U. S. 152, 63 L. Ed. 527.

Lower Vein Coal Co. v. Industrial Board, 41 S. Ct. 252, 255 U. S. 144, 65 L. Ed. 555.

For other cases see *Decennial Digests, Constitutional Law* ¶205(1), 245, 301; *Eminent Domain* ¶2(7).

Q. 55. Discuss the constitutionality of the following state statutes: (a) A statute prohibiting aliens from owning agricultural lands within the state; (b) one prohibiting such ownership to only such aliens as have not declared their intention to become citizens of the United States; (c) one requiring 80 per cent. of an employer's working force to consist of citizens of the United States. Assume that no treaty rights are violated.

A. The basis of classification in each of these statutes is alienage. The equal protection clause protects aliens within a state from arbitrary discriminations, as well as citizens. This does not prevent aliens from being treated as a distinct class, if such classification is a reasonable means for realizing a legitimate state interest. The quality and allegiance of those who own, occupy, and use the farm lands within its borders are matters of highest importance to the

state, and affect its safety and power. To subject aliens only to an incapacity to own such lands is therefore reasonable and a valid classification. The same considerations justify treating as a separate class for this purpose those aliens who have not declared their intention to become citizens, and this is valid, even as to those who under federal law are ineligible for citizenship. The right to work for a living in the common occupations of the community is of the very essence of personal freedom. Discriminating against aliens in that matter is not justified by any peril to the state therefrom. A statute that attempts to do so, even in a qualified manner, denies the alien the equal protection of the laws.

Terrace v. Thompson, 44 S. Ct. 15, 263 U. S. 197, 66 L. Ed. 255.

Truax v. Raich, 36 S. Ct. 7, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283.

For other cases see Decennial Digests, Aliens ☞10; Constitutional Law ☞210, 211, 278(1); Master and Servant ☞11.

Q. 56. A judgment against A Co. is affirmed by the state Supreme Court. A Co. appeals to the Supreme Court of the United States. Pending this appeal the state Supreme Court makes a decision in another case inconsistent with its decision in A Co.'s case. Discuss A Co.'s contention that these facts amount to denying it the equal protection of the laws.

A. A Co.'s grievance is that the state Supreme Court has not decided its case in such a way as to be consistent with its decision in another case, and that there is a lack of uniformity in its decisions. The equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decisions any more than its due process clause assures immunity from judicial error. A Co.'s contention is not well founded.

Milwaukee Electric Ry. & Light Co. v. Wisconsin, 40 S. Ct. 306, 252 U. S. 100, 64 L. Ed. 476, 10 A. L. R. 892.

Tracey v. Ginzberg, 27 S. Ct. 461, 205 U. S. 170, 51 L. Ed. 755.

For other cases see Decennial Digests, Constitutional Law ☞209, 315.

SECTION 8.—INTERSTATE PRIVILEGES AND IMMUNITIES

Q. 57. A statute of state A levied a license tax upon contractors engaged in construction work within the state of \$25 if the contractor's principal office was within the state, and of \$100 if that were outside the state. B, a citizen of another state, whose principal office is in such other state, is engaged in construction work within state A. He refused to pay said tax on the grounds of its unconstitutionality. Discuss his contention.

A. The Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The purpose of this clause is to remove the disabilities of alienage from the citizens of one state while in another state in certain, though not in all, respects. It does prevent a state from denying to citizens of other states equality of commercial privileges. The discrimination prohibited is that between its own citizens and those of other states. The statute in question does not in terms make such a discrimination, but the existence of the prohibited discrimination is to be determined by the natural and practical effects of the statute, not by a mere reference to its terms. As the chief office of an individual is commonly in the state of which he is a citizen, the statute would in practice produce a discrimination against noncitizens. Hence it is invalid. Note that this clause permits of reasonable differences in treatment of citizens of a state and citizens of other states, if those differences do not produce the prohibited results, and it also permits a state to confer upon its own citizens only certain special privileges such as the right to hunt or fish.

Chalker v. Birmingham & N. W. R. Co., 39 S. Ct. 366, 249 U. S. 522, 63 L. Ed. 748.

McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.

For other cases see *Decennial Digests, Constitutional Law* ¶207(1, 4), 236.

SECTION 9.—DUE PROCESS IN PROCEDURE

Q. 58. A state statute conferred upon a tax board the power to revise the returns made by taxpayers by adding omitted property and correcting values. The board was required to give notice to taxpayers of changes made in their returns. The taxpayer had a right to demand an arbitration, if dissatisfied with the board's action. The arbitrators were required to be sworn before entering upon a hearing of any dispute submitted to them, and to render their decision within a specified time. Their decision was final, except that, if they failed to reach a decision within the time specified, the decision of the board should be final. The taxpayers' only opportunity to be heard on the questions of the amount and value of the property was in such arbitration. A taxpayer attacks this procedure as depriving him of property without due process of law. Is his objection sustainable?

A. A tax creates a liability that depends upon the existence of certain facts. One of such facts in the instant case is the value of the property. The statute places the final determination of its existence with a nonjudicial body. Due process does not require the final de-

termination of the existence of facts on which a liability depends by a court. Final decision thereon by a board is due process in tax matters. But even in such cases due process requires that those whose rights are being determined be given notice thereof and an opportunity to be heard at some stage before the liability is finally fixed. These must be required by the law, and not merely accorded as a matter of grace. The notice must be reasonable, and the hearing required is a full and fair hearing on all matters on which liability depends as to which the decision is to be final. The statute in question provides for both requisites, and is valid, except that the provision making the board's determination final, in absence of decision by the arbitrators within the specified time, is invalid as applied to cases where the arbitrators fail to reach a decision through no default on taxpayer's part, since that would bind him by a decision made without an opportunity to be heard.

McGregor v. Hogan, 44 S. Ct. 50, 263 U. S. 234, 68 L. Ed. 282.

Turner v. Wade, 41 S. Ct. 27, 254 U. S. 64, 65 L. Ed. 134.

For other cases see Decennial Digests, Constitutional Law ¶284(2); Taxation ¶319(1).

Q. 59. A federal statute provides that, upon evidence of illegal manufacture or sale of intoxicating liquors, certain designated officials shall assess a tax and penalty which, by another statute, can be collected by distraint without judicial proceedings. A sues to enjoin the seizure and sale of his property under said procedure, for collecting a tax and penalty imposed on him under authority of said statute. Decide the case, assuming that injunction is the proper remedy if A is entitled to any relief.

A. The liability imposed on A, though called a tax, is in substance and effect a penalty for the violation of a penal statute. There are certain situations in which due process requires the determination of the existence of the facts on which a liability depends to be made by a court before the liability is irrevocably fixed. This is the case where that liability is punishment for a crime, in which case due process requires a judicial determination of guilt. The statute is invalid because it authorizes the administrative infliction of punishment. Note that the infliction of so-called quasi criminal pecuniary penalties by administrative boards has been sustained on the theory that they were not punishments for a crime.

Du Kich v. Blair (D. C.) 3 F.(2d) 302.

Lipke v. Lederer, 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061.

Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013.

For other cases see Decennial Digests, Aliens ¶58; Constitutional Law ¶286, 318; Internal Revenue ¶4, 45.

Q. 60. A state statute made the violation of rate orders made by its Public Utilities Commission upon proper notice and hearing punishable by a heavy fine as a contempt, made each day's violation a separate offense, and provided for no judicial review of such orders, except in the proceedings to punish for said contempts. Does this statute provide a constitutional procedure for testing rate orders claimed to effect a confiscation of property?

A. Due process of law requires a judicial review of rate orders claimed to be confiscatory. The statute in question does provide for a form of judicial review thereof. This, however, is not sufficient. Due process further requires that that right be not so burdened with risks as to effect a practical denial thereof. It is thus unreasonably burdened if the penalties that can be imposed, if the prescribed procedure is pursued without success, are such as might well deter the boldest and most confident from taking such risk, or where submission to an unconstitutional imposition is the lesser evil. The statute in question imposes such severe penalties as to operate as a strong deterrent to the assertion of a constitutional right, and is invalid because it subjects the exercise of that right to an unreasonable burden. This of itself deprives A Co. of its property without due process of law, without regard to the constitutionality of the rates prescribed.

Oklahoma Operating Co. v. Love, 40 S. Ct. 338, 252 U. S. 331, 64 L. Ed. 596.
 State ex rel. Dushek v. Watland (N. D.) 201 N. W. 680, 39 A. L. R. 1169.
 For other cases see Decennial Digests, Constitutional Law ¶249, 298
 (1), 303, 316.

Q. 61. A state statute authorizes the trial courts of the state to strike out the defendant's answer, and give judgment for the plaintiff, whenever the defendant shall have refused to obey an order directing discovery or inspection of books or other property in his possession. D's answer to P's suit contained affirmative defenses. D refused to obey an order directing discovery that related solely to proof of damages. The court, acting by authority of said statute, struck out D's answer and gave judgment for P. D claims that this action of the court and the statute on which it is based deprive him of his property without due process of law. Is his claim valid?

A. The statute in question prescribes a rule of procedure. A state can prescribe reasonable procedural rules, but due process prevents it from prescribing rules, if their effect is to deny a fair trial. It prevents a denial of a right to defend as a mere punishment for refusal to obey an order of the court, but permits the

creation of presumptions. The effect of a statute permitting an order to strike out a defense for refusal to obey an order for discovery is in substance to establish a presumption of the want of merit in the asserted defense. But to be valid the presumption must be reasonable, in the sense that there must be in fact a reasonable connection between the inference authorized to be drawn and the facts from which it can be drawn. It is unreasonable to draw the inference that the affirmative defenses in D's answer lack merit from the failure to obey a discovery order relating to the measure of damages only. Hence the court's act in striking D's entire answer denies D due process, and so does the statute in question, in so far as it permits such procedure.

Hammond Packing Co. v. Arkansas, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

Hovey v. Elliott, 17 S. Ct. 841, 167 U. S. 409, 42 L. Ed. 215.

Feingold v. Walworth Bros., 144 N. E. 675, 238 N. Y. 446.

For other cases see *Decennial Digests, Constitutional Law* ⇐ 273, 312.

Q. 62. D, a resident of state A, who has left that state, not intending to return, but who has not yet acquired a residence elsewhere, is sued in that state by P. D is served by publication, but did not appear. P. obtains a personal judgment against D. Thereafter P sues D on said judgment in state B. Is P entitled to a judgment in the latter action? What would the answer be, had D been a nonresident of state A?

A. The judgment in the court of state A imposed upon D a personal liability. A court cannot, consistently with due process, impose such a liability, unless it has jurisdiction over the person of the defendant. To acquire such jurisdiction there must be service of process upon him, in order that he may have notice that a matter touching his legal position is to be determined. To dispense with personal service upon the defendant in the state of the court in which the action is being brought, the substituted service must be that which is most likely to reach the defendant, and service by publication is not valid. Hence the court of state A had no jurisdiction to render a personal judgment against D, and the judgment would be void, even in state A. The full faith and credit clause requires one state to give to the judgments of a court of another state only such force and effect as they would have in the latter. Since the judgment is void and of no effect in state A, state B need not give it any effect. Hence P is not entitled to judgment in his action in state B. The answer would be the same if D had been a nonresident of state A, for the only kind of service that can

give the courts of one state personal jurisdiction over nonresident individuals is personal service within it, on some legal equivalent thereof.

McDonald v. Mabee, 37 S. Ct. 343, 243 U. S. 90, 61 L. Ed. 608, L. R. A. 1917F, 458.

Flexner v. Farson, 39 S. Ct. 97, 248 U. S. 289, 63 L. Ed. 250.

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

For other cases see Decennial Digests, Constitutional Law ⇨309(1, 2, 3).

Q. 63. P, a resident of state A, brought divorce proceedings there-in against D, a resident of state B. The bill of divorce contained a prayer for alimony. Upon filing the bill the court enjoined a bank within state A, in which D kept a deposit, from paying out any part thereof, except on its order. D was served by publication, but did not appear to defend the action. The decree rendered granted P her divorce and awarded her alimony up to the amount of D's deposit in said bank, which was ordered paid to P. Is the divorce valid in state A? Is the alimony decree in the form rendered valid?

A. Actions for divorce are proceedings in rem, having for their purpose the determination of status of residents. Service by publication is all that due process requires in proceedings in rem. The divorce is valid in state A. The judgment awarding alimony in the form rendered in effect determines no more than that P is entitled to the bank deposit. It does not purport to impose on D any personal liability, but only to determine who is entitled to that property. Proceedings of that kind are quasi in rem. They are valid under the due process clause only if the property is within the borders of the state, if it is seized and brought within the control of the court at the commencement of the proceedings, and if the owner is given an opportunity to be heard. The second requisite was satisfied by the injunction issued against the bank, which was as effective a seizure as the ordinary attachment process. The third requisite is satisfied by service by publication. The alimony decree in the form rendered is valid.

Pennington v. Fourth Nat. Bank of Cincinnati, 37 S. Ct. 282, 243 U. S. 269, 61 L. Ed. 713, L. R. A. 1917F, 1159.

American Land Co. v. Zeiss, 31 S. Ct. 200, 219 U. S. 47, 55 L. Ed. 82.

For other cases see Decennial Digests, Constitutional Law ⇨306, 312.

SECTION 10.—DUE PROCESS IN TAXATION

Q. 64. The laws of a state in which grain farming is an important industry provide for the issuance by the state of its bonds and the use of its taxing power to finance the construction and operation

by it of public grain elevators, and also the purchase by it of the bonds of farmers' co-operative grain elevator associations. In an appropriate taxpayer's suit the claim is made that said laws deprive the taxpayer of property without due process of law. Is the contention valid?

A. The due process clause of the Fourteenth Amendment prohibits a state from using its credit or taxing power for any but public purposes. The laws in question provide for the use of said powers for two distinct purposes: (1) To finance the public operation of a business enterprise; and (2) to give financial assistance to private persons engaged in the same enterprise. The enterprises are of the character whose prosecution is usually left to private initiative. Due process does not, however, perpetuate the distribution of public and private enterprises existing at any given time. The state is at liberty to expand the field of public operation, if that is a reasonable method for advancing a sufficient public interest. The use of its credit and taxing power to finance it is then a use thereof for a public purpose. The general, though indirect, public benefits from publicly owned and operated grain elevators in an agricultural state constitute a sufficient public interest, and the use of the state's credit and taxing power to finance it is a use for a public purpose and valid. In the case of financial aid to privately owned and operated elevators, the private benefit aspects predominate over the public interest, and the use of the state's credit and taxing power is their use for a private purpose and hence invalid.

Green v. Frazier, 40 S. Ct. 499, 253 U. S. 233, 64 L. Ed. 878.

Vette v. Childers, 228 P. 145, 102 Okl. 140.

For other cases see Decennial Digests, Constitutional Law ☞283; States ☞114; Taxation ☞38.

Q. 65. A Co. is a corporation organized under the laws of state B, that does business in state C. It also owns a steamboat that operates between points in the United States and Mexico, but is never permanently in any place in either country, but physical facts make it absolutely impossible for it ever to be present in state B. Both states tax said steamboat and certain credits belonging to A Co. arising out of its business in state C. Discuss the validity of these taxes under the due process clause of the Fourteenth Amendment.

A. The due process clause prohibits a state from taxing property that has its situs outside the state. Situs is a legal fact, that depends upon certain other facts, that vary according as the prop-

erty is tangible or intangible. The most significant of these facts in the case of tangible property is relatively permanent presence within the state, except that situs within the state of the owner's domicile can be predicated upon the mere absence of situs elsewhere, even though the property is not present therein at all. Due process permits giving effect in such a case to the legal maxim that the situs of movables is at the owner's domicile. This exception operates only in favor of the state of the owner's domicile. The steamboat has no situs elsewhere, and hence state B can tax it, but state C cannot. Due process permits intangibles used in or arising out of business transacted within a state to be given a situs within such state, but does not prevent the state of the owner's domicile from at the same time giving them a situs also in it. Hence both states can tax the credits arising out of A Co's business operation in state C.

Southern Pac. Co. v. Kentucky, 32 S. Ct. 13, 222 U. S. 63, 56 L. Ed. 96.

Buck v. Beach, 27 S. Ct. 712, 206 U. S. 392, 51 L. Ed. 1106, 11 Ann. Cas. 732.

Fidelity & Columbia Trust Co. v. Louisville, 38 S. Ct. 40, 245 U. S. 54, 62 L. Ed. 145, L. R. A. 1918C, 124.

For other cases see *Decennial Digests, Constitutional Law* ¶283; *Taxation* ¶98.

Q. 66. A is a citizen of the United States domiciled in Mexico. His last domicile within the United States was in state B. None of his income is derived from sources within state B or the United States. State B imposes an income tax upon the entire net income of its citizens, and provides that citizens of the state domiciled abroad shall be subject thereto. The United States does the same. Can either state B or the United States impose such tax on A?

A. The taxes imposed on A by these statutes can be sustained only as taxes on the person, since there is no property within either state B or the United States on which they could be deemed to be imposed. The due process clause of both the Fourteenth and the Fifth Amendments requires that there be jurisdiction over the person subjected to a personal tax. The usual facts on which, consistently with due process, jurisdiction to impose such a tax can be predicated, are domicile, residence, and presence other than as a mere incident to transit through the state. Citizenship is such a fact, in the case of such taxes imposed by the United States. This is based on the theory that the citizen derives protection from the United States, even when domiciled abroad. Since that reason does not apply to the state, it cannot base such jurisdiction on

the fact of state citizenship. Hence state B cannot constitutionally impose the tax in question on A, but the United States can.

Cook v. Tait, 44 S. Ct. 444, 265 U. S. 47, 68 L. Ed. 895.

Haavik v. Alaska Packers' Ass'n, 44 S. Ct. 177, 263 U. S. 510, 68 L. Ed. 414.
For other cases see *Decennial Digests, Constitutional Law* ¶287; *Internal Revenue* ¶7.

Q. 67. The assessment officers of a tax district of state A have for several years adopted a policy of assessing the property of manufacturing concerns at less than its full value, while assessing all other property at its full value. The statutes of the state require all property to be assessed at its full value. Have the owners of the latter a right to have their value reduced?

A. The act of the assessors is the act of the state. Their systematic and intentional undervaluation of the property of some, while that of others is assessed at its full value, constitutes a denial by the state of the equal protection of the laws to the latter. Though this is a discrimination that should logically be removed by procuring the underassessed property to be assessed at its full value, as the state statute requires, still, because it is utterly impossible for the injured taxpayers to secure by any judicial proceeding an increase in the assessment of the mass of underassessed property, the injured taxpayers have the right to have their assessments reduced to the same basis as applied to the favored taxpayers, even though this produces a departure from the requirement of the state statute. Where it is impossible to secure both the statutory standard and the equality required by the Constitution, the latter must be preferred.

Sioux City Bridge Co. v. Dakota County, 43 S. Ct. 190, 260 U. S. 441, 67 L. Ed. 340, 28 A. L. R. 979.

Raymond v. Chicago Union Trust Co., 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 767.

For other cases see *Decennial Digests, Constitutional Law* ¶229(3); *Taxation* ¶40(8), 451.

Q. 68. A state Legislature created a special drainage district, and included therein an island, which, being high land, was not, and could not be, directly or indirectly benefited by the improvement. The owner thereof resisted the collection of the assessment on his land, on the ground that its inclusion in said district denied him due process of law. Is his contention valid?

A. State Legislatures have the power to create special tax districts, the lands in which are to be taxed for the cost of an improvement from which they receive some special benefit. The leg-

islative determination of what lands will be benefited and the extent thereof is valid, unless the results produced are wholly arbitrary. The purpose for creating a special tax district in the instant case was to charge the cost of the improvement to the lands to be specially benefited thereby. The inclusion of the island, which neither did nor could receive any benefit whatever, is wholly arbitrary, and takes property without due process of law.

Myles Salt Co. v. Board of Com'rs of Drainage Dist., 36 S. Ct. 204, 239 U. S. 478, 60 L. Ed. 392.

Milheim v. Moffat Tunnel Imp. Dist., 43 S. Ct. 694, 262 U. S. 710, 67 L. Ed. 1194.

For other cases see *Decennial Digests, Constitutional Law* ⇨289, 290(1).

SECTION 11.—EMINENT DOMAIN

Q. 69. A company upon which the state has conferred the power of eminent domain brings proceedings to condemn a right of way across A's lands for carrying across it the high tension line used by it in distributing the electric power generated from water power within the state. The company's only business was to manufacture electric current produced by water power and to sell the same to the public for power uses only. Can A's land be condemned for the purposes for which the company intends to use it?

A. The due process clause of the Fourteenth Amendment prohibits a state from condemning or authorizing the condemnation of private property, except for public uses. The power has been conferred upon the company as an incident to the development by it of the state's natural water power resources. The widespread benefit to the state from preventing the waste of that power makes the use a public one. It is not necessary that the public as a whole be the direct beneficiaries of such use, as there are public interests in respect of which this is not true, which are still of sufficient importance to warrant a state in advancing them by resort to its power of eminent domain. Federal courts attach great weight to the state's determination that a given use is a public one, in the light of the conditions existing in such state.

Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 36 S. Ct. 234, 240 U. S. 30, 60 L. Ed. 507.

Opinion of the Justices, 91 N. E. 405, 204 Mass. 607, 27 L. R. A. (N. S.) 488.

For other cases see *Decennial Digests, Eminent Domain* ⇨19, 35.

Q. 70. A had a contract with B Co., under which the latter agreed to sell him a quantity of steel plate. Before any deliveries had been made thereunder, The United States requisitioned the en-

tire output of B Co.'s plant, as a result of which B Co. could not perform its contract with A. A sues the United States for the value of his contract, under a statute authorizing suits to recover the value of property taken by the United States. Is A entitled to recover?

A. The Fifth Amendment prohibits the United States from taking private property for public use without just compensation. The duty to compensate, which the statute in question is intended to make effective, exists only if there has been a taking. It does not exist if property is injured or destroyed as an incidental result of a lawful action without a taking. The United States in the instant case took, not the contract, but B Co.'s product, which, but for that, would have been applied to satisfying A's contract. The destruction of the contract was an incidental result of a lawful governmental act. Hence A cannot recover, nor is the failure to provide him compensation for his incidental loss a violation of the constitutional provision requiring just compensation to be made for property taken for public use.

Omnia Commercial Co. v. U. S., 43 S. Ct. 437, 261 U. S. 502, 67 L. Ed. 773.
U. S. v. Cress, 37 S. Ct. 380, 243 U. S. 316, 61 L. Ed. 746.

For other cases see *Decennial Digests*, *Eminent Domain* §2(1), 98.

Q. 71. A owns property in the neighborhood of, but not abutting on, R Co.'s railway line near the opening of a tunnel; the smoke and gases generated by the operation of trains within the tunnel are expelled therefrom by artificial means in such manner as to be projected over A's property, as a result of which it has become less habitable than otherwise, and its value lessened. The tunnel was constructed under authority of a state statute, which purported to relieve R Co. from liability for damages of the kind suffered by A. In a suit to recover damages therefor, A claims that said provision is unconstitutional. Is his contention valid?

A. The prohibition against taking property for public use without just compensation does not prevent the Legislature from legalizing what would otherwise be a public nuisance, nor does it require compensation for consequential damages to those no part of whose property is actually appropriated. It does prevent conferring immunity from action for private nuisances of such a character as to amount in effect to a taking of private property for public use. The injury to A's property from constantly subjecting it to the smoke from the tunnel imposes upon it so special, direct, and substantial a burden as to amount to a taking. Hence the

provision relieving R Co. of liability therefor permits it to take A's property for public use without compensation, and violates the due process clause of the Fourteenth Amendment.

Richards v. Washington Terminal Co., 34 S. Ct. 654, 233 U. S. 546, 58 L. Ed. 1088.

Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S. Ct. 135, 260 U. S. 327, 67 L. Ed. 287.

For other cases see *Decennial Digests*, *Eminent Domain* ¶2(1), 104.

Q. 72. R Co. brought proceedings to condemn A's land for railroad uses. The court entered an order entitling R Co. to enter upon the possession of the land before compensation had been determined or payment made, but required R Co. to deposit in court an adequate sum to cover such compensation as might be awarded. R Co. complied with said order. Thereafter compensation was fixed at a sum which A alleged to be unjust, in that it made no allowance for an element of value which the trial court had decided to be too speculative. Its judgment in this matter was not unreasonable. The proceedings were in accord with state law. Has A's property been taken without due process of law?

A. Private property cannot be taken for public use without just compensation. It is not essential to due process that such compensation be determined or paid before the condemnor be permitted to take possession. It is sufficient if adequate provision therefor be made. The order makes such provision, and is valid. The compensation required to be made must be just, in the sense that it must be based on the value of the property taken. Due process does not require that value to be based on speculative factors that have not at the time of the taking been reflected in its market value, and the judgment thereon of those entrusted with the determination of compensation, while not conclusive, is entitled to the greatest weight. The failure to include the speculative element of value did not deprive A of his property without due process of law.

Backus v. Union Depot Co., 18 S. Ct. 445, 169 U. S. 557, 42 L. Ed. 853.
Appleby v. Buffalo, 31 S. Ct. 699, 221 U. S. 524, 55 L. Ed. 838.

For other cases see *Decennial Digests*, *Constitutional Law* ¶280, 314;
Eminent Domain ¶122.

SECTION 12.—CONTRACT CLAUSE

Q. 73. A and B made a contract, under which B removed a dam that interfered with A's water approach to his land, and B agreed that thereafter he would not interfere therewith. Thereafter the

state Legislature authorized B to construct a dam for the development of water power which would interfere with A's water approach to his land. A sues to enjoin B from erecting said dam. Decide the case.

A. The Constitution prohibits a state from passing any law impairing the obligation of contracts. The obligation of a contract is the law that binds the parties thereto to perform their agreements. B's construction of the dam would be in contravention of his obligation to A, assumed by the contract between them. The statute authorizing B to do so, therefore, purports to relieve B of that obligation. Every contract is, however, deemed to have been made subject to be affected by valid exercises of the state's police power. Hence it was part of the obligation of the contract between A and B that B's promise was made subject to a valid exercise of that power, and its exercise does not constitute an impairment of the obligation of that contract. The statute in question is a valid exercise of that power, because promotive of the general welfare. Judgment for B.

Manigault v. Springs, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

Grand Trunk Western R. Co. v. South Bend, 33 S. Ct. 303, 227 U. S. 544, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405.

For other cases see *Decennial Digests*, Constitutional Law ¶117, ¶134, ¶154(1).

Q. 74. A became indebted to B on a note at a time when the laws of the state in which the transaction occurred made the proceeds of life insurance policies on the life of a debtor payable to his estate includible in the property on which execution could be levied. After the debt had been incurred the state enacted a law exempting said proceeds from such levy. Can that statute constitutionally apply so as to prevent B from levying on the proceeds of policies on A's life taken out after the debt was incurred?

A. When A took out said policies upon his life they became his property subject to the claims of his creditors. The fact that the policies were taken out after the debt was incurred is immaterial, since future acquisitions of a debtor are equally liable as his property owned at the time the debt was incurred. Hence the effect of the statute in question diminished the property out of which B could satisfy his contract claim, and thereby diminished the value of that contract. This impairs its obligation. Hence the statute is unconstitutional as applied to B's claim, and B cannot be prevented by it from levying on the proceeds of the policies in ques-

tion. Remedies can be changed, provided another remedy, at least as efficacious as the former, is given.

Bank of Minden v. Clement, 41 S. Ct. 408, 256 U. S. 126, 65 L. Ed. 857.

Pittsburgh Steel Co. v. Baltimore Equitable Society, 33 S. Ct. 167, 226 U. S. 455, 57 L. Ed. 297.

For other cases see *Decennial Digests, Constitutional Law* ¶¶169, 180.

Q. 75. A state granted a water company incorporated by it an assignable contract right to take free of charge an unlimited quantity of water from a river within the state. Thereafter said company, with statutory authority, transferred all its property, rights, and franchises to a municipality of said state. Thereafter the state enacted a law requiring said municipality to pay for the water taken by it from said river. Can the municipality successfully resist payment on the ground that the statute last mentioned impairs the obligation of its contract to take such water free of charge?

A. The right to take the water free of charge, which the municipality acquired from the water company, was a right belonging to it as an agency of the state. The municipality is a political subdivision of the state, created as a convenient agency for the exercise of such of the state's governmental powers as may be intrusted to it. The diversion of waters from the sources of supply for the use of the inhabitants of the state is a proper and legitimate function of the state. The provision against impairing the obligation of contracts does not apply against the state in favor of its own municipalities. The distinction taken in other connections between governmental and proprietary functions of municipalities is not applicable in this connection.

Trenton v. New Jersey, 43 S. Ct. 534, 262 U. S. 182, 67 L. Ed. 937, 29 A. L. R. 1471.

Pawhuska v. Pawhuska Oil & Gas Co., 39 S. Ct. 526, 250 U. S. 394, 63 L. Ed. 1054.

For other cases see *Decennial Digests, Constitutional Law* ¶¶124, 127, 135.

Q. 76. State A, for a valuable consideration, conveyed to B Co. certain lands for the construction by B Co. of a public canal. B Co. covenanted to complete the canal within a specified period. After its failure so to do, the Legislature of state A enacted a law converting said covenant into a condition subsequent, and declaring a forfeiture of the lands because of its breach. State A sues to recover possession of the lands, basing its right to do so on the statute last mentioned. Is it entitled to do so?

A. A conveyance is a contract within the protection of the contract clause. The statute in question converts a covenant into a condition subsequent, violation of which is ground for forfeiture of the property granted. This imposes on B Co. a heavier burden than was originally imposed upon it. The impairment of the obligation of a contract may consist in increasing its burdens, as well as in diminishing its remedies. State A is not entitled to recover possession.

In the case of an executed grant, it would seem on principle that there is no obligation to be impaired, as in the case of executory contracts, and that the rights of the grantee should be protected on the ground of being vested rights. But the contrary is held, and the doctrine is still expressed in terms of contract. *Columbia Ry., Gas & E. Co. v. South Carolina*, 43 S. Ct. 306, 261 U. S. 236, 67 L. Ed. 629; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162.

In the famous *Dartmouth College Case* it was held that the charter of Dartmouth College, granted by the English crown in 1709, constituted a contract, which the state of New Hampshire, as successor in sovereignty to the English crown, was prohibited from impairing. Corporate charters are contracts, within the protection of the federal Constitution, but the states usually reserve the power to alter, amend, and repeal them. *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629. Limitations have been found even upon this reserved power.

For other cases see *Decennial Digests, Constitutional Law* ¶115, 120, 121 (1), 123, 125.

Q. 77. A sued B for breach of a contract between them. On a first appeal of the case to the state Supreme Court, that court adopted one construction of the contract. On a second appeal, after a retrial in the lower court, the state Supreme Court adopted a different construction of the contract. Does this change in judicial decision violate the contract clause?

A. The contract clause is directed against impairment of contracts by legislative action. It affords no protection against the impairment of the obligation of a contract by judicial decision. Hence the change in judicial decision in the instant case does not violate the contract clause.

Rooker v. Fidelity Trust Co., 43 S. Ct. 288, 261 U. S. 114, 67 L. Ed. 556. For other cases see *Decennial Digests, Courts* ¶394(9).

CONTRACTS

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Section

1. Mutual Assent.
2. Consideration and Seals.
3. Assignment, Beneficiaries, and Joint Contracts.
4. Conditions, Express and Implied.
5. Impossibility and Unforeseen Contingencies.
6. Illegality.
7. Discharge and Statute of Frauds.

SECTION 1.—MUTUAL ASSENT

Q. 1. A guest at a hotel negligently knocks out of the waiter's hand a bottle of wine, which he was carrying to another guest. Must he pay for the broken bottle the price of \$5, marked on the wine list, or only \$2, the ordinary retail price of that wine?

A. Two dollars, the general market price of the wine. The measure of damages in tort is the loss caused the plaintiff. To constitute a contractual agreement, there must be an offer and an acceptance, express or implied. So, if A puts up a sign forbidding trespassers to enter, and giving notice that he will charge \$100 a time to any one who crosses his land or takes water from his well in violation of this notice, no acceptance or agreement to pay \$100 can be inferred from B's act, done in defiance of A's notice, which is a mere warning, and not an offer to make a contract.

Wright v. Sonoma Co., 105 P. 409, 156 Cal. 475, 134 Am. St. Rep. 140.
Compare Taylor v. Dexter Engine Co., 16 N. E. 462, 146 Mass. 613.
For other cases see Decennial Digests, Contracts $\hookrightarrow$ 4.

Q. 2. A, a spinster, resided with B, her brother, who was a widower. She kept house for him, and cared for his little children for six years, but received no compensation, and nothing was said on the subject. After B's death, A put in a claim against his estate for reasonable compensation for her services as housekeeper. Can she recover?

A. Ordinarily, where one renders service for another, there is to be inferred an intent to charge and a promise to pay the reasonable value therefor. But where the one rendering the service is a member of the family, receiving support therein, the presumption arises that the services are gratuitous. A, therefore, cannot recover any pay for the services in addition to the home and living which she has

received, in the absence of proof that the defendant as a reasonable man ought to have understood that the services were rendered for pay and not merely for love.

Spencer v. Spencer, 63 N. E. 947, 181 Mass. 471; *Disbrow v. Durand*, 24 A. 545, 54 N. J. Law, 343, 33 Am. St. Rep. 678.

Snyder v. Guthrie, 187 N. W. 953, 192 Iowa, 624, 24 A. L. R. 950.

For other cases see *Decennial Digests, Executors and Administrators* 206(1); *Work and Labor* 7(6).

Q. 3. D, a blacksmith, was much excited by the theft of a set of harness, worth perhaps \$15, and exclaimed, "I will give \$100 to any man who will find out who the thief is, and I will give a lawyer \$100 for prosecuting him," using rough language and abusive epithets concerning the thief. P discovered the thief, notified D, and claims the reward. Was a contract made?

A. No; a proposition made in such extravagant terms, and under such circumstances that it cannot be reasonably understood as seriously intended, cannot be taken as an offer of a contract. The language used might well be regarded as the extravagant exclamation of an excited man, not seriously intended as a matter of business. But a person may be precluded from denying the reality of an apparent offer, where a person is reasonably led to take it seriously and act upon it. It is not alone a question of how D intended his proposal, whether in jest, or bluster, or seriously, but rather how P reasonably understood that D intended it.

Higgins v. Lessig, 49 Ill. App. 459.

Plate v. Durst, 24 S. E. 530, 42 W. Va. 63, 32 L. R. A. 404.

For other cases see *Decennial Digests, Rewards* 3; *Work and Labor* 7(1).

Q. 4. A made B a written offer to sell his house for \$15,000, in which it was stated that the offer would remain open for one week from date. The next day A changed his plans and made great efforts to find B, in order to revoke his offer. He finally sent a letter of revocation to B's house, which was delivered there. B, however, had closed his house and left town, without leaving any forwarding address. Within the week B mailed his acceptance of A's offer, being in ignorance of A's attempt to revoke it. The acceptance was duly received. Is there a contract?

A. Probably yes; to effect a revocation the proposer must actually notify the other party of the withdrawal of the offer, directly or indirectly. Delivery of the revocation at B's office, where some one was in charge of his business, might amount to communication, but delivery at an empty house would be very doubtful. An offer

may be revoked before it is accepted, but it confers on the offeree a power of acceptance during the time it is stated to continue, unless the proposer is able to communicate the notice of revocation. As soon as the notice is delivered to the offeree, it may be deemed to be communicated, though not actually read by him.

Brauer v. Shaw, 46 N. E. 617, 168 Mass. 198, 60 Am. St. Rep. 387.

Hoban v. Hudson, 152 N. W. 723, 129 Minn. 335, L. R. A. 1916B, 1114.

Holmes v. Myles, 37 So. 588, 141 Ala. 401.

Watters v. Lincoln, 135 N. W. 712, 29 S. D. 98.

For other cases see Decennial Digests, Contracts ⇨19, 20; Notice ⇨10; Specific Performance ⇨19.

K. uncertain
Q. 5. C agreed with S that he would enter a contract to sell S all the pine timber upon certain lands belonging to C, if S elected to purchase within 90 days. The proposal was that S should agree to cut into logs, haul, and deliver at the boom or other place of delivery to be in said contract agreed upon all said pine timber. S was to resell the same at a price of not less than \$9 per 1,000 feet and pay C one-third of the selling price, to be paid within ——— days after such sale. The amount of timber to be cut in any one year was to be agreed upon and specified in such contract. S elected to purchase, and requested C to sign such a contract, but C refused. S sues for \$73,000 damages. Can he recover on the alleged contract?

A. No; the parties must agree upon and define with certainty the terms of the contract and the things to be performed by each. Courts cannot assume to make bargains for the parties. This offer was uncertain (1) as to the place of delivery; (2) as to the time of payment; (3) as to the amount to be cut in any one year. A contract to enter into a future contract must specify all its essential terms, and leave none to be agreed upon by further negotiation.

Shepard v. Carpenter, 55 N. W. 906, 54 Minn. 153.

Varney v. Ditmars, 111 N. E. 822, 217 N. Y. 223, Ann. Cas. 1916B, 758.

For other cases see Decennial Digests, Contracts ⇨33; Master and Servant ⇨3(1).

See separate K. "Fair share" K.
Q. 6. A entered the employment of B, under a contract whereby B agreed to give A, in addition to his wages of \$40 per week, a "fair share of the profits of the business," to be determined on the 1st of January. Will this agreement give a right of action against B for discharging A before January 1st?

A. It is held by the New York courts that what is a "fair share" of the profits is wholly indefinite, vague, and uncertain. Varney v. Ditmars, 111 N. E. 822, 217 N. Y. 223. See 3 Va. Law Rev. 640. The minds of the parties never met upon any particular share

of the defendant's profits, nor upon any plan by which such share could be computed or determined. The agreement in this respect was never consummated, but was left to future negotiation. It has been held that, in case of sales, parties may use the term "fair and reasonable price" as equivalent to market value, which can be ascertained from those competent to testify, and is not pure conjecture merely. But "good wages," or "fair share," or "what is right" would furnish no sufficient standard to some courts, though it might to others.

Brennan v. Employers' Liability Assur. Corp., 100 N. E. 633, 213 Mass. 365; *Fairplay School Tp. v. O'Neal*, 26 N. E. 686, 127 Ind. 95.

For other cases see *Decennial Digests, Contracts* 9(1), (2); *Master and Servant* 3(1); *Schools* 135(3).

Q. 7. D, a manufacturer, sent a circular letter to P, a jobber, stating: "We have prepared and are sending under this cover by registered post a printed document setting forth the terms and conditions upon which the Iver Johnson revolvers will be supplied to the jobbing trade. * * * Hereafter no order will be filled, except on the terms set forth in the inclosed document." Plaintiff sent in an order for revolvers on the terms stated, which defendant refused to fill. What are plaintiff's rights?

A. This circular is not an offer which can be accepted by P's sending an order for a certain number of revolvers, but only an invitation for offers. Offers must be distinguished from mere advertisements and preliminary negotiations. It should be construed as a proposal, if the natural understanding of a reasonable person would be that it was intended as a positive offer to the person addressed.

Montgomery Ward & Co. v. Johnson, 95 N. E. 290, 209 Mass. 89.

Cox v. Denton, 180 P. 261, 104 Kan. 516.

Neb. Seed Co. v. Harsh, 152 N. W. 310, 98 Neb. 89, L. R. A. 1915F, 824.

Blakeslee v. Nelson, 207 N. Y. S. 676, 212 App. Div. 219.

Lovett v. Frederick Loeser & Co., 207 N. Y. S. 753, 124 Misc. Rep. 81 (department store's advertisement of radio sets at a reduction, your choice complete, held not an offer to sell any model demanded).

For other cases see *Decennial Digests, Sales* 22(1, 3), 32; *Vendor and Purchaser* 16(1).

Q. 8. The Wisconsin Central Railway Company advertised that at a specified time and place it would sell certain buildings at public auction. At the auction sale a certain house was bid up to \$675. Plaintiff then bid \$680. The auctioneer refused to accept the bid, because the raise was too insignificant, and later sold the house to the previous bidder for \$675. Plaintiff sued the railway company for the refusal of the auctioneer to accept plaintiff's bid, and recovered a verdict for \$1,500. From an order denying defendant's motion for

judgment notwithstanding the verdict or for a new trial, defendant appeals.

A. Judgment for the defendant. An auctioneer may withdraw property put up for sale, if dissatisfied with the bids, as he merely calls for offers. Each bid is an offer to purchase at the price named. Until the bid is accepted by the auctioneer, either the goods or the bid may be withdrawn. The advertisement of the sale or the call for bids is not an offer to sell to the person who becomes the highest bidder, but a preliminary negotiation.

Anderson v. Wisconsin Cent. R. Co., 120 N. W. 39, 107 Minn. 296, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.
For other cases see *Decennial Digests, Auctions and Auctioneers* ⇨7.

Q. 9. X advertised that on June 1, 1925, he would hold an auction sale of his rugs, paintings, etc., the sale to be to the highest bidder for cash and "without reserve." At the sale A, the auctioneer, announced that, as soon as two bids for any article were received, there could be no withdrawal of any bid and no withdrawal of the article put up. R and S made bids for a certain painting put up; R bidding \$9,000 and S bidding \$9,100. There were no other bids. A, after trying for other bids, announced that the painting was worth at least \$30,000, that he would not knock it down to S for the \$9,100, and that on X's orders it was withdrawn from sale. S at once tendered the \$9,100 to A and to X, and demanded the painting, but the tender and the demand were ignored. The painting actually was worth \$35,000, and on June 9 X sold and delivered it to Y for that sum. What are the rights of the parties?

A. Under the Uniform Sales Act, enacted in a majority of the states, goods cannot be withdrawn after the bidding is begun, if it has been announced that the goods will be sold "without reserve." Uniform Sales Act, § 21 (2). It is barely possible that a preliminary contract to observe the advertised conditions might be found apart from statute, in consideration of participation in the auction sale.

Warlow v. Harrison, 1 El. & El. 295, 309.

But see *Anderson v. Wisconsin Cent. R. Co.*, supra, question 8.

For other cases see *Decennial Digests, Auctions and Auctioneers* ⇨7.

Q. 10. Defendant, without any consideration therefor, gave plaintiff a 30-day written option, not under seal, to purchase certain land for \$10,000. Within the 30 days, plaintiff notified defendant of plaintiff's election to take the land and tendered the money, together with a conveyance which he requested defendant to execute, but defendant refused.

(a) Was plaintiff entitled to specific performance, and why, or why not?

(b) If the option had been under seal, and defendant had notified plaintiff that the option was withdrawn prior to the giving of the notice by plaintiff, would the latter have been entitled to specific performance, and why, or why not?

A. (a) Plaintiff was entitled to specific performance. The 30-day "option," not under seal, was only an offer to contract, and defendant might have withdrawn it at any time before acceptance. But an acceptance while the offer continued in full force completed a valid contract, which is of a class specifically enforceable. *Boston & M. R. v. Bartlett*, 3 Cush. (Mass.) 224; *Walter G. Reese Co. v. House*, 124 P. 442, 162 Cal. 740.

(b) In some jurisdictions, where instruments under seal still require no consideration, an option under seal is irrevocable, and the parties giving the option cannot revoke their offer. But in many states the common-law force of the seal is taken away, and the presence of a seal will not prevent the revocation of an offer made without valuable consideration to keep it open. *Hartford-Connecticut Trust Co. v. Devine*, 116 A. 239, 97 Conn. 193, 21 A. L. R. 134. *Thomason v. Bescher*, 97 S. E. 654, 176 N. C. 622, 2 A. L. R. 626.

For other cases see *Decennial Digests, Contracts* §48; *Specific Performance* §37; *Vendor and Purchaser* §18(1, 3, 4).

Q. 11. A negotiated with B for the purchase of a horse. On January 2d he wrote B, offering to buy the horse for \$150, and added: "If I hear no more about him, I shall consider the horse is mine at \$150." B sent no reply, but on February 25th told C, an auctioneer employed by B, that the horse had been sold. Later C, by mistake, sold the horse to D. Was a contract concluded by B's mental assent or acquiescence in A's offer?

A. No; A could not impose upon B a sale by a notice that acceptance would result from failure to repudiate or refuse the offer. The mere fact that B intended in his own mind to accept is no sufficient expression of assent to make a bargain or bind B. Mutual assent must be expressed. An acceptance may be expressed, either by a communication or by the doing of some overt act prescribed or indicated by the offerer as a method of acceptance.

Feldhouse v. Bindley, 11 C. B. (N. S.) 869.

Bowley v. Fuller, 115 A. 466, 121 Me. 466, 24 A. L. R. 964.

For other cases, see *Decennial Digests, Contracts* §22(1).

Effect of failure to reply to notice of rate at which goods then on the premises may be left, see *Decennial Digests, Contracts*, §22.

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Q. 12. Suppose A makes B an offer of this sort: "I offer to sell you 100 shares of stock at \$50 per share, and unless I hear from you by next Wednesday I shall conclude that you have accepted my offer." The offeror does not get any word. Can he conclude that there is a contract?

A. No; silence does not give consent. The person addressed has a right to say: "Confound his impudence, I am not going to waste a postage stamp on him; but I don't accept his offer. He has no business to suppose that, if he doesn't hear from me to the contrary, I assent." Prof. Samuel Williston's Lectures on Commercial Law, p. 13.

Prescott v. Jones, 41 A. 352, 69 N. H. 305.

For other cases see Decennial Digests, Contracts ⚡422; Insurance ⚡103.

Q. 13. On several prior occasions, plaintiff without previous negotiations had sent shipments of eel skins to defendant, who had each time accepted and paid for them at the market price. Plaintiff now sends a shipment of eel skins to defendant, who examines them, finds them unsatisfactory, lets them lie in his warehouse for some months, and takes no steps to notify plaintiff with respect thereto. They were destroyed by accidental fire. Plaintiff now sues for the market price of the last shipment. Should he recover?

A. Yes; the previous course of dealings imposed a duty on the buyer to act, because it had given the seller reason to suppose that silence and retention of the goods indicated acceptance of the offer. Hobbs v. Massasoit Whip Co., 33 N. E. 495, 158 Mass. 194. See Cavanaugh v. D. W. Ranlet Co., 118 N. E. 650, 229 Mass. 366; 10 Cornell Law Quart. 250. So in sales on approval, if the buyer keeps the goods more than a reasonable time, this may amount to an assent to take the goods. Ostman v. Lee, 101 A. 23, 91 Conn. 731; Evans Piano Co. v. Tully, 76 So. 833, 116 Miss. 267, L. R. A. 1918B, 870; 27 Yale Law J. 272, 441, 561.

For other cases see Decennial Digests, Sales ⚡53(2), 168½(10), 178(3).

orders { Q. 14. (a) B gives to traveling salesman of A an order for a bill of goods, which order the salesman forwards to his employer. Before A acknowledges receipt of the order, he receives from B a letter countermanding the order. Has A any cause of action against B?

(b) If, in the above case, the order had been signed by B, and had contained a provision that it was subject to approval by A and not subject to countermand by B, would the result be changed?

(c) Suppose that, in the above case, A received the letter con-

taining the order from the salesman and a letter from B revoking the order in the same mail. Without opening B's letter, A filled the order and shipped it. Would B be obliged to take the goods?

A. (a) A has no cause of action, because the offer is revoked before A has accepted it.

(b) Orders solicited by drummers for wholesalers are not ordinarily binding until accepted. The provision that the order is not subject to countermand by B is simply an attempt to make an offer irrevocable. Until A is bound, B is not bound, and so the result is not changed. There are some cases which hold that silence for an unreasonable length of time may raise a justifiable inference of acceptance of an order so solicited, where the customer is relying on the goods ordered. The circumstances give rise to a duty not to permit another to be misled by silent acquiescence. See *Cole-McIntyre-Norfleet Co. v. Holloway*, 214 S. W. 817, 141 Tenn. 679, 7 A. L. R. 1683; *T. C. May Co. v. Menzies Shoe Co.*, 113 S. E. 593, 184 N. C. 150; 29 Yale Law J. 441; *Challenge Wind & Feed Mill Co. v. Kerr*, 53 N. W. 555, 93 Mich. 328.

(c) If A receives a letter of revocation before he accepts the order, it is effective, even though A does not read it. B would not be obliged to take the goods.

For other cases see *Decennial Digests*, *Contracts* ¶22(1); *Principal & Agent* ¶103(9); *Sales* 23(2), (3).

Q. 15. On November 1st A wrote B, offering him ten tons of coal at \$15 per ton, the offer to be accepted by return mail. On November 2d B, answering by return mail, offered to pay \$14 per ton. On November 3d A wrote a second letter to B, identical to his letter of November 1st. On the same day B accepted A's original offer. The letters crossed in the mail. Was there a contract between the parties on November 4th? Give reasons.

A. No; one party must assent to a proposal made by the other to constitute a contract. It can hardly be considered, as a practical matter, that by such a coincidence of offers, crossing in the mails the parties have struck a bargain or made a contractual agreement. B has rejected A's original offer, which on Nov. 3d would have expired by lapse of time, so his attempted acceptance is simply a counter offer.

James v. Marion Fruit Jar Co., 69 Mo. App. 207, 219.

Tinn v. Hoffman, 29 L. T. (N. S.) 271.

See *Morris Asinof & Sons v. Freudenthal*, 186 N. Y. S. 383, 195 App. Div. 79.

For other cases see *Decennial Digests*, *Contracts* ¶20, 22(1); *Sales* ¶23(3).

Q. 16. A orally made B an offer, which expressly provided that B should have 24 hours to consider it, and that in the meantime it should be irrevocable. Within the 24 hours, however, A sent a letter of revocation by messenger, which was received by B within 24 hours from the time when the offer was made. B had, however, a few minutes previously mailed a letter accepting the offer. The acceptance was received after the 24 hours had expired. Is there a contract?

(a) Would a contract be made if the letter of acceptance was lost in the mails?

(b) What if the acceptor withdrew his letter of acceptance, as permitted by the United States postal regulations?

A. Acceptance was complete on the posting of the letter of acceptance by B, if duly stamped and addressed, and if the mail is a proper method of communication under the circumstances. The fact that the offer is made orally does not show that the acceptance must be expressed in the same manner. Where it is within the contemplation of the parties, or according to ordinary usage, that the mail might be used as a means of communication, the acceptance is complete as soon as posted. This is not on the theory that the post office is the agent of the offeror to receive communications, but because B has expressed his assent in a proper manner. *Shubert Theatrical Co. v. Rath* (C. C. A.) 271 F. 827, 834, 20 A. L. R. 846; *Farmers' Produce Co. v. McAlester Storage & Commission Co.*, 150 P. 483, 48 Okl. 488, L. R. A. 1916A, 1297; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268.

(a) The contract, having been concluded by the posting of the acceptance, cannot be unmade, even if the letter of acceptance be delayed or lost in transmission.

(b) The contract being complete on posting the acceptance, it cannot be subject to be defeated by withdrawal of the letter from the mails by the sender. See *Traders' Nat. Bank v. First Nat. Bank*, 217 S. W. 977, 142 Tenn. 229, 9 A. L. R. 382. The outward manifestation of assent is the operative fact, even though the evidence may be concealed or destroyed.

For other cases see *Decennial Digests, Bills and Notes* ¶72; *Contracts* ¶20, 22(1); *Sales* ¶22(3), 53(2).

Q. 17. Professor C. T. Terry puts the following case: "A writes a letter to B, proposing marriage, and B, desiring to make the contract, writes and mails to A a letter, accepting his offer and promising to marry him. The letter is lost in the mail. After waiting

more than a reasonable time, A, thinking that B has declined his offer, in despair marries C. Thereupon, at the suit of B for breach of promise, A will be obliged to pay perhaps heavy damages for not having married the woman whom he was most eager to marry." From this he concludes that there is no sound reason of expediency for the rule in contracts by correspondence that the contract is complete upon the mailing of the letter of acceptance. 22 Col. Law Rev. 686. See, also, 34 Harv. Law Rev. 892; 33 Harv. Law Rev. 209, 214. It is argued that what the offeror requests is a "return promise," and not an act, and that sending a letter, which never arrives, is not the making of a promise. Williston, Contracts, §§ 70, 81; Langdell, Summary of Contracts, §§ 14-16. Langdell even contended that, in principle, the letter of acceptance must be received and read in order to be communicated. Can the prevailing rule be supported, not only on grounds of expediency, but also on logic and legal principle?

A. Yes; if one does not assume unsound major premises. If we assume that "communication" is required, then we must get around it by some fictitious explanation, as that the post office is the agent of both parties. Household Fire etc., Ins. Co. v. Grant, L. R. 4 Exch. Div. 216. But, on the expression theory, an explanation seems possible in accordance with legal theory. The proposer confers on the offeree a power to accept, and the bargain is struck the instant the acceptor expresses his assent to the offer. The mailing of the letter is not, in and of itself, communication, but it is directed to that end. It is an overt act, manifesting the intention to accept and close the deal, put in the proper way of communication. Both parties have assented to the same proposition in a suitable way and are bound. Some authorities might prefer to explain the rule on the theory that delivery of the acceptance to the post office is in effect delivery to the offeror, and that it becomes operative, just as when it is delivered at his office, even though not yet opened or read.

Hallock v. Commercial Ins. Co., 26 N. J. Law, 268, 281.

Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511.

White v. Corlies, 46 N. Y. 467.

Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

26 Yale Law J. 204.

33 Harv. Law Rev. 209, 214.

For other cases see Decennial Digests, Contracts ⇨ 22(1, 3); Sales ⇨ 32.

Q. 18. A, in Boston, mailed a letter accepting an offer by B, in California. Three days before the arrival of the letter, A telegraphed B that the letter was coming, but that he had mailed the

acceptance by reason of a miscalculation and mistake on his part, and that he recalled and countermanded his acceptance. Can B hold A to the contract?

A. The issue presented is this: Can an acceptor, who has mailed his letter of acceptance, but later changes his mind, countermand the letter of acceptance by a telegram, which cancels the acceptance before it reaches the proposer? Probably he cannot. He should not be allowed to recall his acceptance, which was an effective expression of assent when mailed, and thus be enabled to speculate at the risk of the other party. Even if the letter of acceptance was recovered from the post office, the contract would have been made. *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268. But see *Scottish-American Mortg. Co. v. Davis*, 74 S. W. 17, 96 Tex. 504, reversing (Tex. Civ. App.) 72 S. W. 217, 97 Am. St. Rep. 932. The acceptor should no more be able to countermand his letter of acceptance than he could his deed, delivered, or his words of acceptance after they have once issued from his lips.

For other cases see *Decennial Digests, Contracts* ⇨22(1); *Vendor and Purchaser* ⇨28.

Q. 19. (a) Y wrote X, offering to sell to X the farm of Y, known as Greenacre, for \$10,000. X promptly mailed Y a reply letter, acknowledging receipt of the offer, but offering Y only \$9,000 for Greenacre. Afterwards X concluded to accept the \$10,000 offer, and telegraphed Y an acceptance, which reached Y before X's letter did, although that letter arrived promptly. Y then notified X that X could not have Greenacre for less than \$12,000. What are the rights of the parties?

(b) Would your answer be the same if X's letter had been an outright rejection of Y's offer?

A. (a) There seems to be no direct authority, but on principle no practical reason appears why a rejection, resulting from a counter offer sent by mail, should take effect at once on mailing. It is unlike a letter of acceptance, which cannot be recalled, because that would allow the acceptor to speculate at the expense of the offeror. A counter offer, like a revocation, need not be given the effect of destroying the original offer until it is actually communicated. X may therefore accept by telegram which arrives before the letter of rejection kills the offer, whether it is an express rejection or merely an implied one by means of a counter offer.

(b) On theoretical grounds, however, a distinction might be drawn on the ground that an offer only takes effect when it is com-

municated, while an outright rejection might be treated as an overt expression of dissent, which, like acceptance, should take effect on mailing. See 1 Williston, Contracts, § 52.

Q. 20. (a) On Monday, R mailed S an offer to sell to S a described piece of real property for \$10,000, the letter ending: "Please send reply by return mail." S sent R, by return mail, on Tuesday, a letter which read: "Unless you hear from me to the contrary by wire before noon to-morrow, I accept your offer." In the ordinary course of the mail, S's letter to R could not arrive before the afternoon of Wednesday. It did arrive in the afternoon. No telegram having been received by R from S, R, on receipt of S's letter, at once wrote back: "As you did not accept my offer outright, I revoke it." Was there a contract?

(b) If S's letter had been lost in the mail, and no telegram had been sent, would there have been a contract?

(a) It is doubtful. If an offer prescribes the place, time, or manner of acceptance, its terms must be complied with. *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556. This offer called for acceptance by return mail. Strictly, then, the contract would be completed upon mailing the letter of acceptance. S attempts to keep the offer open and preserve his power to accept or reject up to Wednesday afternoon, the time when the reply in due course would be received. This was something not contemplated by the offer. But it may be argued that the method of acceptance by return mail was merely intended to require that R should have his answer by Wednesday afternoon at the latest, the time within which return mail would arrive, and that an acceptance by wire or by special messenger, if received by that time, would be equally effective. See *Tinn v. Hoffman*, 29 L. T. (N. S.) 271, per Brett, J.; 1 Williston, Contracts, § 51a.

(b) If S's letter had been lost in the mail, it would seem that there would not have been a contract, contrary to the usual rule, because the letter was not in itself an unconditional expression of assent to the offer, taking effect on mailing, but was an expression of assent to take effect at a future time, namely, when received, unless a telegram countermanding the letter arrived first. The trouble is, not that there is no communication of the acceptance, but that there has been no expression of acceptance in the manner prescribed.

For other cases see Decennial Digests, Contracts ¶22(1), 24.

Q. 21. A contract for exchange or mutual transfer of property gave one of the parties, A, 30 days from date to examine the property of B, and the contract was not to become binding upon A until the expiration of 30 days. At the end of 30 days the contract was to become binding upon A, unless he sooner notified B in writing of his intention to abandon and cancel the same. Is the mailing of notice of cancellation within 30 days sufficient, if it was not delivered or received within that time?

A. No; where the making or termination of a contract is made to turn upon the giving of notice within a specified period, the mere act of mailing does not constitute the giving of notice. It is a different matter from the acceptance of an offer by mail, which does not involve actual communication or notice, and is complete on mailing the letter of acceptance. *Wheeler v. McStay*, 141 N. W. 404, 160 Iowa, 745, L. R. A. 1915B, 181; *Hoban v. Hudson*, 152 N. W. 723, 129 Minn. 335, L. R. A. 1916B, 1114. An agreement may be made, to become operative in the future as a contract upon the happening or not happening of some condition or contingency, and the parties may stipulate as to when their agreement shall become operative. In the meantime either party is at liberty to withdraw. But, where notice is required, actual personal notice must be given within the time specified. See *Farmers' Handy Wagon Co. v. Newcomb*, 159 N. W. 152, 192 Mich. 634.

For other cases see *Decennial Digests*, Exchange of Property Ⓒ5; Notice Ⓒ10; Sales Ⓒ23(2).

Q. 22. On January 1 B received from A a letter offering to sell to B a farm for \$5,000, and giving 10 days within which to accept the offer. On January 7 A received from B a letter stating that he would give \$4,500 for the farm. To this letter A made no reply, but on January 8 he received from B a letter accepting the offer of the farm at \$5,000. Did this conclude a contract?

A. No; a counter proposition is a rejection and kills the offer. Acceptance, to result in a contract, must be an absolute and unqualified assent to the terms of the offer. If one party offers to sell another 5,000 tons of iron rails, and the prospective buyer directs the seller to enter an order for 1,200 tons on the same terms, this amounts to a rejection of the original proposal. A subsequent attempt to accept the prior offer amounts only to a new offer and creates no contract. So the answer to an offer, which proposes modifications or introduces any new term, whether as to credit, security, quantity, price, time, or place of performance, constitutes a

counter proposal. The renewal of a rejected offer to buy or sell land must be in writing.

Lewis v. Johnson, 143 N. W. 1127, 123 Minn. 409, L. R. A. 1915D, 150.

Shaw v. Ingram-Day Lumber Co., 153 S. W. 431, 152 Ky. 329, L. R. A. 1915D, 14.

Phoenix Iron & Steel Co. v. Wilkoff Co., 253 F. 165, 165 C. C. A. 65, 1 A. L. R. 1497.

For other cases see Decennial Digests, Contracts ⇨23, 24; Frauds, Statute of, ⇨103(1); Sales ⇨23(4).

Q. 23. The terms of an offer to W by B were: "I am willing to sell my land on which I reside in the city of X, containing 300 acres, more or less, for the price of \$6.25 per acre cash. W is to have the privilege of buying said property at said price and on said terms for 60 days from date." W gave notice in writing of an election to buy the tract of land mentioned at the price and on the terms mentioned, and that he was prepared to pay for the land as soon as B would convey it to him by proper deed and a survey could be made. Was this notice an unconditional acceptance of the offer, or should W have accepted within 60 days by paying or tendering the cash?

A. To convert such a proposal to sell into a binding contract of sale, it is essential that the acceptance be absolute and unconditional. If an act is requested, the act must be done. If a promise is requested, that promise must be made. It was held that the above offer could not be complied with in any way, except by the actual payment or tender of the whole price of the land before the 60 days expired. W could not withhold such tender until a proper deed was executed, acknowledged, and delivered, or until a survey could be made and the exact number of acres ascertained. A notice of acceptance of an option may, however, be sufficient where the option contemplates a promise and does not require actual payment within the time limited. } *one*

Weaver v. Burr, 8 S. E. 743, 31 W. Va. 736, 3 L. R. A. 94.

Turner v. McCormick, 49 S. E. 28, 56 W. Va. 173, 67 L. R. A. 860, 107 Am. St. Rep. 904.

Pollock v. Brookover, 53 S. E. 795, 60 W. Va. 75, 6 L. R. A. (N. S.) 403.

For other cases see Decennial Digests, Specific Performance ⇨37; Vendor and Purchaser ⇨16(1), 18(3).

Q. 24. A gave the following letter to C, addressed to B: "This will introduce to you C, who desires to purchase about \$1,000 worth of merchandise. If you will let him have the goods, I will guarantee the payment of his bill to the amount of \$1,000." C presented the letter June 1st, and B sold and delivered to him the goods desired. The same day A discovered that C was heavily in debt, and at once

wrote to B, withdrawing the proposal. June 2d B dictated a letter to A, advising him of the sale to C in reliance on his guaranty; before the letter was typed and sent, he received the letter of revocation from A, notwithstanding which he sent the letter as originally dictated. C is insolvent. Can B hold A and why?

Rule { A. Under ordinary principles as to the acceptance of offers of unilateral contracts, the extension of credit of itself without notice to the guarantor completes the contract. The offer of guaranty became a binding contract upon B's doing the act requested, namely, extending credit to C for the goods. (By a peculiar rule, however, notice of acceptance is required in contracts of guaranty, even though unilateral; but this should be regarded merely as an implied condition subsequent, and not as necessary to complete the contract.) The revocation was therefore too late, as acceptance was made before it was received. The giving of notice, if required, is a condition imposed by law on grounds of fairness to the guarantor. What circumstances do and what do not call for notice is a matter of much uncertainty and confusion. Where the guaranty is in the nature of an offer, and no consideration moves directly to the guarantor, and the circumstances are not such as to indicate that knowledge of the acceptance will come quickly to the guarantor, notice of acceptance must be given within a reasonable time, according to some decisions. Some jurisdictions, however, do not require notice of acceptance at all, and in others it is only required in certain classes of cases.

Bishop v. Eaton, 37 N. E. 665, 161 Mass. 496, 42 Am. St. Rep. 437.
 Black v. Grabow, 104 N. E. 346, 216 Mass. 516, 52 L. R. A. (N. S.) 569.
 Midland Bank v. Security Elevator Co., 200 N. W. 851, 161 Minn. 30.
 38 Harv. Law Rev. 828.
 23 Mich. Law Rev. 783.
 5 Col. Law Rev. 215.
 11 Col. Law Rev. 178.

For other cases see Decennial Digests, Guaranty $\S$ 7(1, 4).
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Q. 25. A reward is offered for the arrest and conviction of the perpetrator of a specified crime. Plaintiff arrests the guilty person before hearing of the reward. After hearing of it and intending to claim the reward, he secures the conviction of the person so arrested. Is he entitled to the reward? Must the entire service be given after knowledge of the offer?

(a) A lost his watch and advertised, offering a reward of \$50 for its return. B, not having seen the advertisement and knowing nothing about the offered reward, found the watch, which had A's name inside. B looked up A's address in the directory, took one hour's time to go to A's house, and on reaching there delivered the watch to

him. Afterwards, on hearing of the offered reward, he demanded it from A, but A refused to pay it, and B sued him.

A. The issue presented in each case is whether knowledge of an offer of reward is necessary to claim it by one who has complied with the conditions. The majority rule is that the offer must be accepted (1) with knowledge of it, and (2) with a view to obtaining the reward; that is, with the intent to contract. It has even been held that, where part of the services requested are performed before the offer, or in ignorance of it, the performance of the remainder of the services after knowledge would not be sufficient. *Fitch v. Snedaker*, 38 N. Y. 248, 97 Am. Dec. 791. Where the reward is for the arrest of two, it is not sufficient that one be arrested. *Williams v. West Chicago, etc., R. Co.*, 61 N. E. 456, 191 Ill. 610, 85 Am. St. Rep. 278. But see *Hoggard v. Dickerson*, 165 S. W. 1135, 180 Mo. App. 70.

Some courts treat offers of reward to the public generally as a special class of contracts, in which the promise becomes binding in favor of one who performs the conditions, even though without knowledge, on the theory that the benefit to the defendant is the same, that the doctrine encourages honesty and rewards merit, and that often, as in case of finding, there may be almost the basis for a quasi contractual claim. *Dawkins v. Sappington*, 26 Ind. 199; *Sullivan v. Phillips*, 98 N. E. 868, 178 Ind. 164, Ann. Cas. 1915B, 670; *Smith v. State*, 151 P. 512, 38 Nev. 477, L. R. A. 1916A, 1276; 26 Yale Law J. 169, 182; 29 Harv. Law Rev. 221.

For other cases see Decennial Digests, Rewards ⇨7.

Q. 26. The Governor of a state offers a reward of \$500 for the "arrest and conviction" of C, a murderer. A, without knowledge of the reward, killed C in an attempt to arrest him. A claims the reward.

A. The issues here are: (1) Is knowledge of the offer necessary, where the reward is offered by the state? (2) Has A complied with the terms of the offer substantially?

(1) In general, it is held that one who acts in ignorance of an offered reward cannot recover it. The offer must induce the doing of the act. But, where a reward is offered by public authority under a statute, it is said that the reward is in the nature of a bounty, and that it was not contemplated by the Legislature that any contractual relation was necessary. It may be doubted, however, whether the intention of the Legislature was not to stimulate effort, rather than to reward virtue and merit, where the efforts were not induced by the offer. *Choice v. City of Dallas* (Tex. Civ. App.) 210 S. W. 753.

(2) It has been held that the terms "arrest and conviction" have been complied with, where the fugitive has been killed in an attempt to arrest him. *Smith v. State*, 151 P. 512, 38 Nev. 447. The killing was justifiable, and excused further compliance with the full conditions of the reward. The courts have been liberal as to what amounts to a substantial performance. The object to be accomplished is the discovery of the criminal and the bringing of him to justice. There is a conflict whether giving information which makes possible the arrest and conviction is sufficient, or whether an actual arrest by the claimant is called for. *Elkins v. Board of Com'rs of Wyandotte County*, 120 P. 542, 86 Kan. 305, 46 L. R. A. (N. S.) 662; *Id.*, 91 Kan. 518, 138 P. 578, 51 L. R. A. (N. S.) 638, Ann. Cas. 1915D, 257; 9 Minn. Law Rev. 475.

For other cases see Decennial Digests, Rewards ⇨7, 8.

Q. 27. The Great Northern Railway offered a reward of \$5,000 for the arrest and conviction of certain train robbers. A number of persons acting independently secured the arrest and conviction of the robbers, and each one claimed the whole of the reward. The Great Northern paid the \$5,000 into court. What disposition should the court make of this money?

A. In some jurisdictions an equitable apportionment of the reward is made, where several have contributed to the arrest and conviction. A person who renders services which materially aid in the arrest is entitled to a proportionate share of the reward deposited in court, based on the relative value of his services. *Forsythe v. Murnane*, 129 N. W. 134, 113 Minn. 181; *Bloomfield v. Maloney*, 142 N. W. 785, 176 Mich. 548, Ann. Cas. 1915B, 662. It has been suggested that on principle a distinction should be drawn between the case of several persons acting in concert and a case like the present, where there is no joint action.

Where a reward is offered for the return of a sum of money lost, a proportionate part of the reward has been granted to one who found and returned part of the money. The question would seem to be whether the offer calls for a single entire performance, or whether it may be understood as divisible on part performance. *Hawk v. Marion County*, 48 Iowa, 472.

For other cases see Decennial Digests, Rewards ⇨11, 12, 15(3).

Q. 28. A newspaper made an advertising offer of \$500 free insurance to the heir of anyone killed by accident while in the pursuit of his vocation, provided a copy of the newspaper was found on his

dead body. Thomas Brisay fell from a wagon dead with a copy of the paper in his pocket. What must A, his heir, prove in order to collect?

A. A must prove (1) that T. B. knew of the offer and purchased the paper with a view to accept it; (2) that T. B. met his death by accident—that is by the fall—rather than by old age or disease. See the reward cases, Q. 25.

Brisay v. Star Co., 35 N. Y. S. 99, 13 Misc. Rep. 349.

For other cases see Decennial Digests, Rewards ⇨11, 12, 15.

Q. 29. A gives B the exclusive authority to sell Blackacre, owned by A, for 30 days from date, and promises to pay him a commission of 5 per cent. of the selling price. B proceeds to advertise the property, and on the fifteenth day is about to close a contract with a prospective purchaser, when A revokes B's authority to sell. Has B any cause of action against A?

(a) Suppose that, after making reasonable efforts for five days to sell Blackacre, B then abandoned all attempts to sell. Would A have a cause of action against B?

A. Yes; as to both. Even if the exclusive agency be regarded as the offer of a unilateral contract when made, when the broker has made substantial efforts toward earning his commission, the promise of A becomes binding and irrevocable. B can recover the profits he would have made, if allowed to proceed. } See Dam.

(a) By implication the contract may well be held to be bilateral, as the owner would not give to B an exclusive agency unless he believed reasonable efforts would be made by the agent to sell, and so a corresponding obligation is impliedly assumed by B. A would therefore probably have a cause of action against B for failure to exercise due diligence in finding a purchaser.

Harris v. McPherson, 115 A. 723, 97 Conn. 164, 24 A. L. R. 1530.

Braniff v. Baier, 165 P. 816, 101 Kan. 117, L. R. A. 1917E, 1036.

Cf. Flinders v. Hunter, 208 P. 526, 60 Utah, 314, 28 A. L. R. 886.

A. B. Dick Co. v. Fuller (D. C.) 213 F. 98.

Wood v. Lucy, 118 N. E. 214, 222 N. Y. 88.

5 Minn. Law Rev. 94.

For other cases see Decennial Digests, Brokers ⇨40, 44; Contracts ⇨10(1), 22(1).

Q. 30. The C Publishing Co. advertised a newspaper subscription contest and made a general offer, by which it agreed to give an automobile to the winner. It stated rules governing the contest and reserved the right to change the rules. At the beginning of the last week it published a notice that only certified checks or money orders

would be received for subscriptions. Later on the same day A deposited two uncertified checks with the C Co., which took the checks, but did not count them in the final award. Had these been counted, A would have won a prize—Can A recover against the C Co.?

Note { A. It has been held that he could. A was not sufficiently notified of the change of rules, not having been given personal notice. Long v. Chronicle Pub. Co., 228 P. 873, 68 Cal. App. 171. In general, however, it would seem that, where an offer is made to the public, notice of change or revocation may be made in the same manner and through the same channel as the original offer itself was made. Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697. If the power of alteration had not been reserved, the C Co. could not change the rules in the midst of the contest to the prejudice of the contestants like A.

Sales {

Mooney v. Daily News, 133 N. W. 573, 116 Minn. 212, 37 L. R. A. (N. S.) 183.

See 10 Cornell Law Quart. 220.

For other cases see Decennial Digests, Contracts ⇨238(1), 241; Rewards ⇨3.

Q. 31. A, being the owner of a piece of real estate and being desirous of selling the same, gives a real estate broker a description of the property and states that he will sell it for \$5,000, one-half cash and one-half the purchaser's note, secured by a mortgage on the property. The broker finds a customer ready and willing and able to purchase on the terms stated. The broker reports to A what he has accomplished, states that the customer is ready to sign a written agreement of purchaser and sale, and asks A to sign such an agreement. A replies that he has changed his mind about selling and declines to sign any agreement. The broker demands the usual broker's commission of 2 per cent. and upon A's refusal to pay, brings suit. Can the broker recover anything, and, if so, what is the rule of damage?

A. The broker is entitled to his commission if he secures a purchaser ready, able, and willing to buy on the owner's terms, who continues so until the owner has been given a reasonable opportunity to complete the sale. The fact that the sale, through no fault of the broker, is not consummated, does not affect his right to a commission, which is earned when he has accepted A's offer by performing the services requested. Where the owner has given the broker the full terms of the proposed sale, the broker's commissions are earned when he produces a customer ready, willing, and able to purchase on such terms. Duclos v. Cunningham, 6 N. E. 790, 102 N. Y.

678; *Swift v. Hale & Covington Real Estate Co.*, 244 S. W. 867, 196 Ky. 867. Indeed it may well be that, if an owner requests and permits a broker to expend money or time and effort under an authorization to find a purchaser, an agreement not to revoke for a reasonable time may be implied from the circumstances, in consideration of the broker beginning his efforts and entering upon the performance of the services called for. *Roth v. Moeller*, 197 P. 62, 185 Cal. 415. See *Zwolanek v. Baker Mfg. Co.*, 137 N. W. 769, 773, 150 Wis. 517, 44 L. R. A. (N. S.) 1214, Ann. Cas. 1914A, 793.

For other cases see *Decennial Digests*, Brokers Ⓒ44, 60; Principal and Agent Ⓒ33; Master and Servant Ⓒ72.

Q. 32. A employs B verbally to sell real estate for him at a fixed price for cash, and agrees with B that his commission shall be 5 per cent. of the sale price. B finds a purchaser who is ready, able, and willing to take the land at the price named, and A is informed of these facts. He refuses to take the money and refuses to make deed of conveyance. (a) Can the purchaser maintain a suit against A for specific performance? (b) Can B maintain a suit against A for his commission?

A. (a) The great weight of authority is that the employment of a real estate broker to find a purchaser does not impliedly empower him to make a binding contract of sale with the purchaser. The owner ordinarily reserves to himself the power to conclude the sale, unless there is express authority granted to the broker. *Brown v. Hogan*, 113 A. 756, 138 Md. 25; *Weatherhead v. Ettinger*, 84 N. E. 598, 78 Ohio St. 104, 17 L. R. A. (N. S.) 210. } No

(b) B can recover his commission from A. In the absence of statute an agent may be given authority by parol to sell real estate, and a contract of employment may be oral, even if authority to execute the sale contract must be written. B has fully performed his part, whether the contract is bilateral or unilateral. Where a statute requires a written contract of employment, a broker who acts under an oral contract cannot recover the value of his services upon implied or quasi contract, according to most decisions. *Paul v. Graham*, 160 N. W. 616, 193 Mich. 447. But see *Seifert v. Dirk*, 184 N. W. 698, 175 Wis. 220, 17 A. L. R. 885.

For other cases see *Decennial Digests*, Brokers Ⓒ14, 43(2), 94.

Q. 33. A is a real estate broker, and without any request on the part of B, the owner of the land, who was advertising it for sale, finds and produces a purchaser, C, ready and able to buy. He informs B that he will expect a commission if the sale is made. B

makes a sale to C. Does B thereby come under an obligation to pay A the commission on the sale? (a) Does he if B subsequently promises to pay A for his services?

A. B is probably not liable. There is nothing to prevent B from making a sale to any one who will buy. A cannot thrust himself upon B and render services without request, which B must be deemed to accept, if he disposes of his own property to C, or to any one else to whom A has shown the property. If the services are rendered without request or employment by B, express or implied, and A is a mere volunteer, he cannot recover.

(a) But if B makes the sale, and assents to A's proposal, and promises to pay A for his services, he may be bound.

Walton v. Clark, 56 N. W. 40, 54 Minn. 341.

Sharp v. Hoopes, 64 A. 989, 74 N. J. Law, 191.

Suter v. Farmer's Fertilizer Co., 126 N. E. 304, 100 Ohio St. 403.

29 Yale Law J. 769, 771.

For other cases see Decennial Digests, Brokers ⇨39, 40, 41, 84(1).

Q. 34. A promises to pay ^{due dilig. in port} B \$5 if B will haul a load of freight from A's warehouse to the dock in time to load same upon the boat America before she sails. B loads the freight upon his truck and starts for the dock. When half way there, X offers him \$50 if he will haul X's freight to the dock in time to catch the boat. B thereupon unloads A's freight on the street, takes X's freight to the dock, returns and reloads A's freight, but, as the boat has already sailed, he takes A's freight back to A's warehouse. Has A any cause of action against B?

A. Yes; while this may appear to be the offer of a unilateral contract, a promise for an act, yet, when B enters upon the job of hauling the freight to the dock, a court would no doubt find a bilateral contract, by which he impliedly promised and undertook to go through with the performance with due care and diligence. But, even if it were a unilateral contract, B might well be held liable for breach of an implied promise to use reasonable diligence to perform his undertaking, in which A was depending on him. Even a gratuitous agent, bailee, or volunteer may be liable for failure to carry out an undertaking on which he has entered, and thereby led another to rely upon him.

Carr v. Maine Cent. R. R., 102 A. 532, 78 N. H. 502, L. R. A. 1918E, 389.

Siegel v. Spear & Co., 138 N. E. 414, 234 N. Y. 479, 26 A. L. R. 1205.

Wood v. Lucy, Lady Duff-Gordon, 118 N. E. 214, 222 N. Y. 88.

3 Cornell Law Quart. 290.

A. B. Dick Co. v. Fuller (D. C.) 213 F. 98.

For other cases see Decennial Digests, Bailment ⇨12; Contracts ⇨10(1), 22(1); Torts ⇨6.

Q. 35. X promises to pay the Y Railway Co. a bonus of \$50,000 if it will extend its line to the village of X from Y, a point 25 miles distant. The company begins construction, but, when it has laid 20 miles of track, X revokes his promise. Has the company a cause of action? Suppose the company had stopped work at this stage; would X have a cause of action?

A. After Y has acted on X's offer, and has performed four-fifths of the work, it may be regarded as an acceptance, at least in part. A question may be raised whether Y is entitled only to the proportion of the bonus earned up to the time of the repudiation by X, or to the profits that could have been made by completion. The latter seems the better rule. Acceptance is expressed and X is bound as soon as Y has entered upon the performance of the specified work. If Y stops work before completion, X would probably have no cause of action against Y. But Y could not collect, owing to nonperformance of implied or express conditions precedent to any duty on the part of X to pay the bonus. Courts usually, however, are ready to find a bilateral contract, binding both X and Y, in these cases, and, if such is the case, Y would be liable also. *Los Angeles Traction Co. v. Wilshire*, 67 P. 1086, 135 Cal. 654; *Zwo-lanek v. Baker Mfg. Co.*, 137 N. W. 769, 150 Wis. 517, 44 L. R. A. (N. S.) 1214, Ann. Cas. 1914A, 793; *Roberts v. May Mills*, 114 S. E. 530, 184 N. C. 406, 28 A. L. R. 338, 346. One employed by the week, who continues in the employment in reliance upon an offer of a bonus of 10 per cent. at the end of the year for continuous service throughout the year, cannot be deprived of the benefits of the offer by wrongful discharge before the end of the year, and is entitled to a proportionate share of the bonus for the term served. The offer is accepted by entering on the work. 9 Minn. Law Rev. 677; 5 Minn. Law Rev. 94; 27 Yale Law J. 575, 382. } Kno

For other cases see Decennial Digests, Master and Servant ⇨ 72, 73(5); Subscriptions ⇨ 18.

Q. 36. A bought a Ford coupé in March and used it until September, when he won a new Ford coupé at a county fair. He then offered the former for sale for \$500. B heard from a neighbor that A was offering to sell his Ford coupé for \$500, and, having heard that A. had won a Ford coupé at the fair, and not knowing that A had any other, wrote to A: "I will buy your Ford coupé for \$500, to be delivered and paid for ten days after date of acceptance of this offer." A replied by letter, accepting the offer. Ten days later A tendered the old Ford and demanded payment, but B re- } Not

fused to accept it, demanding the new Ford, and claiming he had thought that was the only one owned by A and had intended to buy no other. A sues for the purchase price. State whether or not he can recover, and why?

A. B is not liable. There was such ambiguity in his offer that it referred equally well to either the old or the new coupé. Each party meant a different thing by the same description, and one meaning was as reasonable as the other. The parties have not only meant, but have actually said, different things, so that this is a mistake which actually prevents any agreement or "meeting of the minds," in the sense of an expression of assent to the same proposition. It would seem that, if B as a reasonable person under the circumstances ought to have understood that the old car was intended by A, then he would have been bound by the reasonable meaning of what he said, even though he meant something different. But if, on the other hand, B was justified in understanding that the new car was referred to by A, and a reasonable person would have received that impression from A, then A would be so bound even though he had the old car in his own mind. (This is the doctrine of the objective, or external, as contrasted with the subjective, or internal, standard, viz. that one is bound by what he expresses to others by his words and acts, rather than by mental assent.)

Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560.

Neel v. Lang, 127 N. E. 512, 236 Mass. 61.

14 Ill. Law Rev. 85; 33 Harv. Law Rev. 376.

For other cases see Decennial Digests, Deeds 69; Vendor and Purchaser 31.

Q. 37. A, the owner of a tract of land, offered to sell it to B. The offer was made orally, and was intended to be for \$6,000, but was misunderstood by B to be \$3,000. Under this oral misunderstanding the deed of conveyance was executed and delivered to B. Can A rescind and have a decree of reconveyance?

A. It was decided by the Massachusetts court in favor of A, on the ground that the misunderstanding prevented mutual assent, and that there was an entire absence of agreement. This is correct, if A offered to sell for \$6,000, and B agreed to buy for \$3,000. But, if B assented to A's offer, but did so because he misunderstood it, then it would be for him to show that the offer was ambiguous, and that his misunderstanding was reasonable and excusable. He cannot be allowed to avoid his expression of assent

merely because he had something different in mind. The declared intention prevails over the real intention.

Neel v. Lang, 127 N. E. 512, 236 Mass. 61.

Cf. Pope v. Bibb Mfg. Co. (D. C.) 290 F. 586.

For other cases see Decennial Digests, Contracts ⇨ 147(2); Deeds ⇨ 69; Vendor and Purchaser ⇨ 31.

Q. 38. A sent to B the following offer in writing: "I offer to sell you my black Chandler automobile for \$500." B immediately replied: "I accept your offer." A owned a black Chalmers, a black Chandler, and a black Cadillac. A really believed that he was offering the Cadillac for sale, and B actually believed he was promising to buy the black Chalmers. B insists that he is entitled to the Chalmers, and, if not that, then to the Chandler. A contends B is entitled to the Cadillac or nothing. What are the rights of the parties?

A. If B is entitled to anything, he is entitled to the Chandler, although neither party actually intended that. But both expressed the intent to buy and sell it. If we apply the external standard in an extreme form, the result here is that a contract is made which is not in accordance with the intent of either party. The mistake is not a mutual one, except that both inadvertently said, and neither meant, the same thing. If the external standard rests on reasonable reliance or estoppel, and if B was not misled by A, nor A by B, there seems no reason to hold either to an expression of mutual assent, based on entire misapprehension as to the identity of the subject-matter described. On the external standard, see Hand, J., in Hotchkiss v. National City Bank of New York (D. C.) 200 F. 287, 293; Star Chronicle Pub. Co. v. New York Evening Post, 256 F. 435, 167 C. C. A. 563; Pope v. Bibb Mfg. Co. (D. C.) 290 F. 586; Dzuris v. Pierce, 103 N. E. 296, 216 Mass. 132; 14 Ill. Law Rev. 85; 33 Harv. Law Rev. 376, 382.

For other cases see Decennial Digests, Contracts ⇨ 1, 93(1), 147(2); Equity ⇨ 8; Vendor and Purchaser ⇨ 31.

Q. 39. A was a contractor, and signed what he and B supposed to be duplicate contracts for the construction of a Turkish bath-house on B's land. The architect fraudulently changed the type-written sheets on which the price was written from \$33,721 in A's to \$23,200 in B's contract before signing by B. A and B did not discover the discrepancy until the building was completed. The market value of A's labor and material was \$33,500; the total cost to A \$33,000. It was an unwise venture, and the increase in mar-

ket value of real estate was only \$22,000. What can A recover from B?

A. The measure of damage is the fair market value of the labor and materials furnished by A, viz. \$33,500. Since there was no express contract to limit B's liability, and since A did the work at B's request, he must pay the reasonable value on the basis of a contract implied in fact. If it were a case of quasi contract, or contract implied in law, A could only recover \$22,000, the enrichment or benefit received by B.

Vickery v. Ritchie, 88 N. E. 835, 202 Mass. 247, 20 L. R. A. (N. S.) 810; 23 Harv. Law Rev. 150.

See Costigan, 33 Harv. Law Rev. 376, 386.

Werre v. Northwest Thresher Co., 131 N. W. 721, 27 S. D. 486.

For other cases see Decennial Digests, Work and Labor ⇐10.

Q. 40. B telegraphed to A: "Wire me best offer on 1,000 bushels potatoes for immediate shipment." In reply thereto, A delivered to the telegraph company the following message for transmission to B: "I offer to ship you immediately one thousand bushels potatoes at sixty cents." As delivered to B, the message read fifty cents in place of sixty cents. B answered: "Offer accepted. Ship at once." Is there any contract between A and B? If so, what are its terms?

(a) Suppose that, in the foregoing case, the telegraph company had transmitted the message so that the price read seventy cents, instead of sixty cents?

A. Assuming that B accepted in good faith without suspicion of the mistake, there is a contract to sell at 50 cents. The prevailing view is that the party who selects the telegraph as the means of communication must bear the loss caused by errors in transmission of the message. There is no "meeting of the minds" or mental assent by A to such an offer, but he is bound by what he has said, by the offer as delivered to B, unless the mistake is obvious to B. This is often explained on the inaccurate theory that the carrier of the message is the agent of the sender. *Mistake as to intention parties.* Des Arc Oil Mill v. Western Union Telegraph Co., 201 S. W. 273, 132 Ark. 335, 6 A. L. R. 1081. But the telegraph company is a common carrier, employed to transmit the exact message authorized, and not an agent, like a stenographer. Eureka Cotton Mills v. Western Union Telegraph Company, 70 S. E. 1040, 88 S. C. 498, Ann. Cas. 1912C, 1273.

(a) If the mistake is in favor of the sender, and the offeree, B, accepts a higher price than that authorized by A, can A hold B?

While the proposer, A, may be estopped to deny the message on which he has caused B to rely, there seems no valid reason why B should not be able to set up that there was no such offer as that which he supposed he was accepting. Such an offer was only apparently made. The parties have really said and intended different things. No actual agreement has been made, and B ought not to be liable. See *Strong v. Western Union Tel. Co.*, 109 P. 910, 18 Idaho, 389, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55; 26 Yale Law J. 169, 205; 19 Mich. Law Rev. 361.

For other cases see Decennial Digests, *Telegraphs and Telephones* ¶39, 56(1, 3).

Mistake by one party.
Q. 41. A, the seller of lumber, in footing up the items of an estimate, made a mistake of \$500 in adding the different items. He also failed to include any item for freight, and quoted a price \$750 lower than he had figured on. B accepted A's bid at the price quoted. A discovered his mistake that evening, before anything had been done, but B insists on holding A to the contract.

A. This unilateral mistake would probably be no defense at law, or ground for rescission in equity. According to the prevailing view, a mistake of one party only, of which the other party is entirely ignorant at the time of concluding the contract, and to which he does not contribute, does not affect its validity. Thus, a mistaken idea of the nature, quality, or value of an object, an error in computation, or the quoting of a lower price than the intended price, if not caused by or known to the other, is not ground for the rescission of the contract. A few cases, however, look the other way, where great hardship and unjust advantage would result from A's unilateral mistake, and where there has been no change of position by the other party. }

Steinmeyer v. Schroepel, 80 N. E. 564, 226 Ill. 9, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224.

Cf. *Harper v. City of Newburgh*, 145 N. Y. S. 59, 159 App. Div. 695.

Moffett v. Rochester, 91 F. 28, 33 C. C. A. 319.

Id., 20 S. Ct. 957, 178 U. S. 373, 44 L. Ed. 1108.

St. Nicholas Church v. Kropp, 160 N. W. 500, 135 Minn. 115, L. R. A. 1917D, 741.

30 Harv. Law Rev. 637.

32 Harv. Law Rev. 736.

For other cases see Decennial Digests, *Contracts* ¶19, 93(1, 5); *Municipal Corporations* ¶335(1), 354; *Sales* ¶114.

Q. 42. A, knowing that B had a certain lot for sale, went to examine it, but by mistake looked at the wrong lot. A thereupon

entered into a written contract of purchase with B for his lot. Later, upon ascertaining his mistake, A gave notice of rescission, and brought this action to set the contract aside and get back the deposit paid. Should A succeed?

A. Some courts would give rescission on the ground that the contract was obtained by mistake of fact. If A supposed he was purchasing a different lot or tract of land from that described in the contract, it might be held that there was a mutual mistake as to the identity of the subject-matter of the contract. Other courts would hold that this was merely a unilateral mistake of A, and that the mistake of one party alone, even as to the identity of the subject-matter of the contract, would be no ground of defense at law, or of rescission in equity, unless caused by the other party.

Goodrich v. Lathrop, 29 P. 329, 94 Cal. 56, 28 Am. St. Rep. 91.

Cf. *Stong v. Lane*, 68 N. W. 765, 66 Minn. 94.

McKinnon v. Vollmar, 43 N. W. 800, 75 Wis. 82, 6 L. R. A. 121, 17 Am. St. Rep. 178.

Linquist v. Gibbs, 142 N. W. 156, 122 Minn. 205 (property sold and described was not the property examined by both parties).

13 Cal. Law Rev. 246.

For other cases see *Decennial Digests, Cancellation of Instruments* 23; *Vendor and Purchaser* 31, 34, 334(2).

Q. 43. A contracted to sell 10 shares of stock in the X bank to B for \$136 a share, a price equal to its book value. The books showed that its paid-in capital was intact and that it had a large surplus and undivided profits. Unknown to A and B, the capital had become seriously impaired, and the bank had no surplus or undivided profits, by reason of concealed defalcations of its employees, and the stock was only worth \$60 per share. B seeks to rescind the contract on the ground that the parties to the sale were mutually mistaken as to the assets of the bank, the book value of the stock, and the correctness of the books. What decision?

A. Judgment for A, the seller. The buyer, B, had no right to rely on the accuracy of the books and reports of the bank, unless A represented that they were correct. The means of information were open alike to both parties. It is true that the mistake was mutual, and related to a basic fact, or common assumption, on which the parties were dealing. There was, however, no mistake as to the identity or nature of the subject-matter, but rather as to its attributes and value. If we apply the "basic fact" test of mistake, as contrasted with the "identity test," there apparently ought to be rescission. But matters of value and quality are usually

within the "realm of bargain," and the contracting parties must determine such questions and look out for themselves.

Costello v. Sykes, 172 N. W. 907, 143 Minn. 109, 5 A. L. R. 250.

Compare Lindeberg v. Murray, 201 P. 759, 117 Wash. 483.

13 Cal. Law Rev. 246.

35 Harv. Law Rev. 757.

For other cases see Decennial Digests, Banks and Banking Ⓒ40, 312½; Contracts Ⓒ93(1, 5); Sales Ⓒ36.

Q. 44. H, an ex-fisherman, in negotiating the purchase of W's land, stated that he was an expert farmer; that "he knew good land when he saw it." H bought the land, and alleges that in doing so he relied on W's representations as to the value of the land and its capability to produce crops. He now sues to rescind the sale and recover the installments he has paid on the purchase price. Can he recover?

A. No; the statements as to the quality of the soil and its value for agricultural purposes were prima facie merely matters of opinion. The buyer's implied challenge to fool him if he could, plus the fact that he saw the land himself, is evidence that he trusted his own judgment rather than defendant's representations. See Hegdale v. Wade, 153 P. 107, 78 Or. 349; 29 Harv. Law Rev. 560. Mere "boosting" or "puffing," or "seller's talk" as to the excellence of the property to be sold, cannot be the basis of an action for fraud or rescission between persons dealing at arm's length.

While representations of value or quality are ordinarily matters of opinion, upon which a commercial adversary is not entitled to rely, yet they may involve representations of fact, especially if made by an expert to a person unskilled in the article sold, or where the purchaser has not sufficient opportunity to investigate for himself. It is not possible to draw a hard and fast line between what amounts to unfair deception and that which is privileged under the rule of caveat emptor, as a legitimate method of bargaining in the game of business. The law must allow a reasonable scope to the art of bargaining or chaffering, which involves a certain amount of dramatic pretense and exaggeration. The buyer cannot rely on the advice of the seller, but must to some extent look out for and defend himself. The general test would seem to be whether the seller or buyer has gone beyond the limits of honest dealing and bargaining, and taken advantage of misrepresentations on which the other party could reasonably rely. Stockton v. Hind, 196 P. 122, 51 Cal. App. 131; Mooney v. Cyriacks, 195 P. 922, 185 Cal. 70.

For other cases see Decennial Digests, Fraud Ⓒ11(1), 64(1); Sales Ⓒ38(3, 7); Vendor and Purchaser Ⓒ36(2), 37(4).

Q. 45. An agent of a cash register company stated to A that the use of his cash register would save the expense of a bookkeeper. The agent knew that the affirmation was false. Is the contract so induced void? ^{Mo.} Can the buyer rescind for fraud? If so, how?

A. No; false representations entitle a party deceived to avoid his contract for any mistake so induced, whereby his consent to the bargain was procured unfairly. The party defrauded may rescind, however, only where misled by a false representation of a past or present material fact, which would affect the judgment of a reasonable man; not by representations of law, of expectation as to the future, or of opinion as to value. Persons are not supposed to rely on dealers' talk as to value, or to take literally the exaggerated eloquence of the other party as to value or prospects. *National Cash Register Co. v. Townsend*, 50 S. E. 306, 137 N. C. 652, 70 L. R. A. 349.

A contract rendered unfair by fraud, misrepresentation, or undue influence is voidable, not void. The aggrieved party may either ratify and affirm the contract, or rescind it and recover that from which he has been unfairly separated. In case of an election to avoid the contract, this must be made within a reasonable time, and must be communicated to the other party. There must also be a complete restoration of the consideration which the party has received, unless it be worthless. Some authorities very justly permit the rescinder to credit what he has received on his own demand, where restoration would involve the surrender of the little indemnity that exists.

For other cases see *Decennial Digests*, Sales § 40. ^{no dis. pleasure new subject no final rel.}

Q. 46. A discovered a gold mine in the land of B, of which he knew B was ignorant. He got B to contract to sell him the land at a small price as timber land. Is B bound?

A. As a general rule the mere failure to disclose information affecting value is not such fraud as will entitle the other party to avoid his contract. Unless the circumstances are such as to impose a special duty to disclose the facts, a cunning reserve or shrewd acquiescence in another's ignorance or misapprehension of the circumstances, allowing him to proceed on an erroneous belief, which he has himself formed, are permitted by the rules of bargain and commercial dealing. Ordinarily it is only where the parties stand in a fiduciary relationship, or in circumstances justifying reliance and confidence, that there is a positive duty to disclose facts. It is only an industrious concealment, which actually suppresses

facts and deceives inspection, that is considered fraudulent. The purchaser, for instance, is under no duty to announce to the seller the existence of a gold mine, or oil formations, or disclose facts which increase the value of the land. But he must do nothing to disarm the vendor, or mislead him, as by representing that it is only good for grazing or timber land.

Crompton v. Beedle, 75 A. 331, 83 Vt. 287, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399.

Weikle v. Sterns, 134 S. W. 908, 142 Ky. 513, 34 L. R. A. (N. S.) 1035.

Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214.

For other cases see Decennial Digests, Fraud 16, 17; Sales 43(1); Vendor and Purchaser 38.

Q. 47. A was an individual doing business under the name of the Cambria Coal Co. He contracted for the purchase of coal on credit from B, who supposed the buyer was a regularly incorporated company. Does A's misleading trade-name excuse B from extending credit to A, an individual?

A. Yes; the mistake was induced by A, whose trade-name was an innocent misrepresentation. At common law an innocent misrepresentation or nondisclosure of facts, misleading one to his prejudice, did not affect the contract, unless the transaction was one of a special class, or unless the person affected stood in a relation of trust or confidence, so that the utmost good faith and fairness were required. Innocent misrepresentation was, however, a ground of voidability in a court of equity, and furnished cause for rescinding a contract on the ground of mistake. Where an error is induced by the conduct of the other party, the law will not permit him to take advantage, even of his innocent misstatements.

Fifer v. Clearfield & C. Coal & Coke Co., 62 A. 1122, 103 Md. 1.

School Sisters of Notre Dame v. Kusnirt, 93 A. 928, 125 Md. 323, L. R. A. 1917D, 792.

Fay v. Hill, 249 F. 415, 420, 161 C. C. A. 389.

For other cases see Decennial Digests, Contracts 93(1); Sales 36.

SECTION 2.—CONSIDERATION AND SEALS

The following general outline may assist in reviewing the topic of consideration:

A.—Sufficient Consideration.

1. Abandonment of any legal right, or the forbearance to exercise it at request, though for indefinite time.

2. Compromise of a disputed claim, if honestly asserted, even though it later prove to be unfounded. (Query, whether it must be reasonable?)

3. Doing anything beyond what one is already bound to do; e. g., payment before maturity.

4. A promise which by its terms limits the freedom of choice of the promisor; e. g., to take all the requirements of his business.

5. Previous legal obligation barred by statute of limitations or bankruptcy.

B.—Insufficient Consideration.

1. Exchange of unequal sums of money.

2. Payment of debt or performance of legal duty under unilateral contract.

3. Performance of public duty; e. g., by public officer.

4. Refraining from legal wrong; e. g., withholding possession wrongfully.

5. Illusory promises—promise to do something if the promisor wishes or desires to do so (lacking mutuality of obligation).

6. Past consideration, giving rise to no moral obligation; e. g., sale and subsequent warranty.

C.—Doubtful Consideration—Conflicting Cases.

1. Promise to do or the doing of what one is already bound to do under an executory contract (1) with the promisee; (2) with a third party.

2. Forbearance or release of groundless and unreasonable claim, asserted in good faith.

3. Payment of only so much of an unliquidated or disputed claim as is admittedly due.

4. Recital of nominal sum, like \$1, in options.

5. Change of position in reliance on promise—promissory estoppel.

6. Past services rendered upon previous request.

7. Moral obligation to pay for benefits received without previous legal obligation.

Q. 48. A gives B an option on his ranch for a year, reciting \$1 paid as consideration. Oil is discovered. A revokes, but B accepts. Is the recital of payment of a nominal sum, such as one cent or one dollar, sufficient consideration to make binding an option to purchase valuable real estate for the space of a year?

A. There is a conflict, but the weight of authority seems to be that \$1 is an adequate consideration for an option to run a reasonable period. *Miller v. Kimmel*, 184 P. 762, 76 Okl. 233. A recital of nominal consideration is undoubtedly sufficient in a deed or conveyance of land; in fact, no consideration ought to be required to support a grant or transfer of real, any more than of per-

sonal, property. In case of a guaranty, it has been held that "a consideration of \$1 is just as effectual as a larger sum stipulated for or paid. A valuable consideration, however small or nominal, is sufficient to support a contract of guaranty, or any other contract. If the promisor has not received it in fact, he will be entitled to receive it." It has been held, however, that a recited consideration of \$1 for an option to purchase real estate, extending over a year, is so flagrantly disproportionate to the value of the privilege in such a case, that it is obviously nominal. The parties could not have regarded it as an equivalent or the agreed value of the thing contracted for, and the question arises whether it was not a mere fiction, and the parties were not really dealing on a gratuitous basis. *Davis v. Wells*, 104 U. S. 159, 167, 26 L. Ed. 686, 689; *Rude v. Levy*, 96 P. 560, 43 Colo. 482, 24 L. R. A. (N. S.) 91, 127 Am. St. Rep. 123; *Murphy, Thompson & Co. v. Reed*, 101 S. W. 964, 125 Ky. 585, 10 L. R. A. (N. S.) 995, 128 Am. St. Rep. 259; *Morrison v. Johnson*, 181 N. W. 945, 148 Minn. 343; *Robertson v. Garvan* (D. C.) 270 F. 643; 9 Minn. Law Rev. 394. A mere recital or receipt of payment may be explained or contradicted by parol evidence, and should not operate as a promise. *Komp v. Raymond*, 67 N. E. 113, 175 N. Y. 102.

For other cases see *Decennial Digests, Contracts* ¶63; *Guaranty* ¶7(3); *Vendor and Purchaser* ¶18(1).

Q. 49. A told B that he could give him information which would increase the profits of his business, and would give such information if B would promise to pay him \$1,000 therefor, if he used the information. B made the promise, and thereupon A said, "Raise the prices at which you sell your goods." B did not raise his prices at once, but some months later did so, and A now sues to recover the \$1,000. Is he entitled to it?

A. It was held in a New York case that the disclosure of the possibility of increasing profits by increasing the price of the defendant's commodity was not valuable information, or sufficiently new or novel, to be consideration for the defendant's promise. *Soule v. Bon Ami Co.*, 195 N. Y. S. 574, 201 App. Div. 794, affirmed 139 N. E. 754, 235 N. Y. 609; *Masline v. New York, N. H. & H. R. Co.*, 112 A. 639, 95 Conn. 702. If plaintiff's plan or idea was adopted, and profits resulted from it, some courts might allow recovery. Courts ordinarily do not weigh the adequacy of the consideration. The usual test of sufficiency is whether A has renounced some right or done something that was a "legal detriment"; i. e., that he was not bound to do. The information was beneficial to the de-

fendant. The plaintiff was under no duty to give such information or suggestion, and there seems no sufficient reason why the defendant should not pay the promised reward, as far as consideration is concerned. The only question is one of construction, whether the information furnished was the kind of information called for, and whether defendant used the information and raised his prices because of the plaintiff's advice.

For other cases see Decennial Digests, Contracts $\S$ 190.

Post contract
Quarrel after K made J. H. Mann
Q. 50. December 1, A loaned B \$1,000 and took his note therefor, payable in 30 days. December 5, doubts having arisen in A's mind as to B's solvency, A asked B if it would be convenient to obtain a guarantor on the note. C, a friend of B, was present at the time, and offered to, and did, sign a guaranty of payment of the note. This was all that occurred until suit was brought against C on the guaranty five days after maturity of the note, except that B was adjudged bankrupt the day before maturity. How should the suit be decided, and why?

A. The signing of the note as surety some days after the principal, B, had executed it, and after the loan had been made, is without consideration. If the guaranty by C had been given at the time of the original execution of the note for the loan, it would be supported by the same consideration; but when subsequent thereto it must have a new and independent consideration of its own. (But it seems that if the original contract is induced by the promise of B that he will procure the signature of C as surety, then no new consideration is necessary for the guaranty after the execution and delivery of the note. The theory of this is not entirely clear. Bank of Carrollton v. Latting, 130 P. 144, 37 Okl. 8, 44 L. R. A. (N. S.) 481. A warranty that an article is in first-class condition, given after the sale and delivery thereof, is wholly without consideration. Savage v. Markey Mach. Co., 223 P. 2, 128 Wash. 433.

For other cases see Decennial Digests, Bills and Notes $\S$ 226; Principal and Surety $\S$ 34; Sales $\S$ 258.

Q. 51. A was indebted to B for \$200 then due. B demanded payment. A said he could not pay then, but that, if he could take a certain job and have the use of his automobile, he would pay next spring. B said that, if A would accept the offer of employment, he might have until next spring to pay the indebtedness then due. Two weeks later B brought suit, and attached A's automobile. A

can't extend time promised by contract
 had already taken the employment before B made any agreement to extend the time of payment. A sets up the agreement of extension as a defense. Is it good?

A. No; while the accepting of employment in reliance upon an agreement for an extension of time would constitute ample consideration, since A had already accepted the employment, there was no consideration for B's promise. Consideration is a detriment incurred or promised in return for a promise, or at least in reliance upon it, or at the request or authorization of the promisor.

Hoeven v. Morley, 155 N. W. 191, 36 S. D. 421.

For other cases see Decennial Digests, Contracts §71(2).

Part of payment
 Q. 52. A owes B \$1,000. B writes the following letter to A: "I do not like to sue you, and I need money right away. If you will pay me \$800 within one week of the date of this letter, I will give you a release and discharge in full for my entire claim, and I agree that I will not claim lack of consideration for the release of the balance of the debt." A sends him a check for \$800 within the week. B does not give him any discharge, and soon after B sues A for \$200. A sets up the letter in defense. What judgment? Give reasons.

(Conn. 1922.)

(a) A owed B \$1,000, past due. A wrote to B: "I am unable to pay you now the \$1,000 which I owe you, but I inclose herewith my check for \$500 which I offer you in full satisfaction of all claims. If you do not care to accept it as such, return it to me." The inclosed check was marked on its face: "In full of all claims of B." After accepting and collecting the check, B sued for the balance of the debt. State whether or not he could recover, and why?

A. Judgment for B. While prompt payment of part of a debt may actually be more beneficial than to insist on the whole, yet the debtor incurs no legal detriment in paying part or all of what he owes, and the creditor obtains no legal benefit in receiving it. The agreement of the creditor to release or discharge the balance needs other consideration, besides part payment of a debt which is liquidated and undisputed. Payment a day, or even an hour, before the debt is due, or at a different place, or by the note of a third person, or in property other than money, would be a good accord and satisfaction.

A few states hold that part payment is sufficient to support an agreement to discharge, and several have so provided by statute.

It is felt by many to be absurd "that a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not."

Sherman v. Pacific Coast Pipe Co., 159 P. 333, 60 Okl. 103, L. R. A. 1917A, 716 (payment of part of a liquidated and undisputed debt as consideration for discharge).

See *Frye v. Hubbell*, 68 A. 325, 74 N. H. 358, 17 L. R. A. (N. S.) 1197.

McGregor v. Farmers' State Bank, 219 P. 520, 114 Kan. 356.

For other cases see *Decennial Digests, Accord and Satisfaction* ⇨7(1), 8(1); *Contracts* ⇨75(2).

Q. 53. P, a physician, sent a bill to a patient for \$670 for professional services, and the patient, on receiving the bill, answered, not disputing the services, but questioning the amount of the bill, and inclosed a check for \$400, which he stated to be in full satisfaction of the physician's claim for services to date. The physician did not reply to the letter, but retained and collected the check, and sent another bill for \$670, crediting thereon \$400 received by check. On failure to get a remittance, he sues for the balance. Can he recover?

A. No; the acceptance of the check involved the acceptance of the condition. The debt was unliquidated, and there was a bona fide disagreement in regard to the amount, which was compromised and settled by acceptance of the check. In a few states the question of the creditor's assent to the debtor's proposition is dealt with as a question of fact, but by the great weight of authority the cashing or retention of the check necessarily results in an accord and satisfaction, if the debtor makes it clear that the check was offered only on condition that it be taken in full payment. *Nassoij v. Tomlinson*, 42 N. E. 715, 148 N. Y. 326, 51 Am. St. Rep. 695; 20 L. R. A. 785, note. A debt is spoken of as "unliquidated" if the amount is not fixed, and cannot be ascertained by mere computation, regardless of whether the debtor disputes his liability. *Hettrick Mfg. Co. v. Barish*, 199 N. Y. S. 755, 120 Misc. Rep. 673; *Id.*, 204 N. Y. S. 915, 209 App. Div. 807; *Stanley-Thompson Liquor Co. v. Southern Colorado Merc. Co.*, 178 P. 577, 65 Colo. 587, 4 A. L. R. 471. (A liquidated claim, admitted to be due, cannot be discharged by the payment of a less amount. *Schnell v. Perlmon*, 144 N. E. 641, 238 N. Y. 362, 34 A. L. R. 1023. See 23 Col. Law Rev. 479, legal consequences of acceptance of a check bearing the notation "in full of all demands.")

For other cases see *Decennial Digests, Accord and Satisfaction* ⇨7(1), 10(1), 11(2), 11(3).

Q. 54. A, on entering the employ of B, deposited with B \$150 as a guaranty of payment of sums to be collected by him for B. Upon leaving B's employ, A demanded the return of the \$150. B asserted the right to retain \$75 for moneys collected by A and not properly accounted for. B sent A his check for \$75 as full settlement. A retained the check and sued for the balance. As a matter of fact A had collected and failed to account for \$20. What decision?

A. There is a conflict whether, if B pays no more than he admits to be due, this furnishes any consideration for a compromise. Thus it may be argued that the giving of the check for the amount which B admitted was due was no legal detriment to B, as he yielded no part of the set-off which he claimed. The true principle, however, seems to be that the law looks at an unliquidated or disputed claim as a whole, and does not attempt to define the extent of the obligation. *Tanner v. Merrill*, 65 N. W. 664, 108 Mich. 52, 31 L. R. A. 171, 62 Am. St. Rep. 687. But see *Isaacs v. Wishnick*, 162 N. W. 297, 136 Minn. 317; *Demeules v. Jewel Tea Co.*, 114 N. W. 733, 103 Minn. 150, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; *Leach v. Woodhill Realty Co.*, 194 N. W. 104, 156 Minn. 73. Where, however, there are independent items some of which are in dispute, payment of the admitted items is not held any consideration. *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 103 N. E. 695, 216 Mass. 204, 51 L. R. A. (N. S.) 315, Ann. Cas. 1915A, 949. *Note*

For other cases see *Decennial Digests, Accord and Satisfaction* ⇨ 1, 10(1), 11(1), (2); *Compromise and Settlement* ⇨ 2, 6(1).

Q. 55. A owes B \$1,000, and is about to go into voluntary bankruptcy, and so informs B. The creditor, B, offers to take 50 per cent of the amount owing him, if A will refrain from going into bankruptcy. A refrains, and pays B 50 per cent and gets a release. Thereafter B sues to recover the balance. What decision?

(a) Suppose A and B both suppose A to be insolvent, but there is no threat of bankruptcy, or agreement to refrain by A.

A. B cannot recover the balance. The refraining from voluntary bankruptcy is a legal detriment incurred by A. B got a sum certain, instead of the chances of an uncertain dividend in bankruptcy. Some courts hold that part payment is a good satisfaction, if so accepted, where the debtor is supposed to be insolvent, even though there was no express intention to seek a discharge. *Note*

in bankruptcy. It is difficult to find any technical legal detriment in such a case.

Melroy v. Kemmerer, 67 A. 699, 218 Pa. 381, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888.

Rice v. London & Northwest American Mortg. Co., 72 N. W. 826, 70 Minn. 77. Sherman, Clay & Co. v. Buffum, 179 P. 241, 91 Or. 352.

For other cases see Decennial Digests, Accord and Satisfaction ⇨8(2); Landlord and Tenant ⇨200(2).

Q. 56. Debtor has not assets subject to execution. Creditor demands payment. Thereupon debtor offers to borrow enough from X to pay creditor 50 per cent. of his claim, if creditor will release the balance. Creditor accepts the offer. Debtor borrows the money from X and pays creditor. Creditor now sues for the balance. Has debtor any defense?

A. Probably not, although the borrowing might be regarded as a legal detriment, and sufficient, if requested by the creditor as part of the consideration. It was argued by the New York court, however, that the mode of obtaining the money by the debtor was immaterial. Of course, if the third person paid the debt in whole or in part, this would be sufficient for a release.

Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546.

Schlessinger v. Schlessinger, 88 P. 970, 39 Colo. 44, 8 L. R. A. (N. S.) 863.

For other cases see Decennial Digests, Accord and Satisfaction ⇨8(1); Compromise and Settlement ⇨6(1).

Q. 57. A, a young man, and B, a woman advanced in years, after marriage, enter into a written agreement, by the terms of which A agrees to care for, support, and nurse B during the remainder of her life, and in consideration for which B agrees that at her death all her property should go to A. A fully performs his part of said contract. What recourse, if any, has A after B's death? (Arizona.)

(a) Suppose the contract was made before marriage.

A. It is contrary to public policy to allow either husband or wife to make a contract to perform services which are ordinarily imposed on a married person, such as support and care in sickness as well as in health.

(a) It has been held that, even before marriage, while the parties may contract with each other as to their property rights, they cannot vary the duties incident to marriage. Since the husband merely promised and did what the law required of him, there was

no consideration for B's promise. The result seems questionable, however, as A was not bound at the time he promised.

Ryan v. Dockery, 114 N. W. 820, 134 Wis. 431, 15 L. R. A. (N. S.) 491, 126 Am. St. Rep. 1025.

Foxworthy v. Adams, 124 S. W. 381, 136 Ky. 403, 27 L. R. A. (N. S.) 308, Ann. Cas. 1912A, 327.

For other cases see Decennial Digests, Contracts §75(1); Husband and Wife §41.

Q. 58. A note by B to A, with C as surety thereon, bearing interest at 10 per cent. per annum, became due June 1. On that date A and B came to an agreement whereby A promised not to call for the money for 90 days, and B promised to pay the accrued interest at once, and to pay the note with interest at the same rate at the end of the 90 days. On July 1, A brings action against B and C, B having paid the accrued interest on June 1. Has either B or C any defense?

(a) If the agreement of June 1 had been that B might pay the note on or before 90 days from date, with interest at 8 per cent. per annum, in what respects, if at all, would your answer be different? No con

(b) A is indebted to B on an overdue promissory note. They enter into an agreement to extend the time for payment of said note until such time as A can pay same out of the profits of his business. Is this agreement enforceable by A? No con

A. Some courts have held that an agreement by a debtor to pay interest on a debt at the rate the debt would bear interest in the absence of agreement, although for a definite time, is not consideration, because it is only agreeing to do what the debtor would in any case be bound to do. Fanning v. Murphy, 105 N. W. 1056, 126 Wis. 538, 4 L. R. A. (N. S.) 666, 5 Ann. Cas. 435, 110 Am. St. Rep. 946. Such decisions are unsound. An agreement by a debtor to keep the money a definite time and pay interest thereon for that time, either at the rate provided or for less, is good consideration for an agreement of the creditor to extend the time of payment. The debtor foregoes his right to pay off the debt, and the creditor acquires an interest bearing investment for the period. Good

But (a) if the debtor does not disable himself from taking up the note at any time, there is no binding extension. (If there is a valid extension without the consent of C, then C, the surety, is discharged, but in (a) neither B nor C has any defense.) Lahn v. Koep, 115 N. W. 877, 139 Iowa, 349, 52 L. R. A. (N. S.) 327. No con

(b) It has been held that a promise to pay the rate of interest specified in a past-due note until such indefinite time as the maker can pay the note out of his business is not sufficient consideration for a promise to extend the time of payment. *First State Bank v. Schatz*, 116 N. W. 917, 104 Minn. 425. The question would seem to be one of construction, whether the debtor disabled himself from paying the note off before his business profits produced enough for the purpose. See *Diehl v. McKinnon*, 155 N. W. 259, 173 Iowa, 32, L. R. A. 1916C, 384.

For other cases see *Decennial Digests, Bills and Notes* ⇨139(2), 437; *Principal and Surety* ⇨105(1).

Q. 59. A, B, C, and D are the heirs at law of X. X dies leaving a will. Before the contents of the will are known, they agree that they will share the testator's property equally, regardless of the terms of the will. When the will is read, it appears that X has left all of his property to A. A refuses to transfer any of it to B, C, or D. What are their rights?

A. The agreement of the others to give up their possible rights under the will of X is sufficient consideration for the agreement of A to share equally. There was reciprocity or mutuality, in that each, so far as he knew, had a chance to gain something, as well as a chance to lose. The chance is a valuable one from the standpoint of the parties, although A really bound himself for nothing. But to A the risk of omission was as great as if the will had not yet been made. It was valid as a compromise of bona fide claims to shares in the estate. (It is not essential to the validity of a compromise and settlement that the claim, if bona fide and not groundless, prove to be valid.) It was not objectionable as a wager, as the parties had an interest in the event.

Minehan v. Hill, 129 N. Y. S. 873, 144 App. Div. 854.

Blount v. Wheeler, 85 N. E. 477, 199 Mass. 330, 17 L. R. A. (N. S.) 1036.

Supreme Assembly of Royal Soc. of Good Fellows v. Campbell, 22 A. 307, 17 R. I. 402, 13 L. R. A. 601.

For other cases see *Decennial Digests, Compromise and Settlement* ⇨5(2), 6(2, 4), 8(4), 9, 16(1); *Contracts* ⇨56.

Q. 60. A has a good cause of action against B for personal injuries caused to A by B's servant, C. B promises to pay A \$500, if A will promise perpetually to forbear suit. A so promises in writing. Can he collect the \$500 from B?

(a) The facts are the same as first stated, except that A actually believes that he has no cause of action against B, but he

threatens to sue A, whereupon the agreement of compromise is made. What answer?

(b) If C were not B's servant, nor acting in the scope of employment by B, but A bona fide believed that he had a cause of action against B, what answer?

(c) If C were not B's servant, nor acting in course of any employment by B, and A believed he had no cause of action against B, but nevertheless threatened suit, whereupon the agreement of compromise was made, would B be liable upon the agreement? No i
ore

(d) Suppose that A thinks he has a good cause of action against B, but that his claim is so absurd that no reasonable man could believe it, and A threatens suit, whereupon an agreement of compromise is made as in the above cases. Is B liable upon the agreement? *No.*

A. A promise to forbear by A, either perpetually or for a reasonable time if that is requested, to assert a good cause of action, is clearly sufficient consideration for B's promise.

(a) The forbearance of a good cause of action by A would be a valuable consideration, even if A erroneously supposed that his claim against B was groundless.

(b) (Many courts say that the claim forborne must be reasonably doubtful in fact or law.) But other courts hold that, if a claim is honestly asserted, it is not necessary to show that there was a doubtful question. By this rule it is sufficient that the claim is not frivolous or vexatious. *Blount v. Wheeler*, 85 N. E. 477, 199 Mass. 330, 17 L. R. A. (N. S.) 1036. Ore

(c) It seems clear that forbearance to sue upon a baseless demand, asserted in bad faith, will not support a compromise agreement extorted by threat of suit.

(d) Forbearance to sue on an utterly absurd and unreasonable claim would probably not be sufficient, according to most decisions. Some degree of reasonableness, as well as good faith, is required. *Montgomery v. Grenier*, 136 N. W. 9, 117 Minn. 416.

For other cases see *Decennial Digests, Bills and Notes* §92(3); *Compromise and Settlement* §6(4).

Q. 61. A reward is offered for the detection and arrest of the criminals who set fire to a certain building. B arrests C, who was convicted. He now claims the reward. B was a police officer, whose duty it was to pursue, arrest, and bring to justice criminals in that city.

A. A public officer cannot recover a reward, if the services performed are those that come within his official duty. Such a contract, for additional compensation for the performance of public duty, would be without consideration, and also contrary to public policy. *Mason v. Manning*, 150 S. W. 1020, 150 Ky. 805, 43 L. R. A. (N. S.) 131. But a public officer may claim under an offer of reward for services which are not within the scope of his duty, as where he makes an arrest outside his own jurisdiction. *Collier v. Green*, 265 S. W. 812, 205 Ky. 361. But see *Lees v. Colgan*, 52 P. 502, 120 Cal. 262, 40 L. R. A. 355; 9 Minn. Law Rev. 476.

For other cases see Decennial Digests, Rewards — 11.

Q. 62. A contracted to drill an oil well for B, but found the conditions much more difficult than there had been any reason to suppose. B promised A \$1,000 extra to complete the contract, to induce A not to abandon performance, in view of the additional expense involved. If a contractor threatens to break his contract on account of unforeseen difficulties and expense, unless he is promised an increased price for his services over and above the contract price, can he recover the additional compensation? *No in Ore.*

90/217 - No consid.

A. There is a sharp conflict of authority whether the promise made to induce the contractor to complete what he was already bound to do is supported by sufficient consideration. It is difficult to find a "legal detriment" in such a case, although there may be a very great detriment in fact on the contractor's part, and a very valuable benefit to the promisor. Subtle refinements are indulged in by some courts to find a "legal detriment"; for example, an imaginary rescission of the old contract and the making of a new one in its place, for a larger compensation, but without reciprocal advantage to the promisor, or the waiver of a supposed right to break the contract and pay damages. In some cases conditions unforeseen when the contract was made justify a demand for more pay, and when the contractor goes ahead, in reliance on the promise, there seems little justice in excusing the promisor, who acted for his own advantage and got what he bargained for. On the other hand, a court properly refuses its aid to a contractor who takes unjustifiable advantage of the necessities of the other party to coerce a promise to pay increased compensation. The change of circumstances need not be such as would excuse the duty of performance, or be ground of relief in equity. It is sufficient if it renders the demand for more pay fair, just, and reasonable, according to some courts. *Linz v. Schuck*, 67 A. 286, 106 Md. 220,

11 L. R. A. (N. S.) 789, 14 Ann. Cas. 495, 124 Am. St. Rep. 481; King v. Duluth, M. & N. Ry. Co., 63 N. W. 1105, 61 Minn. 482; W. K. Morrison & Co. v. Slonczynski, 175 N. W. 992, 145 Minn. 485; Alaska Packers' Ass'n v. Domenico, 117 F. 99, 54 C. C. A. 485. The contractor may easily protect himself, however, for the slightest modification of the contract in favor of the party agreeing to pay additional compensation for completion, such as additional work, or the compromise of any honestly disputed point concerning the contract, will, according to all authorities, furnish sufficient consideration. } *know*

For other cases see Decennial Digests, Contracts §75(2), 237(1, 2).

Q. 63. M employs C to work for him for one year at a salary of \$50 a month, and a written agreement is made and signed by M and C. After working two months, C becomes dissatisfied with his salary, and refuses to work any longer unless his salary is raised. M and C then agree orally that C's salary shall be raised to \$60 a month for the rest of the year; said \$60 to be payable, \$50 of it monthly, and the balance at the end of the year. At the end of the year M refuses to pay the balance. Has C a right of action? *Or - mod'fd agr ex'd, O.K., tho no consid. 137/594.*

A. Some courts hold that the evidence would warrant a finding that the original contract was rescinded or abrogated by the consent of the parties and a new contract made for the higher compensation. A promise of additional compensation to obtain performance of the original contract would have been unenforceable. Schwartzreich v. Bauman-Basch, Inc., 131 N. E. 887, 231 N. Y. 196. Compare Davis v. Morgan, 43 S. E. 732, 117 Ga. 504, 61 L. R. A. 148, 97 Am. St. Rep. 171. An executory bilateral written contract may be varied by a subsequent oral agreement between the parties. Sasso v. K. G. & G. Realty & Const. Co., 120 A. 158, 98 Conn. 571. The theory of rescission is so much favored by some courts that in effect performance of a pre-existing contractual duty is held sufficient consideration, unless the promise of more pay was extorted by refusal to perform in bad faith or without any excuse. There seems very little difference in practical result between a change of compensation in an existing and continuing contract and the substitution of a new contract for the old, calling for the same thing at an increased compensation. These ingenious discoveries of legal detriment are rather aside from the merits of the case, and illustrate the extreme artificiality of the legal detriment test of consideration. See Cragin v. Eaton, 97 So. 532, 133 Miss. 151, 34 } *Or*

A. L. R. 508, necessity of independent consideration to support modification of price in a contract of sale.

For other cases see Decennial Digests, Contracts ⌘75(2), 237(2), 253; Master and Servant ⌘7; Sales ⌘89, 94.

Q. 64. The Lake View Land Company platted an addition to the city of Madison. Ames, a heavy stockholder in the company, purchased a lot. Bates purchased an adjoining lot. Both parties planned to build, and the contracts for both houses were let to Call. Call became dissatisfied with his contracts, and decided to abandon them. Ames, fearing that delay in building would affect the sales of other lots, proposed to Call to pay him \$1,000 extra if he would proceed under his contract with himself; also to pay him \$500 if he would promise to carry out his contract with Bates. Call promised, and completed both houses. Ames refused to pay the extra amounts. Is he liable for either or both of the sums promised, and why?

A. A promise of additional compensation for the performance of what one is already under obligation to a third party to do is held by the weight of authority in the United States to be invalid, as lacking consideration. It is assumed in the American cases that, by the doing or by the undertaking to do what one is already bound to do for another, one incurs no "legal detriment." It may well be that, on grounds of justice and good faith, a contractor should not be assisted to exact more pay from the other party to a contract. But, if a stranger to the contract wishes to offer additional inducements to complete performance, it seems rather far-fetched to deny the contractor a recovery. To hold that what the promisor receives is not adequate or sufficient in value to form the basis of a contract, merely because another may be entitled to insist on the performance of the same thing, seems to be carrying the requisites of consideration to a ridiculous extreme.

McGovern v. City of New York, 138 N. E. 26, 234 N. Y. 377, 25 A. L. R. 1442 (promise of additional compensation for completing building or construction contract).

McDevitt v. Stokes, 192 S. W. 681, 174 Ky. 515, L. R. A. 1917D, 1100.

Abbott v. Doane, 40 N. E. 197, 163 Mass. 433, 34 L. R. A. 33, 47 Am. St. Rep. 465.

For other cases see Decennial Digests, Bills and Notes ⌘92(1); Contracts ⌘52, 75(2); Municipal Corporations ⌘354.

Q. 65. A's daughter, C, and an Italian count, B, were engaged to be married. Thereafter A and B executed articles of agreement, in which A promised to pay C \$2,500 annually, reciting the engagement and prospective marriage as the basis. B and C were

married two days later. B and C assign their rights to D, who sues A to recover an annual payment. Is there consideration for A's promise?

A. Yes; in some jurisdictions. It may be contended that B and C, by marrying, were only doing what they were already legally bound to do, and therefore incurred no legal detriment. The reply has been suggested that refraining from the right to rescind an existing contract is consideration for the promise of a third person to either or both the contracting parties. It may also be suggested that the performance of the contract is a benefit in law to the promisor, as the defendant had no right to call on the parties to marry. If A wishes to hold out an incentive to B to perform his contract with C, the law should hold him to his promise, unless it was extorted from him by some threat of injury to C. } *Note*

De Cicco v. Schweizer, 117 N. E. 807, 221 N. Y. 431, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816.

Abbott v. Doane, 40 N. E. 197, 163 Mass. 433, 34 L. R. A. 33, 47 Am. St. Rep. 465.

Appleby v. Appleby, 111 N. W. 305, 100 Minn. 408, 428, 10 L. R. A. (N. S.) 590, 10 Ann. Cas. 563, 117 Am. St. Rep. 709.

Compare, however, McDevitt v. Stokes, 192 S. W. 681, 174 Ky. 515, L. R. A. 1917D, 1100.

For other cases see Decennial Digests, Bills and Notes ⇨92(1); Contracts ⇨75(2); Husband and Wife ⇨29(4).

Q. 66. (a) A and B entered into a bilateral contract, by which A promised to build a house, and B promised to pay him \$10,000 for it. A became dissatisfied with his contract and ceased work, but, after talking with C, who was interested in the completion of the house, finally said: "If you will give me \$500, I will build the house as I agreed." C paid A \$500, but A did not complete the house. What are C's rights? (Ballantine's Problems in the Law of Contracts, p. 130, problem 62.) *Yes. Consid ex'd.*

(b) Would your answer be the same if A had said to C, "If you will promise to give me \$500 to complete the work, I will build the house as I agreed," and if C had promptly said, "I promise"?

A. (a) C has a right of action against A for failing to complete his contract with B. Students are often confused by similar examination questions, because A promises to do only what he was already bound to B to do. But the fact that the promisor is already bound makes no difference, when he receives an executed consideration; i. e., the actual payment of the \$500 down. It is only promises which require consideration. A has bound himself both to B and to C to complete the house. Ward v. Goodrich, 82 } *Know*

P. 701, 34 Colo. 369, 2 L. R. A. (N. S.) 201, 114 Am. St. Rep. 167. "While it is settled that the promising to do, or the doing, of that which the promisor is already bound to do, does not, as a rule, constitute consideration for a reciprocal promise, * * * it by no means follows that such a promise may not be enforced against such promisor by the promisee," when there is an executed consideration.

Know { (b) The answer would probably be different, if C merely promised the \$500, because in a bilateral contract there must be good consideration upon both sides, and most courts would hold that A's promise would not support C's, and so the whole contract would fail. Hay v. Fortier, 102 A. 294, 116 Me. 455; Morton v. Burn, 7 Adol. & El. 19.

For other cases see Decennial Digests, Contracts ⇨75(1), 78. *Ex. & Transfer*

Q. 67. A executed a transfer of 100 shares of stock in the C Company to B, and B executed a note for \$7,000, with interest at 6 per cent., in favor of A, but with a condition that the note was not to be paid, otherwise than from dividends declared on the 100 shares of stock. A now sues to set aside the transfer of the stock on the ground of lack of consideration. Can he succeed?

Know { A. No; a transfer of title to property cannot be set aside for lack of consideration. The case is not one of mutual promises, but of an executed transfer. (If, however, A had merely promised to transfer property to B, and B had promised to pay for such property out of its proceeds or income, without promising to do anything to produce such return, then the bilateral contract would be lacking in mutuality or reciprocity, and would fail for want of consideration.)

Peavy v. Wells, 161 N. W. 508, 136 Minn. 180.

For other cases see Decennial Digests, Corporations ⇨117.

Q. 68. A, a married man, and B, a single woman, unaware of A's former marriage, entered into an agreement to marry. A subsequently declines to carry out his agreement, for the reason that it is impossible on account of his former marriage. Is he liable to B in damages for breach of contract? Give reasons.

A. A is liable to B for breach of promise. It is true that B is not bound, and that there is no mutuality of obligation. But there is no lack of consideration. The agreement was not a gratuitous one; there was mutuality of undertaking or promise. A cannot set up his own wrong, when he led B justifiably to rely upon his promise. It is often asserted as a fundamental axiom that in bi-

lateral contracts both parties must be bound, or neither will be bound; but actually there are many cases where only one side is bound, as in cases of infancy, insanity, drunkenness, fraud, (or illegality on one side) or where only one party signs a memorandum required to satisfy the statute of frauds. All that is really required in bilateral contracts is reciprocity of undertaking—mutuality in terms, not in obligations. It has been contended, however, that the true ground of recovery in such a case as the above is estoppel, or, since there has been fraud, in tort for deceit.

Millward v. Littlewood, 5 Exch. 775.

Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; 24 Col. Law Rev. 298.

25 Col. Law Rev. 705.

32 Harv. Law Rev. 679.

28 Harv. Law Rev. 121.

11 Mich. Law Rev. 425.

Wilson v. Carnley, [1908] 1 K. B. 729, 1 Brit. Rul. Cas. 901, 917, note.

For other cases see Decennial Digests, Breach of Marriage Promise ¶3, 14.

Q. 69. (a) X, a contractor, advertised for bids for the supplying for the year 1924 of various specified materials which X expected to require in his business. Y sent in a bid reading: "I undertake to supply you during the year 1924 with such quantities of each and every kind of materials specified in your advertisement and set out in the attached list at the prices stated in that list as you may order from time to time." The list specified the materials correctly and gave the prices at which they would be supplied. X thereupon wrote Y: "Your bid is accepted, and the terms of the contract must be strictly adhered to." X in 1924 sent in several orders, and Y filled them; but in July, 1924, Y notified X that Y would fill no more orders. X then, in August, 1924, sent in an order for some of the material, and Y refused to fill it. X sued Y for breach of contract. Was there one?

(b) Would your answer to question (a) be the same if Y's bid had read, "I undertake to supply the needs of your business for the materials specified for the year 1924," and if X had replied, "Your bid is accepted, and I agree to take from you all the materials specified that I shall need in my business in 1924"?

A. (a) No. What was X's acceptance? Merely a consent that Y might supply such materials as X might order from time to time. What obligation did this fasten on X? X did not bind himself to buy of Y only. There is no mutuality of obligation; no reciprocity of undertaking. Y's bid was a continuing offer, which contemplated a series of orders. When orders were given, con-

tracts were made for the goods ordered; but the offer was subject to revocation by Y at any time as to the future. *Wickham & Burton Coal Co. v. Farmers' Lumber Co.*, 179 N. W. 417, 189 Iowa, 1183, 14 A. L. R. 1293; *Great Northern v. Witham*, L. R. 9 C. P. 16.

(b) The contract is valid, if Y agrees to furnish the needs or requirements of the buyer's business, and X agrees to take such requirements from Y, at least where X is engaged in an established business, so that the quantity to be taken is more or less objectively determined. A contract to buy all that one shall require for one's own use in a particular business limits the freedom of choice, and is a very different thing from a promise to buy all that one may desire, or all that one may order. If, by accepting Y's bid or offer to sell, X has fettered his freedom to buy from whomsoever he pleases, there is a sufficient consideration. *Scott v. T. W. Stevenson Co.*, 153 N. W. 316, 130 Minn. 151; *Jenkins & Co. v. Anaheim Sugar Co.*, 247 F. 958, 160 C. C. A. 658, 8 L. R. A. 1918E, 293. *Over Accord*

For other cases see Decennial Digests, Contracts ¶10(4).

Q. 70. A promises to sell B at a stated price per ton all the coal that B shall need in his business during the coming year. B promises to take all his requirements from A. The price goes up, and A refuses to supply coal. Is there a contract?

A. Yes; where the only consideration for the promise to sell is the promise of the buyer to purchase such quantity as he may need, if the buyer has an established business, the contract is not void, either for uncertainty or for want of mutuality. But an agreement to take such goods as B may desire, or may order, is an "illusory promise," which furnishes no reciprocity or consideration, as it is wholly optional with B whether he will order anything or not. He does not really enter into any engagement. If B is a wholesaler, middleman, or jobber without any established business, a contract to take all his "requirements" might be a means of speculation, and of taking an oppressive advantage of the seller if prices rose rapidly, and some courts hold such a contract to be void for want of consideration and mutuality, being influenced, perhaps, by reasons of fairness and public policy.

C. W. Hull Co. v. Westerfield, 186 N. W. 992, 107 Neb. 705, 29 A. L. R. 105. See *Schlegel Mfg. Co. v. Peter Cooper Glue Co.*, 132 N. E. 148, 231 N. Y. 459, 24 A. L. R. 1348.

For other cases see Decennial Digests, Contracts ¶10(4); Sales ¶1(4).

Q. 71. The F Motor Co. agreed to give A the exclusive sales agency for the F cars in certain territory for five years. A agreed to maintain a salesroom, to continue as agent, to sell at fixed prices, and to perform other services. The F Co. agreed to supply the cars at a discount, but reserved the right to cancel the contract at any time. A has sold some cars and performed certain services, but then throws up the agency. Can A recover for services performed?

A. Yes; the F Co. cannot refuse payment. A is not guilty of breach of contract, because the F Co.'s privilege of canceling the contract at pleasure nullifies it as to the other party, except as an offer. *Velie Motor Car Co. v. Kopmeier*, 194 F. 324, 114 C. C. A. 284; *Bernstein v. W. B. Mfg. Co.*, 131 N. E. 200, 238 Mass. 589. The agent is not in default, and is entitled to recover compensation for his services. See *Erskine v. Chevrolet Motor Co.*, 117 S. E. 706, 185 N. C. 479, 32 A. L. R. 196. Mutuality of obligation is not essential in a contract, unless the want of mutuality would leave one party without valuable consideration for his promise. If a contract contain a provision for termination by one party upon notice to the other, if the notice requires time and may not be immediate, the contract is not thereby rendered void for lack of mutuality. *Thomas v. Anthony*, 157 P. 823, 30 Cal. App. 217; *Meurer Steel Barrel Co. v. Martin* (C. C. A.) 1 F.(2d) 687; 29 Yale Law J. 115; 32 Yale Law J. 496; 23 Col. Law Rev. 61. } *Not*

For other cases see Decennial Digests, Contracts §10(1, 2, 4).

Q. 72. On January 5, 1924, A gave his promissory note for \$500, payable to the trustees of a church, and due one year from date, to aid the trustees in building the church. Three months thereafter, and before anything had been done toward building the church, A died. In about one year the church was completed, and a claim on this note was filed against the estate of A. Can the trustees recover?

A. No; A's death before anything was done terminated the subscription. Subscriptions of money to charitable objects, such as the building of churches, though originally invalid for want of consideration, are generally held to become binding contracts, where money is expended and liabilities are incurred on the faith of the subscription. The courts, in their endeavor to apply the ordinary tests of consideration to such a gratuitous promise, have indulged in a variety of theories; e. g., finding the consideration in the mutuality of promises among the subscribers, or a sup- } *One must be consid*

posed request to proceed on the strength of the subscription, or some implied promise of the donee to use the fund according to the wishes of the donor. Under this view, no specific act in reliance on the subscription need be shown to make the promise binding. In general, however, promises to make a gift, as by the delivery of one's promissory note, even where one feels in honor bound to reimburse a loss, or a promise to pay an annuity to a friend or relative out of motives of love and gratitude for past services, are held to be without sufficient basis in consideration. But the expenditure of money or the incurring of liability by the beneficiary, in a charitable subscription, before the promise has been withdrawn, is a sufficient consideration or ground of enforcement to render the promise binding. It has been termed

Note { "promissory estoppel."

Furman University v. Waller, 117 S. E. 356, 124 S. O. 68, 33 A. L. R. 615.
See *In re Griswold's Estate* (Neb.) 202 N. W. 609, 38 A. L. R. 858.

In re Stack's Estate (Minn.) 204 N. W. 546.

For other cases see Decennial Digests, Contracts ⇌ 56, 57; Subscriptions ⇌ 4, 5, 18, 21(5).

moral duty & prom.

Q. 73. A owed B \$300, the balance due on a promissory note. This claim and all other debts of A were discharged by bankruptcy proceedings. Later A orally promised to pay B the \$300 at once. Four years after this promise, B sued A for the \$300. The statute of limitations on promissory notes, in the state where these facts arose, was five years; on oral contracts, three years. Can B recover?

A. The decision will probably depend upon the theory adopted, whether the action is brought on the original written promise, to which a defense has been waived or whether the cause of action is the breach of the new oral promise based on a moral obligation. In the case of certain once valid claims, such as debts barred by the statute of limitations, by bankruptcy, or by want of notice to an indorser, when such claim is recognized by a promise, or even by part payment, it may be enforced without any fresh consideration, on the ground that it is still due in conscience, notwithstanding the discharge by positive rule of law. The explanation is sometimes attempted that such promises merely amount to the waiver of a personal defense or privilege against an existing contract, and a renewal of the pre-existing legal liability on which the remedy merely is suspended. But the obligation in such cases arises, not from the original liability, but on the subsequent promise, which is the measure of the amount and conditions of the claim, and the basis of the remedy. *Trask v. Weeks*, 17 A. 162, 81 Me. 325; *Wolffe v. Eberlein*, 74 Ala.

99, 49 Am. Rep. 809; *Herrington v. Davitt*, 115 N. E. 476, 220 N. Y. 162, 1 A. L. R. 1700; *Gillingham v. Brown*, 60 N. E. 122, 178 Mass. 417, 55 L. R. A. 320. A new promise to pay, after a discharge in bankruptcy or insolvency, is obligatory by force of the subsisting moral obligation to pay. But a new promise to pay a debt discharged by an accord and satisfaction, or by a voluntary release by the creditor, cannot thus be supported. A promise by one after attaining majority to pay debts incurred during infancy needs no consideration. It is commonly spoken of as a "ratification" or "affirmance" of the former voidable contract.

For other cases see Decennial Digests, Bankruptcy 434; Limitation of Actions 151(4), 157(2).

Q. 74. C contracts with A to drive a well upon A's premises. By mistake, and without the knowledge of B, he drives a well on B's land. B had wanted a well driven, and promised to pay C the reasonable value of the improvement. Is he bound to pay?

A. All of the authorities admit that, where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay is supported by the moral obligation to pay, although the legal obligation is gone forever; and there seems no just distinction between such cases and those in which there never was any legal, but only a moral, obligation to pay. Some American authority seems to be in favor of enforcing a promise to compensate for past benefits or services (an "antecedent valuable consideration," as it is called), although unsolicited and rendered under circumstances not sufficient to create a contractual or quasi contractual liability originally. But a moral obligation, to support a promise, must be an obligation of justice and common honesty, based on value received, almost sufficient to raise a quasi contract; not a mere obligation of benevolence, relationship, or piety. It seems, furthermore, that the moral obligation must be coextensive with the promise, which may fall short of, but cannot go beyond, it.

Drake v. Bell, 55 N. Y. S. 945, 26 Misc. Rep. 237.

Edson v. Poppe, 124 N. W. 441, 24 S. D. 466, 26 L. R. A. (N. S.) 534.

Bagæff v. Prokopik, 180 N. W. 427, 212 Mich. 265, 17 A. L. R. 1292.

State of Oregon ex rel. Bayer v. Funk, 105 Or. 134, 199 P. 592, 209 P. 113, 25 A. L. R. 625.

For other cases see Decennial Digests, Brokers 43(3); Contracts 71(1), 79; Municipal Corporations 360(3).

Q. 75. X sued Y, July 17, 1924, on an instrument which read: "I promise to pay X, on or before July 10, 1918, the sum of \$10,000.

Witness my hand this 10th day of July, 1917. (Signed) Y. (Seal.)"
 What purported to be a seal following Y's signature was simply a parenthesis inclosing the word "Seal." Everything except Y's signature was in typewriting. As a matter of fact, no consideration for the promise was given by anybody to Y, who delivered the instrument by way of gift to X on July 10, 1917. By the state statute it is provided that, "in any action upon a sealed instrument * * * the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed." By other statutes the limitation period for actions on unsealed written contracts is fixed at six years, and on sealed contracts at ten years. Discuss all possible defenses of Y disclosed by the foregoing statement.

A. Unless the parenthesis, with the word (Seal), is sufficient to make this a specialty or covenant under seal, X's suit will be subject to the defense of the statute of limitations, which is six years on simple contracts. At common law the seal was an impression upon wax, but under modern statutes and decisions a scroll, the letters "L. S." or the word "Seal," in print and without scroll or device, have been held sufficient. Jackson v. Security Mutual Life Ins. Co., 84 N. E. 198, 233 Ill. 161. No recital of sealing as "Witness my hand and seal," is generally required except in Virginia and a few other states. The instrument is subject to the defense of lack of consideration, because the state statute makes the seal only prima facie evidence of consideration, and Y can introduce evidence to rebut the presumption. (Under such statutes the presence of a seal on an option contract would not preclude inquiry into the absence of consideration to show the revocability of the option.) Hartford-Connecticut Trust Co. v. Devine, 116 A. 239, 97 Conn. 193, 21 A. L. R. 134. In some states, however, an option under seal, though not supported by valuable consideration, is irrevocable.

For other cases see Decennial Digests, Contracts ⚡48; Evidence ⚡432; Seals ⚡3.

SECTION 3.—ASSIGNMENT, BENEFICIARIES, AND JOINT CONTRACTS

Q. 76. R contracted with M, a manufacturer of tires, to supply M at a certain price with all the rubber of a certain quality that M should require for manufacturing purposes for one year, and M undertook not to purchase rubber from any other merchant as long as R should supply it. During the year M transferred all his business

to P, including this contract. If R refused to supply any more rubber under the contract, could P sue him?

A. The general rule is that a contract to deliver goods may be assigned by the person to whom the goods are to be delivered. But the assignee cannot demand that the goods shall be delivered on his personal credit alone. *Arkansas Smelting Co. v. Belden Co.*, 8 S. Ct. 1308, 127 U. S. 379, 32 L. Ed. 246. R could not be called upon to supply more rubber than M would have required in his business, and this is now difficult to ascertain. An even more serious objection is that P has not agreed to take his rubber exclusively from R, and M's promise does not bind the transferee of the business, unless he assumes it. Even though the promise still binds M, he is not in business, and his refraining from buying rubber elsewhere is not the contemplated consideration. It would seem, then, that when M transferred his business to P, this released R from all further obligations. *Kemp v. Baerselman*, [1906] 2 K. B. 604, 2 B. R. C. 604. Compare *Tolhurst v. Assoc. Portland Cement Co.*, [1903] A. C. 414. In general, contracts are not assignable without the consent of the other party, if they involve a personal relation, call for individual skill or experience, or are made in view of the personal qualifications of the contracting party.

For other cases see *Decennial Digests, Assignments* ¶19.

Q. 77. Ames contracted to build a house for Bates, and the latter agreed to pay \$7,000 for it. Bates sold the lot and assigned the contract to Call, and it was particularly stipulated in the contract that Call alone should be liable for the contract price of the house. Neither Call nor Bates paid for the house. Ames sued Bates for the \$7,000. Can he recover? Could Ames sue Call?

A. Yes; Bates cannot escape from liability on his contract by assigning it to Call. Call is also liable, as Ames is beneficiary of the contract by which Call has agreed to be liable for the contract price. Ames would not have been compelled to complete the house, if he had known that Bates required him to look solely to Call. If he does know it, perhaps he could not sue Bates. An assignment of a bilateral contract does not relieve the assignor of his personal liability upon it. *Pioneer Loan & Land Co. v. Cowden*, 150 N. W. 903, 128 Minn. 307. Bates cannot, without the consent of Ames, substitute Call in his place. The rights under a contract may be assigned, if they are not personal; but even impersonal duties can only be delegated. If the assignor indicates to Bates that he disclaims all further liability, an acceptance by Ames of Call as assignee would

amount to an assent to a proposed novation or substitution of parties. See *Fleming v. Law*, 124 P. 1018, 163 Cal. 227; *Pike v. Waltham*, 47 N. E. 437, 168 Mass. 581.

For other cases see Decennial Digests, Assignments 18, 58, 109, 114.

offer Q. 78. The B Company is furnishing ice to A under a proposal to supply such ice as he may order during the year at \$5 per ton. The B Company sells its business to C Company, which continues to supply ice to A, who takes the ice, supposing it to come from the B Company. When A receives the bill at the end of the year for the ice so furnished, he refuses to pay. Can the C Company, having taken over the business, thrust itself into the position of seller, and recover the price of the goods delivered?

Note A. There is no contract, because the C Company cannot accept an offer made to the B Company. An offer can be accepted only by the person to whom it is made. If A orders merchandise of B, and C surreptitiously fills the order, C, having thrust himself without consent into the position of seller, cannot recover the value of his wares. If A had had a contract with the B Company, this contract might have been assigned to a third party; but a mere offer or proposal cannot be assigned. (It would seem, however, that there ought to be at least a quasi contractual liability for the goods delivered and received by A, unless the C Company has acted in bad faith, but this is doubtful.) *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9. See *Costigan*, 7 Col. Law Rev. 32; *Wheeling Creek Gas, Coal & Coke Co. v. Elder* (C. C.) 170 F. 215, 221; *J. B. Colt Co. v. Grubbs*, 263 S. W. 749, 204 Ky. 189. If the defendant had received notice of the change of firm, and had continued to accept the ice as delivered, or even if he had discovered this before he had used the goods, he would have had either to return or pay for them. *Cincinnati Siemens-Lundgren Gas Illuminating Co. v. Western Siemens-Lundgren Co.*, 14 S. Ct. 523, 152 U. S. 200, 38 L. Ed. 411; *Concord Coal Co. v. Ferrin*, 51 A. 283, 71 N. H. 33, 93 Am. St. Rep. 496.

For other cases see Decennial Digests, Assignments 18, 68; Contracts 186(3); Sales 33; Specific Performance 17; Vendor and Purchaser 214(2).

Q. 79. The B Water Co. enters into a contract with city A, whereby the company promises to keep water in every hydrant at a certain pressure and the city promises to pay so much per hydrant per month.

(a) If the city fails to keep its promise, may a stockholder in the Water Co. have an action against the city?

(b) If the company fails to keep its promise, and as a direct result thereof C's house burns, has C a cause of action on the contract against the company?

A. (a) It is very clear that stockholders have no personal rights or liabilities on contracts made by the corporation. Smith v. Hurd, 12 Metc. (Mass.) 371, 416 Am. Dec. 690. The contract is not made for the benefit of individual stockholders, nor is performance to be rendered to them. } *Corporation*

(b) C cannot sue the Water Co. for failure to keep water at the agreed pressure in the fire hydrants. C is merely an indirect or incidental beneficiary. The object of the contract was to benefit the community as a whole. A suit by the individual citizen will not produce the thing contracted for or its equivalent. The Water Co. cannot be considered as an insurer of the individual citizen against loss by fire through failure to provide water in sufficient quantity and under sufficient pressure to extinguish fires. (If the water company is liable, it would be in tort for a duty assumed by reason of its undertaking, rather than in contract.) Trustees of Jennie De Pauw Memorial M. E. Church v. New Albany Water Works, 140 N. E. 540, 193 Ind. 368, 27 A. L. R. 1274; German Alliance Ins. Co. v. Home Water Supply Co., 33 S. Ct. 32, 226 U. S. 220, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; 24 Col. Law Rev. 89. In granting rights to sue to third party beneficiaries, the courts must consider whether such a remedy will most directly effectuate the dominant purpose of the contracting parties. Fosmire v. National Surety Co., 127 N. E. 472, 229 N. Y. 44. *Over- me. Be Tort.*

For other cases see Decennial Digests, Corporations ⇨206(2); Municipal Corporations ⇨739(2); Waters and Water Courses ⇨206.

Q. 80. Land was conveyed by A to B, subject to a mortgage, and and B accepted the deed with knowledge that it provided that he assumed and agreed to pay the mortgage debt. After M, the mortgagee, demanded payment under this agreement, A executed and delivered to B a sealed release of said agreement. Did the release free B from all legal obligation to the mortgagee?

A. A creditor secured by mortgage on the debtor's property may sue a grantee of the equity of redemption, who personally undertakes to pay the mortgage debt as a third party beneficiary. The Home v. Selling, 179 P. 261, 91 Or. 428, 21 A. L. R. 403; Hubard & Appleby v. Thacker, 110 S. E. 263, 132 Va. 33, 21 A. L. R. 423. The main question here is as to the power of A, the promisee, to release B from this obligation to M. It is generally held that, after assent

Note { or acting upon the promise by the third party, the original parties to the contract cannot change or release it without the agreement of the beneficiary. *Tweedale v. Tweedale*, 93 N. W. 440, 116 Wis. 517, 61 L. R. A. 509, 96 Am. St. Rep. 1003; *Bay v. Williams*, 1 N. E. 340, 112 Ill. 91, 54 Am. Rep. 209. A distinction as to the power of release has been suggested between sole beneficiary cases and debtor and creditor cases. In the latter a release might on principle be allowed, if the debtor did not thereby deprive himself of sufficient means to pay his debts. 28 Harv. Law Rev. 321. If a contract for the benefit of a third party is entirely executory on both sides, it may be rescinded by the parties. *Sedgwick v. Blanchard*, 174 N. W. 459, 170 Wis. 121.

For other cases see Decennial Digests, Contracts §269, 317; Mortgages §280(4), 282(1), 285.

re- main ok { Q. 81. A was the owner of Blackacre, and in 1915 he mortgaged the premises to B to secure an indebtedness of \$1,000. In 1916 A sold the property to C, who in turn sold it to D in 1917. In the deed from C to D there was a clause stating that the conveyance was made subject to the mortgage to B, "*which mortgage the party hereto of the second part (D) covenants and agrees to pay off and discharge, the same forming part of the consideration thereof.*" The deed from A to C contained no such stipulations. In 1920, the mortgage being due and unpaid, B, the mortgagee, instructed his attorneys to foreclose the mortgage. Upon looking up the record preparatory to filing suit, they found that D had assumed the mortgage in the deed from C to D. They brought action for foreclosure, and asked for deficiency judgment against D, if the land did not sell for sufficient to pay the mortgage. D sets up the following defenses:

- (a) No privity of contract between D and B.
- (b) No consideration moving from B to D.
- (c) No legal or equitable duty owing from C to B, which would be discharged by D's fulfillment of his promise to C to pay the mortgage.

(d) No intention on the part of C to benefit B, by exacting the promise on part of D to assume the mortgage and pay B.

Are any of the defenses good? Why?

re- main ok { A. (a) Lack of "privity" is no objection, because the right of a beneficiary is not the result of any contractual relation with him. 27 Yale Law J. 1008, 1017.

(b) It is not required that the beneficiary furnish any consideration. 29 Harv. Law Rev. 92, 99.

(c) It is required by some courts that there must be some claim by the beneficiary upon the promisee to give the beneficiary a right of action. Under this rule, there must be an unbroken sequence of personal liability by each grantee of the equity of redemption. B could not hold D, because, although A sold to C subject to the mortgage, C did not assume and agree to pay the debt and incurred no personal liability. C had no motive or interest in protecting the mortgagee, and, unless it was inserted by mistake, the assumption was probably intended merely to protect C against any possible or supposed liability on his own part. See *Fry v. Ausman*, 135 N. W. 708, 29 S. D. 30, 39 L. R. A. (N. S.) 150, Ann. Cas. 1914C, 842; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195. } One + 2 other state

(d) If the performance is to be direct to the third party, as by payment of money to him, the usual inference will be that he was intended as a beneficiary. But that inference might be rebutted by circumstances, as here. Where the grantor, the promisee, C, was not personally liable, the assumption clause may be interpreted as a mere indemnity to the grantor. *Fry v. Ausman*, supra.

For other cases see Decennial Digests, Mortgages ⇨558. *jointly* *K* *get*

Q. 82. (a) X, Y, and Z being jointly and severally liable to A on a contract in the sum of \$15,000, A sued X and got a judgment for the \$15,000. A then sued Y and Z together for the \$15,000. What, if any, defenses to the second action have Y and Z?

(b) If, instead of suing X, A had settled with X for \$5,000 and had given X a release, and then sued Y and Z together for the balance of \$10,000, what, if any, defenses, would Y and Z have had? *K* *now*

A. (a) A must sue them all jointly, or sue any one or all of them separately. He cannot join Y and Z, without X. *Stevens v. Catlin*, 37 N. E. 1023, 152 Ill. 56. If one is sued severally, subsequent suit against all jointly is barred.

(b) A judgment against X is no bar to an action against the other joint and several obligors. But a release of one joint and several debtor releases all, just as in the case of joint liability. This seems an arbitrary technicality. Statutes sometimes change it. *Devy v. Connecticut Co.*, 92 A. 883, 89 Conn. 74, L. R. A. 1915E, 800, Ann. Cas. 1918D, 270; *Tancred v. First Nat. Bank of Ft. Smith*, 187 S. W. 160, 124 Ark. 154.

For other cases see Decennial Digests, Bills and Notes ⇨460; Release ⇨28(1), 29(5).

Q. 83. A, B, and C are jointly obligated to X for \$1,500. A is anxious to be released, and is willing to pay X one-third of the amount

of the debt. X is willing to settle with A, provided he does not lose his rights against B and C. Can this be done? If so, suggest possible means of accomplishing the desired result.

A. A covenant not to sue or a qualified release does not discharge the others. If the release contains an express reservation of the rights of X against B and C, this will preserve his claim for the balance against them. The same rule applies to settlement with one of several joint tort-feasors. *Musolf v. Duluth Edison Electric Co.*, 122 N. W. 499, 108 Minn. 369, 24 L. R. A. (N. S.) 451.

For other cases see *Decennial Digests*, Release Ⓒ37.

SECTION 4.—CONDITIONS, EXPRESS AND IMPLIED

A comprehensive grasp of the confused subject of implied conditions may be aided by the following outline, in which various important distinctions are indicated as to dependency, as affected by order of performance, and the effect of breach of conditions:

Outline of Implied Conditions—The Dependency of the Duty to Perform upon the Reciprocal Performance.

1. Concurrent Conditions.—Necessity of tender of simultaneous performance to put other party in default.

(1) Exchange of equivalents to be made at same date, as transfer of title to land, or goods, and payment of price, concurrent conditions or mutually dependent covenants. *Headley v. Shaw*, 39 Ill. 354; *Runkle v. Johnson*, 30 Ill. 328, 83 Am. Dec. 191.

(2) No date specified. Presumption favors concurrent performance. *Fulton v. American Bldg. & Loan Ass'n.*, 48 N. W. 781, 46 Minn. 190; *W. Harvester Co. v. Jefferson*, 59 N. W. 532, 57 Minn. 456.

(3) Different dates specified in contract, but both performances now due; e. g., last installment and deed. See *Walker v. Hewitt*, 220 P. 147, 109 Or. 366, 35 A. L. R. 100; *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535. Conflict.

(4) Even if performance on one side by A is made an express condition precedent to B's duty (e. g., deed after payment of price), this does not necessarily negative an implied condition concurrent of ability and readiness to perform at the same time by B. Concurrent conditions are implied, unless the contrary intention clearly appears. *Kane v. Hood*, 13 Pick. (Mass.) 281; *Glenn v. Rossler*, 50 N. E. 785, 156 N. Y. 161, 166. Compare *Walker v. Hewitt*, 220 P. 147, 109 Or. 366, 35 A. L. R. 100.

2. Precedent Conditions.—Necessity of prior performance on one side as condition to other's duty becoming operative.

(1) Performance due first is independent duty; subsequent performance is dependent duty. *McChesney v. Oppek*, 194 N. W. 882, 156 Minn. 260; *Central Appalachian Co. v. Buchanan*, 73 F. 1006, 33 C. C. A. 682; *Robson v. Bohn*, 22 Minn. 410; *Id.* 7 N. W. 357, 27 Minn. 333.

(a) But, when time for subsequent performance arrives, the right to call for the prior performance in specie (as contrasted with damages) may become dependent on tender of concurrent performance. *Beecher v. Conradt*, 13 N. Y. 108, 64 Am. Dec. 535. Cf. *Walker v. Hewitt*, *supra*. Some courts, however, hold that a duty or promise, if originally independent, remains so.

(b) Prior performance is excused by repudiation or insolvency or inability of the other party.

(2) Where performance on one side requires time, as in employment contracts, full performance must precede payment, unless otherwise provided. } *Note*

3. Effect of Breach of Contract or Repudiation.

(1) Repudiation or prevention excuses duty to proceed or to tender performance. Insolvency excuses duty to perform on credit, and turns a credit contract into a concurrent exchange. *Torkomian v. Russell*, 97 A. 760, 90 Conn. 481.

(2) Material breach excuses duty to proceed with executory parts of contract. If the breach is such as to indicate probability of future default, or that the injured party cannot safely go ahead, or attain his objects under the contract, he ought to be excused from continuing. *Rosenthal Paper Co. v. National Folding Box & Paper Co.*, 123 N. E. 766, 226 N. Y. 313.

(3) Willful breach excuses duty to proceed. (Query—if slight?)

(4) Substantial performance in good faith satisfies conditions precedent, if implied. (Query as to express conditions?) *Nolan v. Whitney*, 88 N. Y. 648, applies same rule to both. } *Note*

(5) Material breach may excuse duty to pay for executed parts; i. e., for part performance, unless contract is "divisible." In case of some "entire" contracts there may be recovery in quasi contract to prevent forfeiture.

(6) Waiver.

(a) Before breach: Consent to nonperformance before breach will excuse conditions.

(b) After breach: Breach may be waived as a condition by subsequent recognition of the contract, or electing to take benefits under it after breach, even if not waived as a cause of action for damages. *McDonald v. Kansas City Bolt Co.*, 149 F. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Imperator Realty Co. v. Tull*, 127 N. E. 263, 228 N. Y. 447; *Frankfurt-Barnett Co. v. William Prym Co.*, 237 F. 21-28, 150 C. C. A. 223, L. R. A. 1918A, 602; 2 Williston on Contracts, § 703.

For other cases see Decennial Digests, Contracts ☞ 173, 238(2), 278(1), 279(1), 295(1), 316(1), 335(2); Sales ☞ 117, 127, 153, 164, 179(1), 350; Vendor and Purchaser ☞ 58, 75, 76, 107, 303.

Q. 84. A and B entered into a contract on May 1, whereby A agreed to sell B his black horse Ned on June 1, and B was to pay A \$100 for the horse on the same day. B paid \$10 down as a deposit. Neither party did anything on June 1, but on July 1 A requested B to take and pay for the horse, but he refused to do so, and demanded back his deposit. Can either sue the other?

A. Where the performances on both sides are to take place at the same time, either side, which wishes to enforce the contract, must tender performance to put the other side in default. Therefore A cannot sue B for refusal to take and pay for the horse, as tender comes too late. Besides, mere demand of performance is no tender, although refusal of an offer might excuse tender. B cannot sue A to recover his \$10 deposit, as he has not put A in default by seeking him out, tendering the price in money, and demanding the goods on June 1.

Haggood v. Shaw, 105 Mass. 276.

See *Newell v. E. B. & A. L. Stone Co.*, 184 P. 659, 181 Cal. 385, 9 A. L. R. 993.

Q. 84a. Suppose, in the above case, B was to pay for the horse Ned on June 1, and A was not to deliver until July 1. Must A tender delivery to B in order to sue him for the price, if suit is commenced on (1) June 30; or (2) on July 1?

A. A performance first due must be given before a performance subsequently due from the other party can be demanded. During June B's duty to perform is independent and absolute, and he is liable to be sued by A without tender of the horse. But after July 1 it seems doubtful whether A can sue for the price without tendering the horse, delivery of which is now due, although he could

probably defend an action by B and call the contract off, even if B should tender on July 1. B's duty of performance, which at first was independent, has become conditional and dependent after July 1, upon A's performance, if A waives B's delay and seeks to collect the price. A would be excused, if he wishes to set up B's failure to tender in time and sue merely for damages. So, even before July 1, if A becomes insolvent or is disabled from performing his part, B will be excused from paying the price, if he has not yet done so, except upon delivery of the horse. But see *Walker v. Hewitt*, 220 P. 147, 109 Or. 366, 35 A. L. R. 100.

For other cases see Decennial Digests, Contracts ⚡279(1); Sales ⚡153; Vendor and Purchaser ⚡58, 76, 107.

Q. 85. S promises to sell and deliver his Ford to B on August 1, and B promises to pay \$400 on July 1. May S sue B July 15 for (a) damages for not paying the \$400 without tender of delivery of the Ford? (b) for the \$400?

A. (a) Yes; it is clear that S has a right of action for the breach of the contract by B. Since the time has not yet arrived for performance by S, the duty of B to pay the price is independent and unconditional. If S sues before August 1, he need not allege either performance or tender. *Southern Pacific Co. v. Allen*, 44 P. 796, 112 Cal. 455, 461; 18 Harv. Law Rev. 298; 23 Mich. Law Rev. 921; 14 Mich. Law Rev. 320; 17 Mich. Law Rev. 283.

(b) Whether or not S can recover the full price as such, and not merely damages for breach, where the consideration is still executory, is another question. The Uniform Sales Act provides that, where the price is payable on a day certain, irrespective of delivery or transfer of title, the seller may recover the price although the title to the goods has not passed. Some states, however, deny an action for the price, unless the title has passed. *Pate v. Ralston*, 139 N. W. 906, 158 Iowa, 340, 51 L. R. A. (N. S.) 735; *Montauk Ice Cream Co. v. Daigger Co.*, 126 S. E. 681, 141 Va. 686. See *Noyes v. Brown*, 171 N. W. 803, 142 Minn. 211. } Sales
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For other cases see Decennial Digests, Sales ⚡340; Vendor and Purchaser ⚡58, 302, 314(1), 318.

Q. 86. S promises to sell and deliver his Ford to B on August 1, and B promises to pay \$400 on July 1. B fails to pay on July 1, and S, being still able to deliver, brings his action (a) for damages, and (b) for the price, on August 15. What can S recover, if anything, without tender of delivery?

A. S might have sued at any time between July 1 and August 1, for damages or for the price, without alleging delivery or tender of delivery. After August 1 he may sue for damages without tender, because he is excused from the duty of performance on his side by the breach of B. But if he waives this breach as an excuse, and sues for the purchase price, some courts have held that he must allege a tender of performance. It was the intention of the parties to exchange the money for the car, and the seller may well be required to tender delivery, if he still wishes to call on the buyer to pay the full price.

Beecher v. Conradt, 13 N. Y. 108, 64 Am. Dec. 535.

Hill v. Grigsby, 35 Cal. 656.

Kane v. Hood, 13 Pick. (Mass.) 281.

Compare Walker v. Hewitt, 220 P. 147, 109 Or. 366, 35 A. L. R. 100.

For other cases see Decennial Digests, Contracts ~~§~~ 173, 278(1); Vendor and Purchaser ~~§~~ 58, 76, 303.

Q. 87. S promises to deliver his Ford to B on August 1, and B promises to pay S \$400 as soon as he sells his house, and in any event on or before January 1 next. B sold his house on July 31. May B sue S for nondelivery of the car on August 1 without tender of the price?

A. Probably most courts would now hold that B would have no right of action without tender of performance, which is now due. According to rule 1, laid down by Sergeant Williams, however (published in 1799 as a note to Pordage v. Cole), ("if a day is appointed for payment of money or the doing of any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act to be performed, an action may be brought for the money, or for not doing such other act before performance (or tender); for it appears that the party relied upon his remedy.")

Of course, if B did not sell his house before August 1, he could sue S for nondelivery without tender. But as soon as B sells the house his performance becomes concurrently due with that of S. The mere fact that time for performance by one party may possibly arrive before time for performance by the other is not sufficient to make his duty independent, if it does not so turn out.

Q. 88. (a) D agrees to convey Blackacre to P, and P agrees to pay \$5,000 for it on January 1. On January 1 P tenders \$5,000 to D, which D refuses. What are P's rights against D?

(b) On January 1 neither party does anything. What are P's rights against D on January 2?

(c) Up to March 1 neither party does anything. What are P's rights against D on March 1?

A. (a) P has by tender performed the implied condition upon which D's duty to convey depends, and put D in default. P may recover damages at law for the breach, or get a decree of specific performance in equity. *Dam's What*

(b) Since time is not made of the essence, one or two days' delay would not be a material breach, and P may tender on January 2 and enforce the contract against D.

(c) If P delays until March 1, a period of three months, this may amount to such a failure of performance as to prevent P from enforcing the contract. Neither party has a right to recover without a substantial performance, or at least an offer to perform. But, where both parties to a contract fail to perform their mutual covenants on the day named, they may be held to have waived strict performance as to time. *Note*

Cadwell v. Smith, 120 N. W. 130, 83 Neb. 567.

For other cases see Decennial Digests, Contracts §316(1).

Q. 89. By contract duly executed by both, A agreed to buy certain real estate from B for \$3,000, payable in semiannual installments of \$500 each, the final payment to be made and deed delivered three years after the date of the contract. The last two installments were never paid. The vendor did nothing except to demand payment of the amount due at the maturity of each of the installments, and the day after the last was due he sued for the unpaid balance of the contract price. What would have been your decision as judge in the case, and what would have been your reasons?

A. The duty to pay all the installments except the last was originally independent, but the duty to pay the last is dependent on concurrent delivery of a deed. The weight of authority holds that the formerly independent duty to pay prior installments also becomes dependent if not enforced until the last installment falls due. The theory is that it would not be fair to allow the seller to collect the price without a delivery of the deed, when the time for that has arrived. There is some authority contra. *ore contra* *Know. O.*

Walker v. Hewitt, 220 P. 147, 109 Or. 366, 35 A. L. R. 100.

For other cases see Decennial Digests, Vendor and Purchaser §58, 76.

Q. 90. Seller and buyer on January 2 entered into an agreement whereby seller promised to sell and deliver to buyer on March 1 an automobile, and buyer promised to pay to seller \$500 on Janu-

ary 15, \$500 on February 15, and \$500 on March 15. Buyer paid the January installment on time, but failed to pay the February and March installments. Seller did not tender the automobile on March 1. What decision in each of the following cases:

(a) If seller on March 2 brought action for the February installment?

(b) If seller on March 16 brought action for the February installment?

(c) If seller on March 16 brought action for the February and March installments?

(d) If on March 2 buyer brought action for failure to deliver the automobile?

(e) If on March 16 buyer tendered the February installment and interest and then brought action for failure to deliver the automobile?

In answering the foregoing, show the development of the law of implied conditions, and state which of Sergeant Williams' rules would apply, and with what result.

A. (a) By Sergeant Williams' rule 1 (published in 1799 as a note to *Pordage v. Cole*), if the day appointed for the payment of money is to happen before the day when the thing which is the consideration for it is to be performed, an action may be brought for the money without performance or tender of the consideration; i. e., delivery of the automobile. An intention is inferred not to make seller's performance a condition precedent. (Some modern courts, however, hold that, if seller delays to bring his action for an installment of the price (as contrasted with damages), he must aver a tender of performance.) *Beecher v. Conratt*, 13 N. Y. 108, 64 Am. Dec. 535.

(b) If seller on March 16 brought action for the February installment only, the March installment being then due, some courts would hold that the duty of buyer as to that installment was (still independent) Others would hold that it had become dependent on tender. See *Gray v. Meek*, 64 N. E. 1020, 199 Ill. 136; *Walker v. Hewitt*, Q. 84, *supra*.

(c) If seller on March 16 brought action for both the February and March installments, since the latter is dependent on tender of delivery on March 1, seller could not recover. By Sergeant Williams' rule 2, if the day appointed for the payment of money is to happen after the thing which is the consideration for the money is to be performed, no action can be maintained for the money before performance. *Hill v. Grigsby*, 35 Cal. 656.

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(d) If on March 2 buyer sues seller for damages for failure to deliver the automobile, he cannot recover, because he has not paid or tendered the February installment.

(e) If he tenders this installment on March 16, he is guilty of material breach by delay, and by some courts the March installment is now a condition to his right.

For other cases see Decennial Digests, Contracts §301; Vendor and Purchaser §76, 148, 303.

Q. 91. P sues to recover \$1,000, the initial payment made to V upon the signing of a contract for the purchase of land. The balance of the price, \$5,000, was to be paid in 60 days, and V was to execute a deed of conveyance. The 60 days expired June 1. V thereafter gave P notice of forfeiture and termination of the contract by reason of his failure to tender payment. V's title was defective, and V had made no effort to correct the title or to tender a deed. Can P recover the purchase money which he has paid down?

A. Yes; the delivery of the deed and the payment of the balance of the price at the end of 60 days were dependent and concurrent conditions. In such a case, even if time is of the essence, the vendor cannot put the purchaser in default until he has tendered a deed. Moreover, one party to a contract cannot declare a forfeiture for failure of the other party to perform on his part, unless he is in a position to perform himself. He cannot retain the part of the consideration received while he himself is unable to perform.

Cadwell v. Smith, 120 N. W. 130, 83 Neb. 567.

Lemle v. Barry, 183 P. 148, 181 Cal. 6.

For other cases see Decennial Digests, Contracts §267; Vendor and Purchaser §148, 334(1).

Q. 92. A contracted to deliver to B within 40 days a boiler and engine, for which B agreed to pay A \$1,500 in one year from date of delivery, to be evidenced by a promissory note. At the time fixed for delivery, B was insolvent. A learned of this, and did not deliver the boiler and engine to B, but sold them to C for \$1,500. The boiler and engine were in fact worth \$2,000. B brought suit against A for \$500 damages. Can he recover? Explain your answer. (Ohio, 1924.)

A. The insolvency of the buyer, B, did not abrogate the contract, but it excused A from the duty to deliver the articles on credit. If B had tendered the price in cash, A would have been bound to deliver the goods. Pardee v. Kanady, 2 N. E. 885, 100

N. Y. 121. It is doubtful whether insolvency does more than to turn a contract from a credit one into a cash one, and whether it excuses the duty to proceed and tender performance by A. If B was ready to pay cash, it may be that it would be necessary for him affirmatively to indicate his election to proceed, and so hold A to performance on his part. *Hanna v. Florence Iron Co.*, 118 N. E. 629, 222 N. Y. 290. If that is so, B cannot recover damages, for he has not tendered payment or put A in default. Delivery and payment have become dependent and concurrent conditions. *Lincoln v. Charles Alshuler Mfg. Co.*, 125 N. W. 908, 142 Wis. 475, 28 L. R. A. (N. S.) 780.

For other cases see *Decennial Digests*, *Receivers* ⇨90; *Sales* ⇨150(1), 172, 174.

Q. 93. The memorandum of agreement between John Smith and Samuel Jones was as follows: "I will deliver John Smith 5,000 bushels of wheat at his elevator in Detroit at \$1 per bushel. Cash. Samuel Jones." Thereafter Jones delivered 1,000 bushels of wheat and demanded payment. Smith declined to pay until the full amount had been delivered. Jones brings suit for the price of wheat sold and delivered.

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K. { A. This contract is presumably entire, in the sense that delivery or an offer to deliver the entire quantity is a condition precedent to the right to demand any payment. It is otherwise where the entire quantity is to be delivered in stated installments.

Kelly Const. Co. v. Hackensack Brick Co., 103 A. 417, 91 N. J. Law, 585, 2 A. L. R. 685.

Baker v. Higgins, 21 N. Y. 397.

For other cases see *Decennial Digests*, *Action* ⇨53(3); *Sales* ⇨62, 99, 183.

Q. 94. T entered into a contract with S, whereby T agreed to sell and S to purchase 50 slaughtered hogs at a price named, to be delivered at once, and 100 live hogs at a different price, the live hogs to be delivered on their arrival. This agreement to sell live and slaughtered hogs was contained in one and the same contract. T delivered the slaughtered hogs, but the live hogs, on their arrival, were not delivered to S. T brought an action for the agreed price, and S defended on the ground that the contract was entire, and that performance of the contract by T in all its parts was a condition precedent to his recovery.

A. T was entitled to recover the price of the dressed hogs, deducting the damages S had sustained by the breach of the other branch of the contract. The delivery of the live hogs was not a

condition precedent to the duty to pay for the others. The contract consists of two distinct parts, having no necessary connection, each complete of itself.

Tipton v. Feitner, 20 N. Y. 423.

Portfolio v. Rubin, 135 N. E. 843, 233 N. Y. 445.

Wooten v. Walters, 14 S. E. 734, 110 N. C. 251.

Orenstein v. Kahn, 119 A. 444, 13 Del. Ch. 376.

For other cases see Decennial Digests, Contracts 171(1), 297, 319(1); Sales 62, 109, 180(1), 348(1); Vendor and Purchaser 55.

Q. 95. A hotel company entered into a contract, granting to a transfer company its exclusive baggage delivery privilege, in consideration of monthly payments, for five years. While the contract had still more than four years to run, the transfer company was put into involuntary bankruptcy. The trustee did not elect to assume the contract. The hotel company now claims to prove for damages for loss of the contract against the assets. Can the proof of the claim be allowed, the payments not yet being due by the terms of the contract? *Yes*

A. Yes; the filing of an involuntary petition, followed by adjudication of bankruptcy, is held the equivalent of an anticipatory breach of an executory agreement, where the trustee does not elect to assume performance. The claim for damages is founded on a contract under section 63a(4) of the Bankruptcy Act of 1898 (U. S. Comp. St. § 9647 [U. S. C. tit. 11, § 103]), and is provable against the estate. Central Trust Co. v. Chicago Auditorium Ass'n, 36 S. Ct. 412, 240 U. S. 581, 60 L. Ed. 811, L. R. A. 1917B, 580; Napier v. People's Stores Co., 120 A. 295, 98 Conn. 414, 33 A. L. R. 499. Compare Barthen v. Lodi Corporation, 119 A. 189, 94 N. J. Eq. 177. It is said that "bankruptcy is a breach of an implied term of every contract that the promisor will not permit himself through insolvency or acts of bankruptcy to become unable to perform his contract." (Another way to put it is that manifest inability or disablement to perform, due either to bankruptcy or insolvency, may be treated as a cause of action, a threat or indication of coming breach.) Anticipatory breach, 22 Mich. Law Rev. 342. So, also, receivership of a corporation operates as a breach of its open executory contracts, which entitles the other party to file and prove claims for damages without offer of performance.

For other cases see Decennial Digests, Bankruptcy 318(2); Corporations 559(1); Receivers 152.

Q. 96. D borrowed 50 tons of ice from P in 1919, when the price of ice was \$2.50 a ton, and agreed to return an equal amount of ice

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Anticipatory Br. during the following season. In July, 1920, when ice was worth \$7.50 a ton, P demanded a fulfillment of D's promise. D wrote in reply: "I do not know whether I can return the ice or not. It seems unfair to compel me to do so. I will not return it, unless the price of ice falls to \$2.50 a ton." P immediately sues D for a breach of contract. D contends that the action is prematurely brought. What decision?

A. It was held on similar facts by the United States Supreme Court in *Dingley v. Oler*, 6 S. Ct. 850, 117 U. S. 490, 29 L. Ed. 984, that such a declaration did not amount to an anticipatory breach, because it was not a final, unconditional, and unequivocal declaration of a fixed purpose not to perform the contract. There seems no basis in reason, however, for such strictness. While the courts will not transform mere suspicion, fear, negotiation, or request into a cause of action, yet, if P is warranted in inferring as a reasonable man that the contract will not be carried out, this should be sufficient basis for a right of action to enforce it. *Louisville Packing Co. v. Crain*, 132 S. W. 578, 141 Ky. 379. Anticipatory breach, 22 Mich. Law Rev. 329, 343, 351; 10 Cornell Law Quart. 145, 146. A refusal to perform a contract, except upon terms or conditions not embraced in the contract, constitutes in effect a repudiation. *Lemburg*, 10 Cornell Law Quart. 135, 163-166.

Rule { In all jurisdictions, except Massachusetts and Nebraska, the repudiation of a bilateral contract before the day of performance gives an immediate right of action. In the case of debts, which are unilateral contracts, for the payment of money, no right of action to collect before maturity is given, except in case of bankruptcy, receivership, and decedents' estates. See *Equitable Trust Co. v. Western Pacific Ry. Co.* (D. C.) 244 F. 485, 501.

For other cases see Decennial Digests, Contracts ⇨ 317, 318; Railroads ⇨ 154.

Q. 97. A agreed to sell, and B agreed to buy, 100 cases of boots, to be manufactured at A's factory during the ensuing month and delivered the last day of that month. The middle of the month the buyer repudiated this contract, and the seller wrote back: "I accept your repudiation as an immediate breach of contract." On the next day the factory was totally destroyed by fire. What are the rights of the parties, supposing the events take place in England and action is to be brought there? What would their rights be, if the events took place in Massachusetts and the action were brought there?

Anticipatory Br

A. A has elected to treat B's repudiation of the contract as an anticipatory breach. But it would seem that A must still show, in order to recover damages, that he would have been able and ready to perform at the appointed day, but for the repudiation. At least it would be a defense for B to show that A would have been unable to perform at the date of delivery. *Caporale v. Rubine*, 105 A. 226, 92 N. J. Law, 463; *Dosch v. Andrus*, 126 N. W. 1071, 111 Minn. 287; *Gray v. Smith*, 83 F. 824, 28 C. C. A. 168; 22 Mich. Law Rev. 329, 346. See *British & Beningtons, Lim., v. North Western Cachar Tea Co.*, [1923] A. C. 48, criticized in 10 Cornell Law Quart. 156-159. Certainly, if A had not elected to treat the repudiation as a breach, the supervening impossibility of performance, due to the destruction of the designated means of performance would excuse both parties. *Avery v. Bowden*, 5 El. & B. 714, 6 El. & B. 955.

The Massachusetts court, while it rejects the anticipatory breach doctrine, holds that a repudiation of a contract before the time for performance may give cause for treating it as rescinded, or may excuse the other party from making ready for performance, or tendering performance, in order to enforce his rights. But it does not constitute a present injury, or confer a present right of action. Clearly A could not recover in Massachusetts. *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384.

For other cases see Decennial Digests, Action ¶61; Contracts ¶279-1; Vendor and Purchaser ¶322, 323.

genuine Br

Q. 98. An opera singer agreed to be in London six days before the commencement of his engagement for rehearsals. He arrived only two days before, and the manager thereupon threw up the contract. Is he liable?

A. Yes; the singer's breach did not go to the root of the matter, so as to destroy his rights. In other words, it was a minor breach, the time for rehearsals not being regarded as vital and essential to the bargain.

In commercial contracts, such as contracts for the manufacture or sale of goods, time is presumed to be of the essence, and stipulations relating to the time of performance are strictly insisted on. } *Note*
Where a party to a bilateral contract totally or partially fails to perform what he has promised at the proper time or in the proper way, the other party frequently may in turn decline to perform his reciprocal duty. It would be unfair to compel A to live up to his side of an exchange, when B has made material default in his part. Breach of contract always gives a right of action, but not

always an excuse to the other party from his duty to continue with the contract. *Bettini v. Gye*, 1 Q. B. D. 183.

In contracts for work or skill, a statement fixing the time of performance is not ordinarily of the essence, and a short delay will not justify the aggrieved party in repudiating the entire contract. *Beck & Pauli Lith. Co. v. Colorado Milling & Elevator Co.*, 52 F. 700, 3 C. C. A. 248. On the question of sufficient "materiality" of the breach to excuse the duty to proceed, it is not properly so much a question of how much damage the employer has already suffered, as what is reasonably to be expected of him in protecting himself under the circumstances of the transaction as to the future. *Poussard v. Spiers & Pond*, 1 Q. B. Div. 410; *Powell v. Newall*, 61 N. W. 335, 59 Minn. 406.

For other cases see Decennial Digests, Contracts ⇨211.

Q. 99. Contract between A and B for boring an oil well of a specified depth and diameter, etc. Plaintiff A struck salt water and reduced the hole to $4\frac{1}{4}$ inches from $5\frac{5}{8}$, as called for. The experiment proved that the territory did not produce gas or oil, and it would have been a useless expense to have drilled a larger hole for the purpose of a test, without any corresponding benefit to B the defendant. The deviation, however, was intentional, and not the result of a mistake or inadvertence. Plaintiff sues for the reasonable value of his work.

Note { A. A person cannot recover on an entire contract, if he willfully and intentionally fails to perform any part of it, although the part he fails to perform is not of the essence of the contract, and although an innocent breach after part performance, not material or going to the essence of the contract, will not ordinarily prevent a recovery on the contract. Some courts, however, might not insist on so harsh a rule in case of minor willful defaults. *Sipley v. Stickney*, 76 N. E. 226, 190 Mass. 43, 5 L. R. A. (N. S.) 469, 5 Ann. Cas. 611, 112 Am. St. Rep. 309; *Gillespie Tool Co. v. Wilson*, 16 A. 36, 123 Pa. 19. This is not a case of substantial performance, and recovery, if allowed, must be in quasi contract.

For other cases see Decennial Digests, Contracts ⇨295(1); Master and Servant ⇨73(3); Work and Labor ⇨12, 14.

Q. 100. A contracted to build a house for B, the last payment of \$1,000 to be made "when the house is completed according to specifications." When the house was completed, B refused to pay, on the ground that A had used a cheaper grade of paint on the ex-

terior than that specified, and that there were certain defects in the plumbing, due to the carelessness of workmen employed.

(a) Is either of these defects good ground for B's refusal?

(b) Would the rights of the parties be varied if the contract had provided that "payments shall be made only on the certificate of the architect that the work has been performed in compliance with the contract," and the architect had refused a certificate because of the aforesaid defects?

A. (a) Under the doctrine of substantial performance, A may recover the balance due, deducting full allowance for the defects. }
 Literal compliance in every detail cannot be required in building contracts as an implied condition to recovery of the contract price. It is frequently said, however, that the doctrine of substantial performance does not apply where omissions or departures from the contract are intentional. If A willfully or in bad faith substituted a cheaper grade of paint than that specified, his right to recover on the contract, or even in quasi contract, might be doubtful. "There is no general license to install whatever in the builder's judgment is just as good." Jacob & Youngs v. Kent, 129 N. E. 889, 230 N. Y. 239, 23 A. L. R. 1429; 5 Minn. Law Rev. 329, 330, 331; Smith v. Mathews Const. Co., 179 P. 205, 179 Cal. 797; Henry v. Jons, 145 N. W. 909, 164 Iowa, 364. } *know*

(b) It has been held by some courts that the doctrine of substantial performance has no application to a case where an architect's certificate is made an express condition precedent to the liability of the owner. It is said that this extends the rule of implied conditions to express conditions, and deprives the owner of the protection which his contract calls for; i. e., decision according to the trained judgment of an expert, rather than that of a jury. Pope v. King, 69 A. 417, 108 Md. 37, 16 L. R. A. (N. S.) 489, 15 Ann. Cas. 970. But a few courts hold that nonproduction of a certificate is excused if the builder in good faith performs substantially and the refusal of the certificate is "unreasonable." Nolan v. Whitney, 88 N. Y. 648; 21 Col. Law Rev. 582. The production of a certificate of an architect or engineer, when made an express condition precedent to the duty to pay, will be excused if by fraudulent collusion the owner induces him to withhold a certificate, or if the architect refuses to exercise an honest judgment, or in case of his death. Hebert v. Dewey, 77 N. E. 822, 191 Mass. 403. The unreasonable, but not fraudulent, refusal of the certificate is not an excuse by the weight of authority. Incompetency, unfairness, or unreasonableness will not invalidate an honest decision, but } *know*

there must be such a gross mistake as to imply bad faith or a failure to exercise an honest judgment. *Ripley v. U. S.*, 32 S. Ct. 352, 223 U. S. 701, 56 L. Ed. 614; *Chicago, S. F. & C. R. Co. v. Price*, 11 S. Ct. 290, 138 U. S. 185, 34 L. Ed. 917. Relief against forfeiture of the value of the work done may perhaps be obtained on the basis of quasi contract.

For other cases see *Decennial Digests, Contracts* ⇨284(4), 287(1), 289, 294, 295(1), 296.

Q. 101. A promised to make a bookcase according to specifications and in a manner satisfactory to B in every particular. In consideration thereof, B promised to pay A \$100. The bookcase was made according to specifications. It ought to have satisfied B, but he was honestly, though unreasonably, dissatisfied. What are the rights of the parties?

A. If A agrees to make something or perform services to the satisfaction of B, this is construed, if possible, to mean reasonable satisfaction, rather than actual satisfaction. In matters of personal taste and preference, B, the promisee, must at least exercise an honest, even if capricious, judgment after a fair inspection. In matters of business, where the object of the contract is not to gratify personal taste or individual preference, some courts hold that the contract is performed if B ought to be satisfied on grounds of mechanical fitness and utility. Other courts hold otherwise, however, if the promisee is genuinely, though unreasonably, dissatisfied with the article, and no remuneration can be recovered. B, the promisee, must at least examine the work and exercise an honest judgment upon it; otherwise, the condition will be excused.

Baltimore & O. R. Co. v. Brydon, 3 A. 306, 65 Md. 215, 57 Am. Rep. 318. *Gerisch v. Herold*, 83 A. 892, 82 N. J. Law, 605, Ann. Cas. 1913D, 627.

Doll v. Noble, 22 N. E. 406, 116 N. Y. 230, 5 L. R. A. 554, 15 Am. St. Rep. 398.

American Music Stores v. Kussel, 232 F. 306, 146 C. O. A. 354, L. R. A. 1916F, 882.

For other cases see *Decennial Digests, Contracts* ⇨282, 284(4); *Master and Servant* ⇨21; *Sales* ⇨72(5).

Q. 102. X agreed to deliver to Y 3,000 tons of coal in ten monthly installments of 300 tons each, beginning September 1, and Y agreed to pay \$10 a ton for each month's delivery by the 10th of the following month. The September and October installments were paid for promptly, but, Y not having paid for the November installment, X notified Y on December 20 that X renounced the contract and would deliver no more coal. Immediately on receiv-

ing the notice, Y paid for the November installment and demanded that X perform. What are the rights of the parties?

A. This raises the question whether the seller must continue to deliver goods on credit to a buyer who has failed to pay according to the contract for prior installments. Is failure to pay for one installment until 40 days late and refusal to proceed with the rest a material breach? The English courts have held that, under such a contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery. The seller is not justified in refusing further deliveries where there is no repudiation or refusal to pay on the part of the buyer. *Mersey Steel & Iron Co., Ltd., v. Naylor-Benzon Co., L. R. 9 App. Cas. 434.*

The prevailing American rule is adopted by the Uniform Sales Act, that "it depends in each case on the terms of the contract and the circumstances of each case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract." } U.S.
Default as to one installment, though falling short of repudiation, may be so material as to justify X in his election to declare the contract at an end. The failure to make punctual payment may be trivial or material, according to circumstances, such as the cause of the default, the length of the delay, the needs of the seller, and the financial responsibility and good faith of the buyer. If the delay is willful, if there are indications that the seller cannot safely proceed with further deliveries, he should be excused from proceeding. *Helgar Corp. v. Warner's Features, 119 N. E. 113, 222 N. Y. 449.*

For other cases see Decennial Digests, Sales §384(1).

Q. 103. A contracted to deliver to B twelve cars of materials at the rate of one car each month, payment to be made on delivery. After six cars had been delivered, B insisted that the material was defective in quality, that deliveries had been delayed, and that he was entitled to \$400 damages, which he would withhold from the balance of the price then due until the claim was adjusted. A, the seller, canceled the contract. B offers to pay for subsequent cars, and sues for damages for failure to deliver. Can he recover?

A. Some courts have held that a buyer of goods to be delivered in installments does not destroy his right to demand further installments by retaining money due to apply upon damages for alleged defaults as to prior installments. *Greer v. Oelhafen, 192 N. W. 467, 180 Wis. 131; Frankfurt-Barnett Co. v. Prym Co., 237 F. 21, 150 C.*

C. A. 223, L. R. A. 1918A, 602; Hjorth v. Albert Lea Machinery Co., 172 N. W. 488, 142 Minn. 387; North Coast Lumber Co. v. Great Northern Lumber Co., 175 N. W. 547, 144 Minn. 304. It is said that the seller will not be justified in withholding further deliveries, if the buyer is solvent and offers to pay for the subsequent shipments, and withholds only enough to protect him against loss. Other courts, however, deny the buyer the right to protect himself by retaining a payment due, without losing his right to further performance of the contract. (But it is a question of fact whether the withholding under these circumstances is such a material breach as to excuse the seller from further deliveries.) 2 Williston, Sales, § 467j; 2 Williston, Contracts, § 859. Retaining money due as indemnity or security for possible default in future shipments is more in the nature of repudiation than retaining a reasonable amount (by way of recoupment) to cover damages already suffered, even if technically cross-demands do not cancel one another. Chess & Wymond Co. v. La Crosse Box Co., 181 N. W. 313, 173 Wis. 382; Harbor Bros. Co. v. Moffat Cycle Co., 37 N. E. 676, 151 Ill. 84; 34 Harv. Law Rev. 329.

For other cases see Decennial Digests, Sales ⇨ 174, 179(1), 180(3), 182(1), 194.

Q. 104. Under a contract *not of a question of fact.* between A and B, A was to deliver B 15,000 feet of lumber, of a specified kind and grade, in three monthly installments of 5,000 feet each. The first installment delivered was not of the grade called for by the contract. B paid for the first delivery, and then notified A that he would receive no more lumber under the contract. A brings suit, averring readiness to deliver. Under what conditions will the breach of an installment of a contract to be performed in installments give the party injured a right to consider himself discharged from all further performance?

A. It is often an important question to a business man whether he may call such a contract off, and make a new contract with some one else upon whom he can rely. But the answer is uncertain. It depends on the seriousness and materiality of the breach, an indefinite test. The law is so uncertain as to the effect of a default in these installment contracts that the best way to avoid possible complications is to provide very fully in the contract what shall be the duties of the respective parties in the event of breach by the other.

The English cases seem to require such a failure in particular installments of installment contracts as amounts to a repudiation of the entire contract, but the American cases hold that it is a question

of fact, dependent in each case on the circumstances, considered with the terms of the contract, whether the breach is so material as to justify the party in refusing to proceed further. His right, in the absence of such materiality, is limited to compensation for the particular default. *Kieckhefer Box Co. v. John Strange Paper Co.*, 189 N. W. 145, 193 N. W. 487, 180 Wis. 367; 2 Wis. Law Rev. 363. The question of the materiality of the breach is a question of fact for the jury, and not one of law for the court. *Glines v. Berry Box & Paper Co.*, 143 N. E. 344, 248 Mass. 518. } Know

For other cases see Decennial Digests, Sales ⇨151, 182(1).

Q. 105. If A bargains for ten horses for \$1,000, and the horses are to be delivered by B one per week and paid for in a lump sum, and B, the seller, is late in delivering the last horse, or delivers a poor animal, what are A's liabilities? Can A refuse to pay for any of them? If A keeps and uses the nine horses, must A pay for them? Can A retain the benefit of nine-tenths of the performance and claim a complete defense against payment of the \$1,000?

A. No; if the contract is "divisible." If the contract is "entire," the right to recover on the contract for part performance after material breach seems to depend upon an election to accept or retain the benefit of such part performance, and the voluntary waiver of the right to refuse anything short of complete performance. *White v. Beeton*, 7 H. & N. 42, 50, 126 Rev. Rep. 319, 325. But to obviate the injustice of allowing the buyer to retain the benefit of part of the goods without paying for them, the seller may recover, by the weight of authority, the reasonable value of the part delivered, less the damages by default in making complete performance, even if the contract is entire and there is no waiver. *U. S. v. Molloy*, 144 F. 321, 75 C. C. A. 283, 11 L. R. A. (N. S.) 487. In some jurisdictions a stricter rule is for some reason applied to work, labor, and service contracts than in the sales cases, and if the contract is entire, and plaintiff does not substantially perform, he cannot recover anything for the fair value of what he did do. *Steel Storage & El. Co. v. Stock*, 121 N. E. 786, 225 N. Y. 173; *McCurry v. Purgason*, 87 S. E. 244, 170 N. C. 463, Ann. Cas. 1918A, 907; *McGrath v. Cannon*, 57 N. W. 150, 55 Minn. 457. } Rule Know Labor K.

For other cases see Decennial Digests, Contracts ⇨294, 295(1), 319(1); Sales ⇨343; Work and Labor ⇨12.

Q. 106. Can a stenographer, or other employee, employed at monthly wages, say \$100 per month, collect her full wages if she is prevented by illness from doing her work for a week; or can a de-

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duction be made for the time during which she was prevented from performing services by sickness?

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A. Some courts hold that a servant, employed by the month, cannot recover for time lost by absence, but can recover pro rata for the service actually performed, less damages for failure to complete performance. Other courts hold that, if a servant falls sick or becomes disabled, and later resumes work, the master must not abate any part of his or her wages for the time lost. But the later authorities indicate some limitations on the rule. One is that, if the sickness is so serious that it is likely to continue for a considerable period, the master may dismiss or suspend the servant, if he desires to excuse himself from liability for wages.

MacFarlane v. Allan-Pfeiffer Co., 109 P. 604, 59 Wash. 154, Ann. Cas. 1912A, 1180, 28 L. R. A. (N. S.) 314.

For other cases see Decennial Digests, Master and Servant ⇨ 73(6), 75.

W. L. J. Br.

Q. 107. Plaintiff was the owner of a thresher, and contracted to thresh all of defendant's crop of grain at so much per bushel. Before the entire crop had been threshed, plaintiff hauled his machine away and refused to thresh more, for the reason that he was losing money. Three hundred acres of grain were left in shock. Plaintiff sues for the work of threshing that he had done at the agreed price per bushel. Can he recover, either at the contract rate or the reasonable value of what he has done, where he has willfully and without just cause refused to complete the contract on his part? Is the contract entire or severable?

A. The mere fact that the price is fixed by the bushel is not enough to make the contract severable. If the contract is an entire one, and the thresher abandons the contract before completion, he cannot recover, either on the contract or for the number of bushels actually threshed. The decisions are conflicting in holding such contracts entire or severable. If severable, there may be a recovery for part performance on the contract, less damages for noncompletion. Johnson v. Fehsefeldt, 118 N. W. 797, 106 Minn. 202, 20 L. R. A. (N. S.) 1069; McMillan v. Malloy, 4 N. W. 1004, 10 Neb. 228, 35 Am. Rep. 471; Oakley v. Duluth Superior Dredging Co., 194 N. W. 123, 223 Mich. 478.

Under the harsh New York rule, where plaintiff contracted to construct a grain-elevating plant of a capacity of 4,000 bushels per hour, and the elevator constructed had only a capacity of 3,300 bushels per hour, it was held that the plaintiff could not recover in quantum meruit the fair and reasonable value of the work and mate-

rials furnished, as this would compel defendant to pay for something he had not bargained for. Plaintiff can recover only if the work has been substantially performed. *Steel Storage & El. Constr. Co. v. Stock*, 121 N. E. 786, 225 N. Y. 173.

For other cases see Decennial Digests, Contracts ⇨171(2), 294, 319(2); Work and Labor ⇨12, 14(3), 29(2).

Q. 108. A, a lawyer, ^{employed by K.} agreed with the state commissioners to codify and revise the laws of his state, to perform such parts of the work as might be assigned to him, and to do all in his power to make the Code a success. His compensation was to be \$75 a month, but not to exceed \$1,000, however long his services were to continue. A worked six months, and then informed the commissioners that he was obliged to cancel the contract and devote his whole time to private practice. About one-quarter of the Code was then completed. If A has been paid nothing under the contract, what are the rights of the parties?

A. In a contract of employment, where, as here, the performance is "entire," an undivisible unit, if the employee before completion abandons the service without excuse, it is generally held that he cannot recover anything for the services he has rendered. *Peterson v. Mayer*, 49 N. W. 245, 46 Minn. 468, 13 L. R. A. 72; *Diefenback v. Stark*, 14 N. W. 621, 56 Wis. 462, 43 Am. Rep. 719. The services rendered in such a case as this may be of little or no value, if the whole task is not completed by A. *Martin v. Massie*, 29 So. 31, 127 Ala. 504. Some cases, however, allow recovery by an employee in default, who has willfully abandoned his contract, of the value of his services, less damages caused by the breach. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713; *Porter v. Whitlock*, 120 N. W. 649, 142 Iowa, 66.

Most courts would deny such recovery, unless the contract can be held severable. The fact that the compensation is payable by the week or month, instead of in a lump sum, is, however, not conclusive. The true test of the right to recover cannot be found in the apportionment of the compensation, or the unity of the work to be done, or the intention of the parties, (but whether the conduct of the plaintiff is so culpable as to demand a denial of all relief by way of penalty.)

For other cases see Decennial Digests, Contracts ⇨256, 319(1); Master and Servant ⇨73(2, 4).

Q. 109. A agrees on January 1 to purchase a farm from B for the consideration of \$5,000. At the time he enters into the contract he

pays \$2,500 down. His contract provides that he shall pay the remaining \$2,500 and get a deed March 1 following, but, being unable to raise the money, he fails to make payment on time. Does he forfeit the money paid, and is he thereby precluded from later paying the balance of the purchase price? *No*.

(a) What is the effect, in the case of land contracts, of the common provision that "time shall be of the essence" thereof?

A. Where a contract for the sale of land contains no express stipulation making time of performance essential, and there is nothing in the terms of the contract, the nature of the property, or the circumstances which requires an inference that payment on March 1 was regarded as essential for carrying the contract to completion, the buyer will not forfeit his rights by a slight delay, which is excusable and not material. *Parkin v. Thorold*, 16 Beav. 59; *Jaeger v. Shea*, 99 A. 954, 130 Md. 1; *Morgan v. Patillo* (C. C. A.) 297 F. 140. It is further to be observed that apparently B, the seller, made no tender to put A in default, and that it does not appear that he was ready, able, and willing to convey on March 1. The contract calls for concurrent acts on that date.

(a) If time is made "of the essence," then prompt performance by the purchaser is a condition precedent to the enforcement of the contract. A will be precluded by slight delay from obtaining specific performance, but a few courts would probably relieve him from forfeiture of the money already paid. *Steedman v. Drinkle*, [1916] A. C. 275. Compare *Glock v. Howard & Wilson Colony Co.*, 55 P. 713, 123 Cal. 1, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Ballantine, Forfeiture for Breach of Contract*; 5 Minn. Law Rev. 329.

For other cases see *Decennial Digests, Contracts* ⌘277(1), 279(1); *Equity* ⌘24, 71(1); *Specific Performance* ⌘93; *Vendor and Purchaser* ⌘75, 78, 335.

Q. 110. A and B entered into a written contract under seal for the exchange of pieces of real property. After making the contract, and on the same date, it was agreed by parol that either party might perform certain provisions as to clearing the title, in a different way from that provided for in the contract. A was willing, at the time and place for closing the contract, to carry it out as required by the oral agreement. Was evidence of the parol waiver admissible? Could B take advantage of an omission induced by his unrevoked consent?

A. The evidence was competent, and B could not summarily rescind because of the breach, which he encouraged. The contract

stood unchanged. B might have retracted his oral promise an hour after making it, or even at the very hour of the closing, if coupled with an offer of extension which would reasonably enable A to perform. (One who procures or encourages a departure from the literal performance of contractual duty cannot complain that the departure was a wrong.) Until the consent has been acted on, either party may change his mind. After it has been acted on, it stands as an excuse for nonperformance. Rule

Waiver is a broad, general term, which covers acts by which a person dispenses with the performance of a condition precedent to his duty or surrenders a defense to his liability. There are different species of waiver. You may waive a condition in advance by permission to violate it. If A, relying on the permission, fails to perform the condition, B cannot take advantage of it.

Imperator Realty Co. v. Tull, 127 N. E. 263, 228 N. Y. 447.

Lieberman v. Templar Motor Co., 140 N. E. 222, 236 N. Y. 139, 29 A. L. R. 1089.

For other cases see Decennial Digests, Contracts §238(2), 241.

Q. 111. C contracted with W to write a three-volume law book. W agreed to pay \$2 per page for the work, and an additional \$4 per page, if C abstained from intoxicating liquor and otherwise fulfilled his agreement. C did not abstain, but completed the book, which was accepted by W. C sues to recover the additional \$4 per page, and alleges a waiver by W and his reliance on the waiver in completing the work. C alleges that W, with full knowledge of the breach of this condition, represented to C that he would receive the higher rate of compensation. Was there a waiver of this condition?

A. Yes; the full sum is recoverable. A "waiver" is often defined as the voluntary relinquishment of a known right, a very inadequate description. The law abhors a forfeiture, and is very ready to find that a provision calling for one is waived. While in form this was a condition precedent, in substance it was a condition subsequent, by which the real compensation, namely, \$6 per page, was to be reduced to \$2 per page in case C did not observe total abstinence. It was thus a penal provision, intended to enforce performance of C's agreement to abstain. W might perhaps counterclaim for the actual damages sustained by the breach, in the delay or inferior quality of the work. But, in case the work is properly performed or accepted, the court will seize upon almost anything as a "waiver," or surrender of the alleged condition or penalty, such as any expression of intent not to claim it. Such waiver does not depend upon new contract, new consideration, or estoppel, especially where it surrenders Waiver
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some technical defense or incidental term, which is not the object, end, or main consideration of the contract.

Clark v. West, 86 N. E. 1, 193 N. Y. 349.

Alsens American Portland Cement Works v. Degnon Contracting Co., 118 N. E. 210, 222 N. Y. 34.

For other cases see Decennial Digests, Contracts ⇨221(3), 227, 316(6), 323(2).

Q. 112. A fire insurance policy was expressly conditional on no gasoline being kept on the premises at any time during the term of the policy. The insured kept gasoline on the premises for a time after the policy was issued. Then, discovering that this was a violation of the condition of his policy, (he notified the insurance company of the fact, and received a reply that the breach of condition would not be insisted upon by the company.) Thereafter all gasoline was removed from the premises, but they were destroyed by fire several months later, during the term of the policy. On settlement being demanded, the insurance company set up the condition relating to gasoline. Is this a defense?

A. A distinction must be observed between waiver before and after breach of a condition in a contract. An oral consent by the company or its duly authorized agent, given after the execution of the policy, permitting the insured to deviate from the requirements of the policy, will be effective as a waiver, if the insured has relied upon it. This has the elements of estoppel. After breach, however, the waiver is in the nature of a surrender of a defense already accrued. It is generally held that, if an insurer has knowledge of the breach of a condition in the policy, but elects to treat it as still operative and valid, by failing to assert the remedy of forfeiting and canceling the contract, and encourages the insured to rely upon it for his protection, the policy will be continued in full force and effect. No new consideration is required to support the waiver of a forfeiture. It is merely an election to continue the old contract, not the making of a new one. Forfeitures are not favored in the law, and one who desires to avail himself of one, must act promptly; it will be waived by an expression of intent not to insist on that provision of the contract. 29 Harv. Law Rep. 458, 724; National Life Ins. Co. of United States v. Clayton, 173 P. 356, 70 Okl. 116; Cassimus v. Scottish Union & National Ins. Co., 33 So. 163, 135 Ala. 256. You may waive a condition in advance by permission to violate it. If the other party, relying on this consent, fails to perform the condition, you cannot take advantage of it. (Technical defenses, which involve forfeiture, may be waived or surrendered without consid-

eration or estoppel, even after a breach has occurred and a defense accrued. It is doubtful whether any positive act of election to cancel an insurance policy is required after breach of condition by the insured. Mere inaction by the insurer after knowledge of the breach is not an election or waiver of the defense, unless the insurer will acquire or retain rights by keeping the policy in force, according to the better view. But see *Security Ins. Co. v. Cook*, 227 P. 402, 99 Okl. 275.

For other cases see *Decennial Digests, Insurance* ¶229(1), 310(1), 372, 390, 391.

SECTION 5.—IMPOSSIBILITY AND UNFORESEEN CONTINGENCIES

Q. 113. On April 1 A agreed to build a barn for B according to plans and specifications, and to have the same complete and fit for use by September 1 following. On August 20, when the barn was nearly completed, it was struck by lightning and burned. What are the rights of the parties under this contract?

(a) Suppose the barn was to be built on the land of B, but before its completion it fell down by reason of a latent defect of soil unknown to either party?

A. Unforeseen difficulties, which arise in performance, do not excuse the duty to perform. If a building contractor agrees to construct a house on the land of another, and performance is rendered impossible by reason of a latent defect in the soil, or by destruction of the building by fire or earthquake shortly before the day named for completion, liability for the breach cannot be avoided. In fact, such accidental calamity would, in all probability, afford no excuse for the delay in construction. The contractor must perform his promise, or respond in damages for the breach, notwithstanding the fact that unforeseen accidents or acts of God have rendered the performance of the contract unexpectedly burdensome, or even impossible. Certain rules excusing a party from the performance of an undertaking which becomes impossible have gradually found a place in our law, as rules of construction or interpretation of the intent of the parties. These "unexpressed conditions of the agreement," covering contingencies not contemplated by the parties, are in fact created by law from the nature of the transaction and principles of justice. But it is only in certain specified classes of cases, where, it is said, an intention may be presumed, that the law relieves from an apparently unqualified undertaking. These exceptions are gradually being extended to

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cover risks which the promisor cannot be fairly held to have contemplated or assumed. 99/318

Ahlgren v. Walsh, 158 P. 748, 173 Cal. 27, Ann. Cas. 1918E, 751.

Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762.

Mineral Park Land Co. v. Howard, 156 P. 458, 172 Cal. 289, L. R. A. 1916F, 1.

For other cases see Decennial Digests, Contracts 231(1), 300(1), 303(1).

Q. 114. B contracts with A to construct him a dwelling for \$7,500, which is a very reasonable figure. The next day B has a stroke of paralysis. Is B excused from performance?

A. No; where performance relates to personal services, which can be rendered only by the promisor himself, as in case of a musician or painter, the death or serious illness of the employee will constitute an excuse for nonperformance. (But, where the duty of performance is not of an individual, personal nature, it is no excuse that the promisor is disabled by illness or death.) Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7.

A contract to do ordinary work does not entitle the employer to personal performance by the promisor himself. So, in the ordinary building contract, it is not contemplated that the building should be the product of the contractor's own personal labor or skill, and it will survive his death. Macdonald v. O'Shea, 108 P. 436, 58 Wash. 169, Ann. Cas. 1912A, 417. See Johnson v. Vickers, 120 N. W. 837, 139 Wis. 145, 21 L. R. A. (N. S.) 359, 131 Am. St. Rep. 1046. B would therefore not be excused from liability. Where performance is not personal sickness is no excuse.

For other cases see Decennial Digests, Assignments 19; Contracts 303(1); Executors and Administrators 92.

Q. 115. On September 1 M and S entered into a contract whereby S promised to teach Latin for the succeeding ten months in a boys' school conducted by M, and M promised to furnish S board and lodging during the period, and to pay him \$1,000 at the end of the period. During the month of November, on account of an epidemic of diphtheria, M closed the school. During the month of January, on account of an epidemic of smallpox, S refused to teach. When he tendered his services for teaching on February 1, M informed him that he was discharged for refusing to teach during January. On April 1 M died. S diligently sought other employment as a teacher, but was unable to find any until after July 1, though he had numerous opportunities to earn \$60 per month at manual labor, all of which he refused.

(a) Assuming that, in closing the school in November, M act-

ed as an ordinarily prudent man under the circumstances would have acted, and that S, when refusing to teach during January, was reasonably in fear of peril to his life through exposure to smallpox, what are the rights of S against the estate of M?

A. As a general rule, a school-teacher is entitled to compensation for the period during which the school is closed by reason of an epidemic. *Smith v. School District*, 131 P. 557, 89 Kan. 225, Ann. Cas. 1914D, 139; *Phelps v. School District*, 134 N. E. 312, 302 Ill. 193, 21 A. L. R. 737; *Dewey v. Alpena School Dist.*, 5 N. W. 646, 43 Mich. 486, 38 Am. Rep. 206. The duration of the discontinuance and the necessity of remaining in readiness to teach are factors to be considered. These contracts may be construed as retainer contracts, and the employer assumes the risk. But where the school is closed by the health authorities it has been held that no recovery can be had, as performance is made impossible by act of law. *Gregg School Tp. v. Henshaw*, 132 N. E. 586, 76 Ind. App. 503, 17 A. L. R. 1222; *Clune v. School District*, 166 N. W. 11, 166 Wis. 452, 6 A. L. R. 736.

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S was justified in refusing to teach during January, if he was reasonably in fear of peril to his life. *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77. But, although S was excused from liability, it does not follow that M was bound to keep his position open for him, any more than if he had been ill. Even if M was not excused by the refusal of S, his death on April 1 would terminate the contract of employment. *Lacy v. Getman*, 23 N. E. 452, 119 N. Y. 109, 6 L. R. A. 728, 16 Am. St. Rep. 806.

For other cases see Decennial Digests, Contracts ⇨309(1), 319(2); Master and Servant ⇨26; Schools and School Districts ⇨141(1), 144 (1, 2, 4).

Q. 116. A agreed to sell to B 175 quarts of milk every day for one year, and B agreed to come to A's premises and get it. In the middle of the year, by order of the commissioner of domestic animals, all A's cattle and all products of his farm were quarantined, and he was not allowed to go from the premises. Shortly after the quarantine order, all A's cattle were killed, by order of said commissioner, being infected with the hoof and mouth disease. For the balance of the year, A furnished no milk to B. B sued A for damages for breach of his contract to supply milk. What judgment should be rendered, and why?

A. It was held by the Connecticut court that A was not relieved of the duty of furnishing the milk by the fact that he and his farm

were quarantined and his cows killed. It was said that the contract was not to deliver milk produced on the premises. The quarantine order did not make it illegal for A to procure milk to be delivered to B. A could still perform substantially, though not literally. The result seems unjust. It may reasonably be contended that the parties entered into the contract on the basic assumption that the source of milk supply was A's cows, and that the specified means of performance were to continue in existence. The risk of such a quarantine cannot justly be placed on the milkman. *Whitman v. Anglum*, 103 A. 114, 92 Conn. 392; 2 Minn. Law Rev. 541.

Note { The destruction or impairment of the promisor's factory does not excuse from performance of a contract to deliver goods at a stated time, if the contract did not require the goods to be manufactured in that factory. Nor is the promisor excused from liability on a contract to sell goods manufactured at a particular mill by the fact that the machinery in the mill broke down, thereby making the performance impossible. There are, however, a few American decisions to the effect that the continued existence of the means of performance, if contemplated by the contract, is an implied condition of contractual liability. *Stewart v. Stone*, 28 N. E. 595, 127 N. Y. 500, 14 L. R. A. 215. Excuse by reason of "impossibility" is not properly a question of physical impossibility, or whether caused by act of God, but whether the risk may justly be regarded as one assumed by the promisor, and what is the scope of his undertaking. *Gulf & S. I. R. Co. v. Horn*, 100 So. 381, 135 Miss. 804, 34 A. L. R. 814; *Day v. U. S.*, 38 S. Ct. 57, 245 U. S. 159, 62 L. Ed. 219; *Kinzer Const. Co. v. State (Ct. Cl.)* 125 N. Y. S. 46.

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For other cases see Decennial Digests, Contracts §309(1), (2); Sales §172.

Q. 117. B entered into a contract for the purchase of a dwelling house from A under an installment contract and went into possession. The house was burned without fault of either party. A collected full insurance, and now sues B for specific performance. Can he recover the balance of the price, without deduction?

Rule { A. By majority rule, in contracts of sale of a house or building there is no abatement of the purchase price in case of destruction of the building, even if such accident deprives the premises of all their value. At common law it would seem that the buyer would be protected by "implied conditions" against failure of considera-

Fig. 194 outline

tion; the owner cannot furnish the consideration agreed upon, namely, a house and lot for the purchase price. In equity, however, where the buyer of land has the remedy of specific performance, he is regarded as the substantial owner of the land from the moment of making the contract. The buyer is in the position of a mortgagor, and the seller in that of a mortgagee, who holds legal title simply as security for the payment of the purchase price. The contract effects an immediate transfer of all the substantial interest in the property. The consideration bargained for having been received, it does not afterward fail, if it become of no value, since it is at the risk of the true and substantial owner. *Sewell v. Underhill*, 90 N. E. 430, 197 N. Y. 168, 27 L. R. A. (N. S.) 233, 18 Ann. Cas. 795, 134 Am. St. Rep. 863. A contrary view is taken by the courts in some states, which hold that risk follows the legal title. *Conlin v. Osborn*, 120 P. 755, 161 Cal. 659. See 8 Minn. Law Rev. 127. The risk is on the vendor, if he agrees to deliver premises in the condition then existing. There is a conflict of authority whether the purchaser has any claim to the benefit of the proceeds of the vendor's fire insurance policy. *Brownell v. Board of Education*, 146 N. E. 630, 239 N. Y. 369, 37 A. L. R. 1319; 34 Yale Law J. 87.

For other cases see Decennial Digests, Insurance Ⓒ580(1); Vendor and Purchaser Ⓒ54, 109, 203.

Q. 118. A contractor contracts to make certain improvements to a school building and also to construct an annex thereto. After 99 per cent. of the work has been done and 80 per cent. thereof had been paid, the building and the new work, without the fault of either, burned down. The school board demanded that the contractor complete his contract, and offered to rebuild the original building, so as to restore it to the condition it was at the inception of the contract. The contractor refused.

(a) Could the board hold the contractor for damages for refusing to rebuild?

(b) Could the board recover the 80 per cent. paid to the contractor?

(c) Could the contractor recover for the work done, but not paid for, before the fire?

A. (a) The board cannot hold the contractor to make the improvements, because this is dependent on the continued existence of the building upon which the work was to be done. If the annex is a separate and independent structure, the contractor may be li-

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able as to that. But he is not bound to make improvements or repairs on a new and different building. Krause v. Board of Trustees of School Town of Crothersville, 70 N. E. 264, 162 Ind. 278, 65 L. R. A. 111, 102 Am. St. Rep. 203, 1 Ann. Cas. 460.

(b) The board cannot recover payments made for improvements on the school building; but, if the annex is an independent structure, payments on that may be recovered. Ahlgren v. Walsh, 158 P. 748, 173 Cal. 27, Ann. Cas. 1918E, 751.

(c) Most states would allow the contractor to recover for work done, but not paid for, so far as it consisted in improvements upon an existing structure. Some limit the recovery to the work and materials which had become so far identified with the structure that they would have inured to the owner's benefit as part of the structure, if the fire had not occurred. Carroll v. Bowersock, 164 P. 143, 100 Kan. 270, L. R. A. 1917D, 1006. Some states, however, deny recovery on the fallacious ground that the defendant has received no benefit from the plaintiff's work, labor, and materials. Taulbee v. McCarty, 137 S. W. 1045, 144 Ky. 199, 36 L. R. A. (N. S.) 43.

For other cases see Decennial Digests, Contracts §§231(1), 309(2), 319(2), 320.

Q. 119. X, who controlled an electric light plant and a railway, made a contract with Y and Z, under which X was to form a corporation with those properties as assets, the corporation to issue 7,500 shares of stock, of \$100 par value, and to mortgage its properties to secure \$2,000,000 in bonds; \$500,000 of the bonds to be issued at once, and \$1,000,000 to be held in reserve as part of the means of making improvements and extensions of the property of the corporation. By the contract X was to keep \$450,000 of the issued bonds in payment of the properties, and Y and Z were to have all the stock and the \$50,000 balance of issued bonds, the reserve bonds to be retained by the corporation. It was also provided that, in case X was unable to organize the corporation and deliver the stock, "then said parties shall be exonerated from all obligations hereunder, except so far as the same have been completed." After the making of the contract, and before the corporation could be organized, a state commission having full authority over the issue of securities by corporations was created by statute, and that commission forbade a stock issue of more than 1,420 shares of \$100 par value per share, and forbade a mortgage bond issue of more than \$500,000. X formed the corporation under those

terms, and tendered to Y and Z the 1,420 shares of stock and the \$50,000 of bonds, keeping \$450,000 of the bonds, but Y and Z refused to accept. X then sued them for breach of contract. Had they any defense?

A. Yes; The contract by X to deliver to Y and Z a certain number of shares of stock and bonds of a corporation is not performed by the tender of a less number, though representing the same interest in the corporation. It is no excuse that, under a ruling of a state commission created after the contract was made, the issuance of the amount in stock and bonds called for is prohibited. X may not be liable to Y and Z, but he cannot enforce the contract against them. To permit X to recover on the theory that he had approximated performance as nearly as possible would be to rewrite the contract. Y and Z were not bound to accept stock on a different capitalization basis from that called for by the contract. No reserve bonds were provided as agreed. Courts are fond of declaring that they are without power to make a new contract between the parties.

Cummings v. Clark (D. C.) 282 F. 300, affirmed (O. C. A.) 2 F.(2d) 443. See, also, Paul v. Pacific Development Corporation (Sup.) 197 N. Y. S. 811; 37 Harv. Law Rep. 466, 467.

For other cases see Decennial Digests, Contracts ⚡309(1); Corporations ⚡78, 118, 472.

SECTION 6.—ILLEGALITY

Q. 120. A sells his grocery business to B, and to protect B in his purchase A promises never again to carry on a similar business in that city, or within 500 miles thereof. Later A does re-enter the same business in the same city. Is he liable?

A. This will depend upon the scope of the business, and whether the restriction on A was a reasonable one, for the protection of the good will, or an arbitrary one. As a general principle, a man ought not to be assisted in restraining himself from the exercise of any lawful craft or business, and all interference with liberty of action in trading is contrary to public welfare and policy. In cases of sale of good will of a business, however, the law sanctions such contracts not to compete as are reasonably necessary for the protection of the vendee who succeeds to the business. The restraint may be a reasonable one so far as the city is concerned, although invalid as to the radius of 500 miles. Fleckenstein Bros. Co. v. Fleckenstein, 71 A. 265, 76 N. J. Law, 613, 24 L. R. A. (N. S.) 913. Limitation as to time or space is unnecessary, if the con-

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tract be reasonable, for the protection of the parties, and not in conflict with the general welfare. *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 F. 588, 142 C. C. A. 220, L. R. A. 1916C, 620.

For other cases see *Decennial Digests, Contracts* ¶116(1), (2), 117(2, 3).

Q. 121. A and B, dealers in salt, agreed that A should not import any salt to the Pacific Coast, and should discourage any such shipments by other parties, and should take all his salt from defendant. Is this valid?

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Note { A. Agreements between competitors to limit competition by restriction of production, maintaining prices, or dividing territory, with the object of keeping rivals out of the business and avoiding competition between themselves, to the public's detriment, are illegal contracts. These are to be distinguished from contracts in connection with the sale of good will of a business, which aim to protect the vendee. Here the object is, not to serve a proper end, but to suppress competition, and to monopolize some portion of trade by a union of former competitors, with an injurious effect upon the market and the public at large.

Getz Bros. v. Federal Salt Co., 81 P. 416, 147 Cal. 115, 109 Am. St. Rep. 114. *Emery v. Ohio Candle Co.*, 24 N. E. 660, 47 Ohio St. 320, 21 Am. St. Rep. 819.

Cummings v. Union Blue Stone Co., 58 N. E. 525, 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655.

For other cases see *Decennial Digests, Contracts* ¶116(3); *Monopolies* ¶15.

Q. 122. A and B made a wager of \$100 each on the election for Governor. They placed the money in the hands of C as bailee. After the election, B, who had lost his bet, before C turned the money over to the winner, demanded the return of his money. Can he recover?

A. Gambling contracts, being opposed to good morals and public policy, are not enforced by the courts. Where, however, a party to such a wager disaffirms or withdraws from it before the event has happened, he will ordinarily be entitled to a return of the money put up by him. Indeed, money may be recovered from a stakeholder, who is merely an agent, even after the event, if he is notified before it has been actually paid over. *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 775; *Pabst Brewing Co. v. Liston*, 83 N. W. 448, 80 Minn. 473, 81 Am. St. Rep. 275. Statutes often permit recovery even from the winner.

For other cases see *Decennial Digests, Gaming* ¶28(1), 29.

Q. 123. (a) Defendant was a member of the X Chamber of Commerce and a broker, accustomed to buy and sell grain on commission under the rules of the chamber, upon margin and otherwise. Plaintiff was a teacher in the grade schools in Y. In November, 1912, plaintiff wired defendant to sell 1,000 bushels May wheat and sent \$100 margin to cover the deal. In December plaintiff ordered defendant to buy 1,000 bushels of May wheat. The two contracts were adjusted on the basis of the difference in prices at the dates specified. Thereafter a large number of similar purchases and sales of grain, amounting to hundreds of thousands of bushels, were made by defendant for plaintiff, and settled in the same manner. On June 1, 1914, plaintiff ordered defendant to buy 100,000 bushels September wheat, which order defendant executed the same day. On August 31 plaintiff ordered defendant to sell 100,000 bushels September wheat, which defendant did. The difference in prices left a balance of \$20,000 in favor of plaintiff, for which he brought action in the district court of Hennepin county. The defendant pleaded that the contract was a wagering contract. At the trial the defendant offered to show plaintiff's occupation, residence, the facts as to the previous dealings between the parties, and plaintiff's financial inability to pay for so much wheat. He also offered to show that plaintiff's attorney was engaged in the practice of soliciting cases against grain brokers, that he solicited this case, that, by agreement with plaintiff, plaintiff's attorney was to pay all expenses of the action, was to receive nothing if the verdict was for defendant, and was to receive 50 per cent. of any sum recovered in court or by settlement. How should the court rule upon these offers of evidence? What should be the substance of the court's charge to the jury upon the point of illegality?

A. It is sometimes difficult to draw the line between a speculative contract as to stocks or grain and a gambling or wagering contract. The carrying of the grain or stock on margin, and the closing of the transactions by setting off one trade against another, are not invalid. But the magnitude of the purchases made with reference to the financial ability of the speculator, and whether there was any possibility of the sale or purchase, bear on the question whether the dealings were mere wagers, or were valid purchases or sales on margin. The defendant's offers of evidence as to these circumstances should be admitted. The burden of proof to show that the contracts were mere bets on the rise and

fall of prices is on the defendant. *Richter v. Poe*, 71 A. 420, 109 Md. 20, 22 L. R. A. (N. S.) 174; *Anderson v. Holbrook*, 57 S. E. 500, 128 Ga. 233, 11 L. R. A. (N. S.) 575.

Even if the contract between plaintiff and his attorney is void for champerty, the making of such a contract cannot be set up in bar of a recovery on the cause of action to which the champertous contract relates. *Burnes v. Scott*, 6 S. Ct. 865, 117 U. S. 582, 29 L. Ed. 991.

For other cases see Decennial Digests, Champerty and Maintenance 5(7); Gaming 11, 14, 18.

Q. 124. A sold B on a conditional bill of sale certain furniture, which A knew that B intended to use and did use in a house of ill fame conducted by B. B paid A only a portion of the amount due. C, a creditor of B, attached the furniture, secured judgment, and purchased the furniture on execution sale. The officer conducting the execution sale stated that the furniture was sold subject to contract of sale between A and B. A brought an action against C to replevy the furniture, claiming that the title still remained in him under the conditional bill of sale, because of non-payment of installments due. What should the judgment be? Give reasons.

A. A seller who knows that the buyer intends to put the property sold to an immoral use, and reserves the title as security for the price, so aids and participates in such immoral purpose as to make the contract and security void. A could not collect the price, and he cannot reclaim the property from C. C is not estopped to set up the illegality of the contract. In case of absolute sale, however, mere knowledge that the buyer intends an illegal use will not bar an action for the price. *Standard Furniture Co. v. Van Alstine*, 62 P. 145, 22 Wash. 670, 51 L. R. A. 889, 79 Am. St. Rep. 960; *Anheuser Busch Co. v. Mason*, 46 N. W. 558, 44 Minn. 318, 9 L. R. A. 506, 20 Am. St. Rep. 580. The sale of a preparation or substance intended to be used in the unlawful manufacture of intoxicating liquor is void, and the price is not recoverable. *Three Star Food Products Corporation v. Ofsa*, 119 S. E. 859, 94 W. Va. 636, 29 A. L. R. 1053.

For other cases see Decennial Digests, Contracts 112; Estoppel 102; Intoxicating Liquors 327(1); Vendor and Purchaser 39.

Q. 125. A was the superintendent of P.'s sawmill at X, and of P.'s logging railroad, which terminated there. A and Z entered

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into a contract whereby A promised to use his influence to secure the removal of the sawmill to Y, and the extension of the logging railroad to that point, and Z promised to pay A \$1,000 when the mill was so removed. The contract contained a clause providing that: "Should any dispute arise under this agreement, it shall be referred to a committee of three, to be chosen," etc. "No action shall be brought upon the matter in dispute before the same shall have been arbitrated by such committee, and the award of such committee shall be final and conclusive." A brings action against Z, setting out the contract, alleging the removal of the mill as a result of the use of A's influence, and nonpayment by Z, but failing to allege any submission to arbitration. Z demurs to the complaint. What decision?

A. A contract made by an agent or officer of a corporation, under which the interests of the agent are adverse to those of the corporation, is against public policy, as tending to impair fidelity, and cannot be enforced, unless the corporation assented. Estate of Smythe v. Evans, 70 N. E. 906, 209 Ill. 376. } *corps*

Assuming that the agreement of A did not involve any disloyalty to P, the question remains whether the agreement to submit to arbitration is a valid condition precedent to action against Z. Under the English law, a provision for arbitration, put in the form of a condition precedent (not a mere collateral covenant), is effective. In the United States, if the provision relating to arbitration relates to subsidiary questions of fact, it is enforceable. But in some states a provision for arbitration of the entire question of liability is invalid, even though expressed in the form of a condition precedent. Meacham v. Jamestown, etc., R. Co., 105 N. E. 653, 211 N. Y. 346, Ann. Cas. 1915C, 851; United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C.) 222 F. 1011. } *My cont
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An agreement to arbitrate all disputes that may arise under a contract is said to be invalid as constituting an attempt to oust the jurisdiction of the courts, deprive parties of legal redress, and set up private tribunals. W. H. Blodgett Co. v. Beebe, 214 P. 38, 190 Cal. 665; Ezell v. Rocky Mt. Bean & Elevator Co., 232 P. 680, 76 Colo. 409. } *One
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For other cases see Decennial Digests, Arbitration and Award ◊1; Contracts ◊113(3), 127(2), 138(5); Sales ◊58.

Q. 126. A organizes a corporation and proceeds to sell shares of its capital stock without procuring a permit, as provided for under the Blue Sky Law, which prohibits the sale of such capital stock without first having procured a permit. B subscribes for

\$5,000 par value of such stock, and pays A on account the sum of \$2,500, executing his note for the balance.

(a) Can A recover of B the amount of his note? *No*

(b) Can B recover of A the \$2,500 paid? *yes*

A. (a) A cannot recover of B the amount of his note, which is not enforceable as between the parties. *Planters' Bank & Trust Co. v. Felton*, 124 S. E. 849, 188 N. C. 384; *Guaranty Mortgage Co. v. Wilcox*, 218 P. 133, 62 Utah, 184, 30 A. L. R. 1324.

(b) The contract of subscription, made in violation of the Blue Sky Law, was voidable by B. Upon rescission he may recover the \$2,500 which he has paid. If the plaintiff participates in an attempt to circumvent the law, he may not be entitled to any relief in an illegal transaction in violation of the Blue Sky Law. *Domenigoni v. Imperial Live Stock & Mortgage Co.*, 209 P. 36, 189 Cal. 467.

For other cases see *Decennial Digests, Licenses* ¶39.

Q. 127. B, a member of the Legislature, accepts a bribe of \$1,000 from A, and agrees for such consideration to cast his vote in favor of some bill then before the Legislature in which A was interested. When the vote was taken, B voted against A's bill. May A recover the \$1,000 in an action against B? (Arizona.)

A. The general rule in the case of illegal contracts is expressed by the maxim, "In pari delicto potior est conditio defendentis."

Rule { An action will not lie to recover damages for the breach of the contract, nor to obtain restitution for benefits conferred. *Smith v. Richmond*, 70 S. W. 846, 114 Ky. 303, 102 Am. St. Rep. 283.

In general, the law leaves the parties to an illegal contract where it finds them. There are certain exceptional cases, where the party to an illegal contract will be relieved and may recover back the money or consideration he has given. Such are cases where the plaintiff is not in pari delicto (equal fault), or where he repudiates the transaction before the illegal purpose is consummated, or where the contract was prohibited merely for his protection, or where a new duty arises from the actual receipt of money or goods, as the profits of the transaction, after the execution of the void contract, and is separable from it. The doctrine of illegality of contracts is not intended as a shield for injustice or dishonesty, or a privilege to fraud in subsequent dealings.

Q. 128. A has been indicted for an offense. B assures him that for \$1,000 he can buy off the prosecution, and A delivers to B the

\$1,000 for such purpose. While the money is still in B's hands, A sues B for its return. Can such action be maintained? (Arizona.)

A. A person who places money in the hands of an agent to be disbursed for an illegal purpose does not necessarily forfeit his right to the money. He may require the agent to return so much as has not been used for the unlawful purpose. *Ware v. Spinney*, 91 P. 787, 76 Kan. 289, 13 L. R. A. (N. S.) 267, 13 Ann. Cas. 1181; *Wasserman v. Sloss*, 49 P. 566, 117 Cal. 425, 38 L. R. A. 176, 59 Am. St. Rep. 209 (stocks advanced for bribery of officials). Where the illegal part of an agreement is wholly unexecuted, a *locus poenitentiae* is allowed, to repent and recover money paid or goods delivered. } *known*

For other cases see *Decennial Digests*, Contracts §138(3), 139.

SECTION 7.—DISCHARGE AND STATUTE OF FRAUDS. *unexecuted accord.*

Q. 129. A sues B to recover damages for personal injuries caused by the alleged negligence of B. B pleads that he agreed to pay A \$500 in full settlement of his claim, and that plaintiff agreed to accept this sum and upon payment to discontinue his action. B tendered this sum to A, which he refused to accept. B continues ready and willing to pay \$500. Is this any defense?

A. No; this is only an executory accord, which is an agreement to give and accept something in satisfaction of a claim in contract or tort. Since there is no allegation that defendant's promise to pay was received in satisfaction, the claim continues to exist. In general, an accord is not a bar, unless it is received in satisfaction, and no facts are pleaded to support such an agreement. The mere tender of performance does not amount to satisfaction, though B is guilty of breach of contract.

Reilly v. Barrett, 115 N. E. 453, 220 N. Y. 170.

Bandman v. Finn, 78 N. E. 175, 185 N. Y. 508, 12 L. R. A. (N. S.) 1134.

29 Yale Law J. 114, 115.

23 Col. Law Rev. 479.

For other cases see *Decennial Digests*, Accord and Satisfaction §2(2), 16, 25(2); *Compromise and Settlement* §3, 20(2), 22. *novation*

Q. 130. A owed B \$1,000, which was past due. A, B, and C entered into an oral agreement, whereby C promised to pay B \$500, and in consideration of such promise B released A from all liability. What, if any, liability thereafter existed on the part of A, and why? On the part of C, and why?

A. No liability exists on the part of A, because by novation C has been substituted as debtor in A's place. In order to consti-

tute novation, there must be either an express or implied agreement on the part of the creditor to substitute the new debtor in place of the original debtor, and also an express or implied agreement to release or discharge the original debtor. B may agree with C to accept the promise of C as a satisfaction of A's debt. It would seem that A's assent is unnecessary. *Klinkoosten v. Mundt*, 156 N. W. 85, 36 S. D. 595, L. R. A. 1918B, 111. The mere assent by a vendor to an agreement by an assignee of the purchaser's contract to assume the liabilities under the contract does not constitute a novation, which will release the assignor. The assignee becomes an additional debtor. The release of the original debtor may, however, be implied from conduct and circumstances. *T. W. Stevenson Co. v. Peterson*, 157 N. W. 750, 113 Wis. 258.

For other cases see *Decennial Digests*, Novation $\Leftrightarrow$ 1, 5 7.

Q. 131. What contracts are required to be in writing under the statute of frauds?

A. All contracts may be oral, and made by mere word of mouth, except such as are especially required by statute to be evidenced by some note or memorandum in writing, signed by the party to be charged. These statutes are known as "statutes of frauds." The English statute of frauds, which was enacted by Parliament in 1676, has been substantially re-enacted by most of the American states, and provides that certain contracts shall be unenforceable, unless there be some sufficient memorandum of the contract in writing. The principal classes of such contracts are:

(1) Contracts for the sale of real property, or any interest in land, though leases for one year or less are usually excepted.

(2) Contracts for sale of goods over a certain value, varying from \$50 to \$200. Several states do not have this provision at all. Exceptions are usually made in case the buyer accepts and receives part of the goods, or pays some part of the purchase price.

(3) Contracts of guaranty, to answer "for the debt, default, or miscarriage of another"; i. e., to be secondarily responsible for another's obligation.

(4) Contracts which by their terms are not to be performed within the space of one year from the time of making; but if such contract be capable of being fully performed within one year, or if the contract is fully executed on one side, the statute does not apply.

(5) Contracts in consideration of marriage, except mutual promises to marry.

The requisite memorandum may be found in letters, telegrams, and different papers, if they are connected together by reference or internal evidence. In many states, other contracts require written evidence, as, for example, a promise to pay a debt barred by the statute of limitations or bankruptcy, building contracts, contracts to leave property by will, real estate brokers' employment contracts, and others.

Q. 132. A met B on the street in Columbus, Ohio, and said: "I will give you \$26 per ton for 100 tons of the pig iron you have in the yard at your Cleveland foundry, take it at once, and pay you on delivery." B replied: "You have bought something." The next day A sent his agent to Cleveland, Ohio, to load the iron, and B refused to deliver it. A then tendered to B \$2,600 in cash and demanded the iron. B still refused to deliver it. The next day B sold the 100 tons of iron to L for \$32 per ton. What, if any, relief can A obtain? Explain your answer. (Ohio, 1924.)

A. By the Uniform Sales Act a contract to sell or a sale of any goods or choses in action of the value of \$500 or upward shall not be enforceable by action, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be signed by the party to be charged or his agent. This section was amended to \$2,500 in the act as passed in Ohio. The contract price here is \$2,600, and A cannot obtain any relief, as B has not signed any memorandum in writing, and nothing has been done to satisfy the statute by acceptance and receipt, or part payment. The amount has been changed to \$50 in Maryland, Minnesota, New York, Oregon, Vermont, Wisconsin, and Wyoming; to \$100 in Connecticut and Michigan; to \$200 in Nevada; in Iowa to all sales.

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Q. 133. A was orally employed by B on Saturday, September 22, for a year's work, to commence in performance of the contract on the following Monday. A was discharged in March, and sued for breach of contract of employment. B pleads the statute of frauds, making every oral contract void which "by its terms is not to be performed within one year from the making thereof." Is this a good defense?

A. No; the mere fact that physical work is not begun or required under a contract of service until a subsequent day does

not necessarily imply that the "performance" of the contract has not begun at an earlier date under the statute. Contracts for service to begin one day after the contract is made are not invalidated. But, if the services are to begin more than one day after the contract and continue for a year, the contract is invalid. Prokop v. Bedford Waist & Dress Co., 173 N. Y. S. 792, 105 Misc. Rep. 573; Dykema v. Story & Clark Piano Co., 190 N. W. 638, 220 Mich. 600, 27 A. L. R. 667; 7 Minn. Law Rev. 356.

An oral contract to support another person for 13 months is invalid, while a promise to support another for life is valid, because the latter is an indeterminate period, which may be fully completed within a year. In the former case, although the promisor may be excused by the death of the promisee, he will not have performed. Eiseman v. Schneider, 37 A. 623, 60 N. J. Law, 291.

For other cases see Decennial Digests, Frauds, Statute of §50(2), 53: Time §4.

Q. 134. One Seymour was employed in a position for life at a good salary. Defendant Oelrichs orally agreed to employ him for a larger salary for ten years, and to execute a written agreement to that effect, and asked him to give up his life position at once and enter defendant's service under the oral agreement, which he accordingly did. Defendant, after plaintiff had served a number of months, discharged him without cause. To his suit for damages, defendant pleads the statute of frauds and that the performance of the contract was not to be made within one year.

A. It was held in a California case that the statute of frauds cannot be set up where the effect would be to perpetrate a fraud. Plaintiff was induced by defendant to resign his former position, which he could not regain, and this created an estoppel, preventing defendant from setting up the shield of the statute to repudiate his oral agreement. Seymour v. Oelrichs, 106 P. 88, 156 Cal. 782, 134 Am. St. Rep. 154. Part performance of a contract for the sale of land by change of possession takes the case out of the statute in equity. In general, however, part performance (in and of itself) of a contract, when entire performance is not to be made within a year, is not sufficient to take the contract out of the statute of frauds, though full performance generally will do so. Brown v. Wisconsin Granite Co., 201 N. W. 555, 44 S. D. 635.

For other cases see Decennial Digests, Frauds, Statute of §119(2), 138(4).

CORPORATIONS

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Section

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SECTION 1.—FORMATION AND PERSONALITY OF CORPORATIONS

Q. 1. A client informs you that the partnership of which he is a member wishes to conduct its business (the manufacture of hardware, with one factory in Connecticut and another in New York) in corporate form. He requests you to procure the organization of a corporation. What matters will you take into consideration in determining the state under whose laws you will form the corporation?

A. In general, a corporation should be created under the laws of the state in which its principal business is to be carried on, unless certain advantages and privileges are desired which can be acquired only under the laws of another state. Sometimes a holding company in one state, with a small operating company in another, may be advisable. Delaware statutes are especially liberal as to the issue of non-par stock, the exclusion of certain classes of stock from voting power, and the holding of stockholders' and directors' meetings outside the state. In some states the fees for incorporating are small, and there is a moderate annual license tax or none at all. The statutory stockholders' liability is a serious objection to incorporating in Minnesota or California. The most important matters to be considered include, in general:

(1) Stockholders' individual liability, and also liabilities imposed by statute on directors.

(2) Fees and taxation, including incorporation fees, annual franchise tax on the corporation, taxes on stockholders, such as inheritance tax on nonresidents, and practice as to personal property taxes.

(3) Requirements as to the issue of stock, such as what form of payment will make stock fully paid and nonassessable; kinds of stock authorized and liberality as to non-par stock and as to bond issues.

(4) Convenience of operation, such as nonresident directors' meetings; full powers in the directors to act without assent of stockholders; power of delegation of the directors' authority to an executive committee, an important item in large corporations, with directors scattered over the country.

(5) Ease of making corporate changes, such as the increase or decrease of stock or the amendment of purposes.

(6) Power of majority of stockholders to sell out assets and business, and consolidate or merge in a new corporation, on paying off objecting stockholders, who seek to hold up the majority.

(7) The reputation of the state as to corporate legislation; also the care and certainty with which the corporation statutes have been worked out to meet the needs and convenience of business.

Q. 2. Give a concise statement of the steps you would take to organize an ordinary business corporation for your clients, in the end, having them fully organized and ready for business as a corporation.

A. The various steps usually required are as follows:

(1) Drafting the articles of association or certificate of incorporation, the constitution of the corporation.

(2) The signing of this by the requisite number of incorporators; sometimes also the sealing and acknowledgment before a notary.

(3) The filing of the articles with the secretary of state and the payment of the organization fees.

(4) The filing and recording of a certified copy of the articles or certificate with the register of deeds or other county official of the county in which the principal place of business is located.

(5) In some states, the publication of the articles or certificate and the filing of proof of publication.

(6) In a few states the articles must be approved by some court or commissioner before filing.

(7) The securing of a permit or license to do business from the commissioner of corporations or secretary of state is sometimes provided for.

(8) A permit from the commissioner of corporations under the Blue Sky Law is often required before the corporation can take subscriptions or sell stock or bonds to the public.

(9) Some statutes require an organization meeting, the election of officers, the subscription of stock, the payment of a certain proportion thereof, and a report or certificate of such organization as a condition precedent to the right to commence business.

Q. 3. What matters do the statutes usually require to be set forth by the articles or certificate of incorporation?

A. Requirements vary, but the articles or certificate of incorporation must usually set forth:

(1) The name of the corporation.

(2) The purposes or lines of business for which it is formed.

(3) The amount of authorized capital stock, the number of shares, and whether or not they shall have a par value, the different classes of stock, common or preferred, and preferences and restrictions thereof.

(4) The principal place of business or office.

(5) The duration of corporate existence.

(6) The number of directors, not less than three, with names and addresses of directors for the first year.

(7) The names and addresses of the incorporators, and sometimes the amount of stock for which each subscribes.

(8) The amount of subscribed and paid-in capital stock with which the corporation will commence business.

(9) Other provisions are required or permitted, such as limitation of the amount of indebtedness authorized, limitation of stockholders' liability, etc.

Q. 4. A statute permitted joint-stock companies to sue and be sued, and make contracts and conveyances, in the company name. The X Real Estate Association was managed by a board of trustees and issued certificates of stock, which were transferable. The statute provided that such associations should not be dissolved by the death of any associate, that the interest of each should be assignable, and that upon such assignment the assignor should cease to be liable for any of the obligations of the associates. A tax is payable by "every private corporation." May this tax be collected from the X Real Estate Association?

A. Probably not. A corporation may doubtless be created by legislation giving an association all the facilities, powers, and privileges of a corporation, without saying that it is a corporation. The above association is given most of the corporate characteristics, except that of limited liability. It would seem, therefore, to be properly only a joint-stock company, a kind of partnership, in which the debt of the company is the joint individual debt of the associates.

The creation of a corporation involves the recognition of a separate legal entity or personalty of which the rights and liabilities are distinct from those of the members. *People ex rel. Winchester v. Coleman*, 31 N. E. 96, 133 N. Y. 279, 16 L. R. A. 183; *In re Jones' Estate*, 65 N. E. 570, 172 N. Y. 575, 60 L. R. A. 476. Compare *Roberts v. Anderson*, 226 F. 7, 141 C. C. A. 121.

Some cases hold that joint-stock companies under such legislation as that of New York are practically corporations for certain purposes, despite the lack of the important corporate attribute of limited liability. In the absence of legislative grant of corporate power, joint-stock companies are partnerships, with a quasi corporate organization and transferable shares. A corporation may be defined as an association of persons granted by statute the privileges of legal personality, which means not merely that the association can hold property, make contracts, and sue as a legal unit, but that there is a separation of the capacity, rights and relations of the group from those of the members individually, just as if they were held by a different person. *Mackay v. New York, N. H. & H. R. Co.*, 72 A. 583, 82 Conn. 73, 24 L. R. A. (N. S.) 768. In *Donnell v. Herring-Hall-Marvin Safe Co.*, 28 S. Ct. 288, 208 U. S. 267, 273, 52 L. Ed. 481, Holmes, J., says that this separation, this ignoring of the individuals, is the characteristic of the corporation most important in business and law. The privilege of separate entity, personality, or capacity of the corporate unit, which means that its property and contracts and acts are not treated as those of the stockholders individually, is the foundation of corporation law. See *Hamilton v. Young*, 225 P. 1045, 116 Kan. 128, 35 A. L. R. 496; *State ex rel. Colvin v. Paine* (Wash.) 243 P. 2.

For other cases see Decennial Digests, Corporations ¶1; Internal Revenue ¶9; Joint-Stock Companies ¶1, 17; Trade-Marks and Trade-Names and Unfair Competition ¶73(2); Taxation ¶114, 872.

Q. 5. A statute of X provides: Ten or more residents of this state may organize a co-operative store association by drawing up articles which shall state the amount of money subscribed by each

associate. Each must subscribe the same amount. The articles must be filed in the manner prescribed in the case of articles of business corporations. When they have been so filed, and 25 per cent. of the subscribed capital shall have been paid in, in cash, then the secretary of state shall issue the association a license to do business. These associations shall have power to sue and be sued, and to hold or convey property in the name of the association. They may issue shareholder's certificates, which shall be freely transferable among members, and, with the consent of a majority of such members, to outsiders, who shall thereupon become members. The associates shall not be liable for the debts of the store beyond the amount of their subscriptions. The state taxing commission instructs its officers to collect from the D Co-operative Store, organized under the above statute, a tax payable only by corporations. Is D liable?

A. Yes; the Cooperative Association though not specifically designated as a corporation is granted by statute powers and privileges characteristic of a corporation, and is a legal entity, distinct from the persons who compose it, which acts and holds legal relations on its own account. See *Hamilton v. Young*, supra, question 4, On Co-operative Marketing Associations, see *Ballantine*, 8 Minn. Law Rev. 1.

For other cases see Decennial Digests, Joint-Stock Companies ¶1.

Q. 6. The property of the Lone Star Oil Company is vested in trustees, beneficial interest therein being divided into common and preferred shares represented by transferable certificates. The declaration of trust provides that the trustees shall have full powers of management, but may not bind the shareholders personally, and shall expressly stipulate with all contracting parties that they "shall look only to the fund and property of the trust." The trustees hold office for one-year terms, being elected thereto annually at a meeting of the common shareholders; but at a special meeting, called for the purpose, the common shareholders may by a three-fourths vote remove the said trustees at any time or give binding instructions to them in the conduct of the business. In case the guaranteed 7 per cent. cumulative annual dividend on the preferred shares becomes in arrears, it is provided that the afore-mentioned voting powers shall vest exclusively in the preferred shareholders, and so continue until such arrears are paid up. Since 1921 the company has paid no dividends, and the preferred shareholders have exercised the above voting powers. The trust may be terminated at any time

by a majority vote of both classes of shareholders. In 1922 P drilled some wells for the company under a written contract signed by the trustees "as trustees," but containing no stipulation exempting the shareholders from liability. In fact, P did not know of this provision in the declaration of trust. By statute the liability of partners is made joint and several. May P sue A, a common shareholder, for the contract price? May he sue B, a preferred shareholder?

A. Both the common and preferred shareholders would be individually liable for the debts of the company. Where a business is conducted under a declaration of trust, with the management exclusively vested in trustees, there is by the weight of authority no partnership liability. But if the shareholders are given power (1) to elect trustees at stated intervals; (2) to remove trustees; (3) to alter or amend the declaration of trust; (4) to terminate the trust; or, above all, to give binding instructions to the trustees in the conduct of the business, then the trustees are agents and the shareholders are principals and partners, being co-owners of the business and having control over its conduct. *Wells v. Mackay Telegraph-Cable Co.* (Tex. Civ. App.) 239 S. W. 1001. See *Thompson v. Schmitt* (Tex.) 274 S. W. 554; 39 Harv. Law Rev. 276; *Weber Engine Co. v. Alter* (Kan.) 245 P. 143; *Home Lumber Co. v. State Charter Board*, 190 P. 601, 107 Kan. 153, 10 A. L. R. 879; *Hamilton v. Young*, 225 P. 1045, 116 Kan. 128, 35 A. L. R. 496; *Magruder*, 23 Col. Law Rev. 423; *Cook*, 9 Am. Bar Ass'n Journal, 763. It is doubtful in some jurisdictions whether the beneficiaries would be regarded as conducting the business by reason of power to alter, amend, or terminate the trust, or elect trustees alone. *Frost v. Thompson*, 106 N. E. 1009, 219 Mass. 360.

For other cases see Decennial Digests, Associations Ⓒ20(2); Corporations Ⓒ28(1); Joint-Stock Companies Ⓒ1, 15(1); Partnership Ⓒ3, 20; Trusts Ⓒ30½(1, 2), 210.

Q. 7. A partnership engaged in business in Baltimore City enters into a valid contract with its competitor, a Maryland corporation, whereby the partnership agreed not to sell goods in a certain territory in competition with the corporation. Shortly thereafter the members of the firm and others formed a corporation under the laws of Delaware for the purpose of carrying on the same general business, and announced their intention to handle the same goods formerly sold by the firm, and in the district in which the firm had bound themselves not to sell. The Maryland corporation thereupon files a bill in equity to restrain the new company from entering into competition, averring that any such action would amount to a

breach of a lawful contract, for which no adequate remedy existed at law. Is the Delaware corporation liable?

A. A corporation would not ordinarily be bound by contracts entered into by its stockholders or incorporators, as it is a separate person or entity. But the privilege of separate capacity and liability must not be abused. If A agrees not to compete with B in connection with the sale of the good will of his business to B, and then organizes a corporation with the fraudulent purpose of continuing and carrying on the same business through the medium of the corporation, this evasion will not be allowed to succeed. The corporation itself will be enjoined, if it appears that it was fraudulently created as a device to evade the obligations of its members or organizers as individuals.

Beal v. Chase, 31 Mich. 490.

See Moore & Handley Hardware Co. v. Towers Hardware Co., 6 So. 41, 87 Ala. 206, 13 Am. St. Rep. 23.

Booth & Co. v. Seibold, 74 N. Y. S. 776, 37 Misc. Rep. 101.

Gormully & Jeffrey Mfg. Co. v. Bretz (C. C.) 64 F. 612.

10 Michigan Law Rev. 310.

7 Col. Law Rev. 137.

For other cases see Decennial Digests, Contracts ⚡117(5); Corporations ⚡185; Equity ⚡140; Injunction ⚡61(2).

Q. 8. A, B, and C organize a corporation to carry on the business of buying and selling automobiles, each taking one-third of the stock. After the company has been in operation for some time and is indebted to a considerable extent, A purchased the stock of B and C, thereby becoming the owner of all the stock of the corporation, and continues to carry on the business of the corporation as theretofore, keeping up the organization of the corporation, and intending as soon as he could find a purchaser to dispose of a portion of the stock. An employee in the business is injured in the course of his employment, and brings suit against the corporation and A to recover for such injuries, basing his right to recover against A upon the ground that A was the sole stockholder of the corporation at the time of the injury. Can he recover against A?

A. A few courts hold that two or more stockholders are necessary in order to sustain the separate existence or capacity of a corporate entity; that where the number falls below that required to organize a corporation the entity falls into a state of suspense, but is not dissolved. Apparently the corporation continues as a living legal entity, though its corporate powers are in a state of suspended animation. Louisville & N. R. Co. v. Nield, 216 S. W. 62, 186 Ky.

17; *Templeman v. Grant*, 227 P. 555, 75 Colo. 519; *Lang v. Lundy*, 152 N. W. 78, 185 Mich. 390.

By the majority view the mere fact of being a "one man company" is not sufficient to make the sole stockholder personally liable for contracts or torts of the corporation. He may incorporate for the very purpose of escaping personal liability. No fraudulent abuse of the corporate privilege is shown here. Statements that the mere fact that one man owns or controls all the stock of a corporation will destroy its corporate capacity are inaccurate and unsound. *Elenkrieg v. Siebrecht*, 144 N. E. 519, 238 N. Y. 254, 34 A. L. R. 592; *Erkenbrecher v. Grant*, 200 P. 641, 187 Cal. 7.

For other cases see *Decennial Digests, Corporations* ¶174, 221, 252, 265 (6), 377 (2), 600.

Q. 9. Defendant, a prosperous New Hampshire construction corporation, contracted to construct in that state a dam and power house for a traction company. Thereupon defendant, through its three directors, acting as nominal incorporators, organized under the laws of Maine the Atlantic Construction Company, with a capital of \$1,000, the minimum amount allowed by law. The said incorporators held all the stock of the Atlantic Construction Company in trust for defendant, which out of its own funds advanced the \$1,000 to pay for said stock. The officers and directors of the two corporations were the same persons. Thereafter defendant sublet the construction contract to the Atlantic Construction Company, the latter agreeing to furnish all the materials, to provide for the safety of employees, to rent the machinery and appliances from defendant at a rental of \$100 per month, and to receive as compensation the actual cost of the work and materials plus one-half of 1 per cent. thereof in addition. Admittedly the object of this arrangement was "to prevent the tying up of defendant's assets by attachments," etc. Defendant is sued for the wrongful death of plaintiff's intestate, caused by the negligence of employees of the Atlantic Construction Company in the course of constructing the dam under the foregoing arrangement. Is the defendant liable? (Harvard.)

A. According to some cases, where a corporation is a mere adjunct, agency, or instrumentality of another or parent corporation, the parent corporation may be held liable for contracts or torts of the subsidiary corporation. *Davis v. Alexander*, 46 S. Ct. 34, 269 U. S. 114, 70 L. Ed. 186; *The Willem Van Driel, Senior*, 252 F. 35, 164 C. C. A. 147; *Lehigh Val. R. Co. v. Delachesa*, 145 F. 617, 76 C. C. A. 307; *Joseph R. Foard Co. of City of Baltimore v. State of Mary-*

land, 219 F. 827, 135 C. C. A. 497 (business not kept separate; funds of subsidiary dealt with as if they were parent's); *Gulf C. & S. F. Ry. Co. v. Cities Service Co.* (D. C.) 281 F. 214; *Specht v. Missouri Pac. Ry. Co.*, 191 N. W. 905, 154 Minn. 314; *Auglaize Box Board Co. v. Hinton*, 126 N. E. 881, 885, 100 Ohio St. 505. But the parent will become liable for the act or omission of its subsidiary, not simply because it is the sole stockholder, but only when it so dominates and controls the other as to make that other a simple instrumentality or agent of the owning company. This is often spoken of as "disregarding the separate entity" of the subsidiary, which is used as a mere cover for the transactions of the controlling corporation, which can be held liable for the acts of the subsidiary on grounds of agency, disguised under the appearance of an independent contract. Some cases go on the idea that there should be deemed to be legal identity in cases where there is almost complete business identity between two corporations. *Platt v. Bradner Co.*, 230 P. 633, 131 Wash. 573. In the following cases the parent corporation was held not liable for the negligence or tort of the subsidiary: *Stone v. Cleveland, C., C. & St. L. Ry. Co.*, 95 N. E. 816, 202 N. Y. 352, 35 L. R. A. (N. S.) 770; *Union Sulphur Co. v. Freeport Texas Co.* (D. C.) 251 F. 634, 661. See *Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 118 A. 279, 141 Md. 67.

The organization of a corporation for the purpose of escaping personal liability is not such an abuse of the corporate privilege as to make the sole stockholder personally liable. *Elenkrieg v. Siebrecht*, 144 N. E. 519, 238 N. Y. 254, 34 A. L. R. 592. See Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Cal. Law Rev. 12 (November, 1925). Generally the courts will disregard the separate entity or capacity of a corporation when the privilege is misused for any of the following purposes: (1) To evade an obligation of the incorporators; (2) to circumvent a statute; (3) to form a monopoly; (4) to cover up fraud or crime; (5) to defraud creditors; (6) to escape responsibility for acts done on behalf of the stockholders, where the corporation is but an agency of the stockholders, or of a parent corporation. This means that the corporation may be held liable for the acts of the stockholders, or the stockholders held liable for acts done in the name of the corporation, when to recognize their separate entities would aid in the misuse of the corporate personality.

For other cases see Decennial Digests, Carriers ⚡219(5); Corporations ⚡1, 221, 225, 590(1,4), 591; Master and Servant ⚡301(4); Patents ⚡287; Railroads ⚡16, 259(3), 261.

Q. 10. B owns all the stock of Q corporation, which manufactures copper wire, and all the stock of T corporation, a copper-mining company. Q corporation held a contract to take, and did take, all the output of T corporation. B manages both corporations as president, with dummy directors. They occupy the same office. The same office staff acts for both, but separate books are kept and the separate corporate organization is strictly observed. Q corporation became in arrears upon payments to T corporation. B lent Q corporation a large sum and took its note. Q corporation is heavily indebted to trade creditors, who have petitioned it into bankruptcy. T corporation is solvent.

(a) Can T corporation prove its debt against Q corporation?

(b) Can B prove his debt against Q corporation?

A. (a) T corporation can prove its debt against Q corporation for goods sold and delivered, unless it is to be regarded as a mere adjunct or department of the same business: T and Q may be distinct corporate entities, although managed by the same officers and stockholders. The right of the creditors of Q is only to be paid out of Q's assets. T and Q are not in the relation of partners or agents of each other. *Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 118 A. 279, 141 Md. 67; *Kendall v. Klapperthal Co.*, 52 A. 92, 202 Pa. 596; *Salomon v. Salomon & Co.* [1897] A. C. 22, 46.

(b) The right of B to prove his debt against the Q corporation is more doubtful. If this corporation is to be regarded merely as the agency of the sole stockholder, the capital invested in it by him cannot be treated as a loan to the corporation as a distinct entity, as against the rights of creditors. This would be in effect a loan to himself. The question would seem to turn on B's good faith, and whether there was any fraudulent abuse or juggling of the legal entity by B. *S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania*, 107 A. 721, 264 Pa. 265; *In re Watertown Paper Co.*, 169 F. 252, 94 C. C. A. 528; 14 Cal. Law Rev. p. 12; 4 Minn. Law Rev. 219; 29 Yale Law J. 664.

For other cases see Decennial Digests, Bankruptcy §340, 355; Corporations §1, 378, 466, 565(1), 603.

Q. 11. The A corporation promoted the formation of another corporation, the K Company, as a subsidiary. Articles of incorporation were signed by five men, all in the employ of A's attorneys, in charge of the organization of K. Each subscribed for one share of the capital stock, and one subscribed as trustee for A for 995 shares. The stock was paid for by this company, and nothing was paid by the

incorporators. The K Company was controlled as a subsidiary of A, which loaned it money and sold it goods on credit. In bankruptcy proceedings against the K Company, A seeks to prove a claim for money loaned. It is objected that the K Company was a "dummy company," with no valid, separate existence, either as a corporation de jure or de facto, and no separate assets or property.

A. There is no reason why a corporation may not cause a subsidiary corporation to be formed through agents. They need not have any financial interest or benefit of any kind in the corporation. The separate entity of a corporation is not to be disregarded merely because of the ownership of all its stock by another corporation. *Salomon v. Salomon & Co.* [1897] A. C. 22, 46; *Martin v. Development Co. of America*, 240 F. 42, 153 C. C. A. 78; *Kardo Co. v. Adams*, 231 F. 950, 146 C. C. A. 146; *City of Holland v. Holland City Gas Co.*, 257 F. 679, 168 C. C. A. 629; *Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 118 A. 279, 141 Md. 67. Control by stock ownership does not expose the stockholders to liability for acts of the corporation, nor prevent them from dealing with it as strangers. But, if the subsidiary acts as a mere agent of the parent corporation, then the holding corporation is responsible, and cannot prove its debts against itself in fraud of legitimate creditors. *S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania*, 107 A. 721, 264 Pa. 265; *Hunter v. Baker Motor Vehicle Co.* (D. C.) 225 F. 1006, 1015. But see, contra, *Peckett v. Wood*, 234 F. 833, 148 C. C. A. 431; *In re Watertown Paper Co.*, 169 F. 252, 94 C. C. A. 528; 15 Mich. Law Rev. 172. Complete dominance, identity of interest, and participation in the same business enterprise may show agency, or that the subsidiary is to be regarded simply a branch or department of the same concern for certain purposes. *Clere Clothing Co. v. Union Trust & Savings Bank*, 224 F. 363, 140 C. C. A. 49; *Spokane Merchants' Ass'n v. Clere Clothing Co.*, 147 P. 414, 84 Wash. 616; *In re Eilers Music House* (C. C. A.) 270 F. 915, Id., 274 F. 330; *In re Muncie Pulp Co.*, 139 F. 546, 71 C. C. A. 530; 4 Minn. Law Rev. 219; 14 Cal. Law Rev. 12.

For other cases see *Decennial Digests, Bankruptcy* ¶116, 140½, 308, 340, 355; *Corporations* ¶1, 29(2), 215, 378, 565(1), 585, 586, 590(1), 603.

Q. 12. A has acquired all the stock of the B corporation. He made a contract with C in the name of the corporation. Now C seeks to hold him personally liable upon the contract. Can he do so?

(a) Could X, a creditor of A, levy on the assets of the B company?

(b) Suppose A made a contract in his own name by which he purported to transfer certain stock and bonds owned by the corporation to C, and to appoint C agent of the corporation to transfer other corporate property to D. Would the corporation be bound by A's acts?

A. A corporation is not dissolved ipso facto by the concentration of its stock in the hands of one man, nor do its property or contracts become in law those of the sole stockholder. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 45 S. Ct. 250, 267 U. S. 333, 69 L. Ed. 634.

C, a creditor of the corporation, cannot hold A personally liable on a contract of the corporation, merely because he is sole stockholder, if its books and affairs are kept separate from his, and it is not a mere agent. As a general rule, the separate corporate existence, entity, or capacity cannot be disregarded, unless abused. *Minifie v. Rowley*, 202 P. 673, 187 Cal. 481.

(a) X, an individual creditor of A, cannot levy on the assets of the corporation. The remedy of its creditor is to levy on the stock held by A. But see *Louisville & N. R. Co. v. Nield*, 216 S. W. 62, 186 Ky. 17; note 29 Yale Law J. 659.

(b) The corporation will be bound by acts of the sole stockholder, where he treats the corporation as a mere agency for his own private affairs, and where he does not distinguish between the corporate business and his individual business. The individuality or separateness of the corporation and the stockholder has ceased, so that the corporation is bound without formal corporate action by the directors. *Wenban Estate v. Hewlett*, 227 P. 723, 193 Cal. 675; 13 Cal. Law Rev. 235.

For other cases see Decennial Digests, Corporations $\hookrightarrow$ 1, 174, 252, 265 (6), 642(4½), 668(15).

Q. 13. The D Company was a corporation organized under the English Companies Act by the G D Company, a German corporation, which, together with certain German citizens, owned all but one share of its stock. The purpose of its organization was to form a subsidiary of the German company for the sale of its merchandise in England. Shortly after the outbreak of the war in 1914, the D Company brought suit in an English court against the C T Company, an English company for moneys owing from the latter, which defended on the ground that payment to the D Com-

pany would be in violation of the royal proclamation relating to trading with the enemy, which forbade, among other things, payment to or for the benefit of an alien enemy. Was the defense good?

A. The English courts have held in effect that a corporation organized under the laws of England, but controlled by German stockholders, may not sue in England in time of war to recover money due before the war. *Daimler Co., Ltd., v. Continental Tyre & Rubber Co.* [1916] 2 A. C. 307; *Ann. Cas.* 1917C, 170; *In re Bayer* [1921] 2 Ch. 331. For certain purposes a court must look behind the corporate personality, and take into account the personalities of the stockholders and officers. The enemy character of those who control the company's acts may thus be material on the question of the enemy character of the company and its right to sue in the courts. See 24 *Col. Law Rev.* 602; *British Yearbook of International Law* (1923-24) 44, 50.

In an American case, plaintiff corporation was organized under the laws of New Jersey, but all its shareholders were citizens of Germany. Defendant resisted suit for debt during the war, on the ground that the plaintiff was an alien enemy. It was held that the corporation is a legal entity distinct from its shareholders, having its domicile within the state of its creation, and that the courts would not regard the domicile or enemy character of the stockholders as affecting that of the corporation. It cannot therefore be deprived of access to our courts in time of war. *Fritz Schulz, Jr., Co. v. Raimes & Co.*, 166 N. Y. S. 567, 100 *Misc. Rep.* 697; *Id.*, 164 N. Y. S. 454, 99 *Misc. Rep.* 626; *Behn, Meyer & Co., Ltd., v. Miller*, 45 S. Ct. 165, 266 U. S. 457, 69 L. Ed. 374; 27 *Yale Law J.* 108; 29 *Yale Law J.* 774.

For other cases see *Decennial Digests*, War ¶10(2), 12.

Q. 14. Under a statute of the United States relating to "trading with the enemy," enemy corporations were defined to be those (a) incorporated within the territory (including that occupied by the military and naval forces) of any nation with which the United States was at war, or (b) incorporated within any country other than the United States and doing business within such territory, and the Alien Property Custodian was authorized to seize any property belonging to an enemy corporation. Furthermore, all individuals who were citizens of any nation with which the United States was at war were declared to be enemies, and the Alien Property Custodian was authorized to seize any money or other prop-

erty owing or belonging to or held for, on account of, or on behalf of, or for the benefit of an enemy. A corporation, X, had been organized under the laws of a British crown colony. It had never done any business within enemy territory. It had, after April 1917, carried on business in the Philippine Islands. Its managing director was a citizen of Switzerland, who owned 10 per cent. of its stock. The remainder of its stock was owned by citizens of Germany. Was the Alien Property Custodian authorized to seize the assets of X?

A. No; the statute was not intended to authorize the seizure of corporate property merely because of enemy stockholders' interests therein. The statute was drafted to avoid the difficulties which would follow disregard of the corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These difficulties had been indicated by the diverse opinions of the English judges in *Daimler Co., Ltd., v. Continental Tyre & Rubber Co.*, [1916] 2 A. C. 307. Under the federal statute a corporation is an entity with a character of its own, irrespective of the status attributed to stockholders, and is an "enemy" only when directly within the statutory definition. A British corporation, which had never done business in enemy territory, does not come within the definition, though Germans owned the controlling interest. The statute gave no regard to residence or nationality of stockholders. *Behn, Meyer & Co., Ltd., v. Miller*, 45 S. Ct. 165, 266 U. S. 457, 69 L. Ed. 374; *Swiss Nat. Ins. Co. v. Miller*, 45 S. Ct. 213, 267 U. S. 42, 69 L. Ed. 504.

For other cases see *Decennial Digests, War* 12.

Q. 15. D divided his property into building lots and sold them, giving purchasers a deed which contained a covenant that the title to the land should never vest in a person or persons of African descent. Many white persons bought lots in the subdivision. Later some of these purchasers were about to convey their lots to a corporation called the People's Pleasure Park Company. This corporation was composed exclusively of colored people, and was organized to establish an amusement park for colored people. Its officers knew of the covenant in the deeds. Assuming the legality of the restriction, and that it is a covenant running with the land, may a white owner of a lot enjoin the conveyance to the People's Pleasure Park Company?

A. By a rather extreme adherence to the entity, doctrine, it has been held that a covenant that title should never vest in colored

persons was not violated by a conveyance to a corporation composed of negroes for use by them. *People's Pleasure Park Co. v. Rohleder*, 61 S. E. 794, 63 S. E. 981, 109 Va. 439. The corporation was an entity distinct from its members, and was not a "colored person." But it might well have been held that this use of the corporation entity was a transparent evasion, that the court could see the members behind the corporate veil, and that it would not permit the dishonest use of the separate corporate capacity to evade an obligation and defeat the purpose of the contract by indirect ownership.

For other cases see *Decennial Digests*, Corporations ¶1; Covenants ¶103(1).

Q. 16. The P corporation was formed under laws of state X, by A, B, and C, citizens of X. P lent money to D, a citizen of state Y. Later A acquired all the stock of P and became a citizen of Y. P sues D in a federal court to recover the money. No federal question is involved. May P maintain this action?

A. Corporations, although not citizens, are treated as citizens of the state of their creation, for the purpose of determining the jurisdiction of the federal courts on the ground of diversity of citizenship. This is explained on the needlessly artificial theory that the stockholders are the real parties in the interest, and that "there is an indisputable presumption that a state corporation is composed of citizens of the state which created it." Usually this fiction is discarded, and the corporation referred to as itself a citizen of the state of creation for jurisdictional purposes. Even when it does business in another state, it may sue or be sued in federal courts as a citizen of the state of its original creation. There is accordingly the requisite diversity of citizenship between P and D.

Shulthis v. McDougal, 32 S. Ct. 704, 225 U. S. 561, 56 L. Ed. 1205.

Southern Ry. Co. v. Allison, 23 S. Ct. 713, 190 U. S. 326, 47 L. Ed. 1078.

State of Wisconsin v. Pelican Ins. Co., 8 S. Ct. 1370, 127 U. S. 265, 32 L. Ed. 239.

6 Wis. Bar Assn. Rep. 227 (1904).

See *Charles Friend & Co. v. Goldsmith & Seidel Co.*, 138 N. E. 185, 307 Ill. 45.

For other cases see *Decennial Digests*, Corporations ¶52; Courts ¶314; States ¶200.

SECTION 2.—DE FACTO CORPORATIONS AND ESTOPPEL

Q. 17. (a) The Constitution of state A provided that the Legislature should pass no special act creating corporations or conferring corporate powers. Afterward, however, the Legislature of

state A did pass a special act incorporating X Railroad Company, which went ahead unmolested, and built its railroad as specified in the act, and put it in operation. P made a contract with X Company to transport a carload of freight over its line for \$100, for which he gave his note, payable in 60 days to the order of X Company. Through the negligence of X Company, P's freight was damaged to the amount of \$1,000. P then learns that X Company was incorporated under the special act. He brings suit for his damage against all the stockholders he can find. They demur. X Company indorsed and sold the note to Y for value before it was due. Y sues P on the note. P demurs. What are the various views? Indicate weight of authority.

(b) X was a corporation organized under the provisions of an act of incorporation which was declared by the Supreme Court of the state to be unconstitutional because of certain improper classifications contained in the act. The incorporators of the X Company had complied with all the provisions of the act. The company became insolvent. After the decision declaring the statute unconstitutional, Y, a creditor of the X Company, sues all the stockholders to recover his debt. Should he recover?

A. The question of personal liability may depend upon whether the X Company is either a corporation de facto or a corporation by estoppel. A corporation de facto is recognized when there is a law under which the company might be incorporated and a bona fide attempt has been made to comply with the statute, and there has been user; that is the doing of business as a corporation. The weight of authority appears to be that there cannot be a de facto corporation, unless there is a constitutional statute under which it might be created. An unconstitutional law is said to be no law at all. See 13 Mich. Law Rev. 271.

But there may be an estoppel to question the de facto status of the company, where the parties have dealt on a corporate basis. To hold investors in stock liable individually on all obligations of the corporation is unjust and unreasonable, and imposes a liability never contemplated by either party. Exemption from individual liability was an implied term of the contract. See *Building & Loan Ass'n v. Chamberlain*, 56 N. W. 897, 4 S. D. 271. P has no defense to the note, as purchase for value without notice of a negotiable note cuts off such defenses as failure of consideration. *Eaton v. Walker*, 43 N. W. 638, 76 Mich. 579, 6 L. R. A. 102; *Mason v. Stevens*, 92 N. W. 424, 16 S. D. 320.

For other cases see *Decennial Digests, Corporations* ¶28(1), 29(2), 34(3), 34(6).

Q. 18. Corporation X was formed by a special act of the Legislature of state M in 1900. This act provided that the corporate existence of X should cease at the end of 20 years. The corporation did not commence business until 1902. In 1920 the directors and stockholders were advised by an attorney of experience in corporate matters and of good standing that the 20 years ran from the date when business was commenced. This advice was erroneous, as the 20 years ran from the date of the act. In 1920, a corporation with all the powers of X might have been formed under a general act, upon the filing of specified papers and the payment of a specified fee, but no proceedings under this general act were taken by the directors or stockholders. In 1921 a contract was made with A by the directors in the name of X. The stockholders all knew at this time that the directors were proposing to continue business in the name of X until 1922, and approved, but few of them knew that this particular contract had been made. May A recover from the stockholders the amount due him under the terms of the contract?

A. There is a conflict of authority, but by the better view, where a corporation continues to transact business as a going concern for several years after its authorized period or term of existence has expired, it has a de facto existence. There is here a user of corporate powers and a statute under which it could be legally created, but no attempt to comply with the statute. No public policy of the state, however, is infringed by the continuance of the user of corporate organization. There are the old corporate articles on file. There would be no justice in permitting A to recover from the stockholders individually. A defense might be found in the doctrine of corporations by estoppel, if not in corporations de facto. A distinction is drawn by some courts between cases where the statute prescribes a limit of existence for a certain period, like 50 years, and cases where the law does not prescribe the limit, but one is specified in the articles or charter by the incorporators. *Wilson v. Brown*, 175 N. Y. S. 688, 107 Misc. Rep. 167; *Arlington Hotel Co. v. Rector*, 186 S. W. 622, 124 Ark. 90. See *Held v. Crosthwaite*, 260 F. 613, 627, 171 C. C. A. 377.

A de jure corporation, whose charter has been forfeited for failure to pay a license tax, does not continue to function as a de facto corporation, so as to give validity to its contracts entered into during the period of its forfeited charter and suspended powers. Such corporations are forbidden by positive law to do business as corporations and their existence is subject to collateral attack. The

doctrine of estoppel cannot be applied against the prohibition of a statute. *Van Landingham v. United Tuna Packers*, 208 P. 973, 189 Cal. 353.

For other cases see *Decennial Digests, Corporations* ¶28(3), 29(1, 2), 34(8), 336, 617(2), 618.

Q. 19. A, a resident of Minnesota, purchased two shares of stock in a supposed South Dakota corporation. The organizers of the alleged corporation, although doing business under the corporate name, had never filed any corporate papers as required by the South Dakota laws. B loaned money to the pretended corporation, and now sues A as being individually liable as a partner, because of the defective organization of the corporation, for the entire loan. Has A any defenses?

A. Two possible defenses are: (1) No participation in the business; (2) corporation by estoppel. See next question.

Q. 19a. A, B, and C are assuming to act as a corporation under the name of the X Company, although they have failed to file any certificate of incorporation. D conveys to the company certain property, and accepts in payment a promissory note executed by the company, believing that he is dealing with a corporation. The company fails to pay, and D brings suit against A, B, and C individually as partners. The defendants contend that they are liable only as a corporation, and not individually. What decision?

A. One who merely undertakes to become a stockholder in a supposed corporation, which has failed to comply with the incorporation statute sufficiently to be recognized as a corporation de facto, does not thereby expose himself to liability as a partner for debts incurred in the name of the corporation.

But, if A, B, and C actively engage in business under the name and pretense of a corporation, which they know has not acquired a legal existence, even as a corporation de facto, they may be held liable individually, either on the ground that they themselves became partners or principals, or on the theory that they were acting as agents for a nonexistent principal and impliedly warrant their authority. A distinction is drawn by some cases as to the liability of those who merely purchase or subscribe for stock in a pretended corporation and those who actively participate in making contracts in its name. *Baker v. Bates-Street Shirt Co.* (C. C. A.) 6 F. (2d) 854. There is a conflict as to whether filing incorporation papers is essential to recognition as a de facto corporation. *Harrill v. Davis*, 168 F. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.)

1153; *Magnolia Shingle Co. v. J. Timmon's Co.*, 58 So. 90, 3 Ala. App. 578. See 22 A. L. R. 376, note.

For other cases see *Decennial Digests, Corporations* ¶30(5), 34(3), 215, 221, 225, 330; *Partnership* ¶41.

Q. 20. Corser, Cauty, and Mitchell assumed to act as the Scott Building Company, Inc., without making any attempt to comply with the law as to the formation of corporations, except to sign articles associating themselves together as a body corporate. By-laws were adopted at the first meeting, and officers elected. They styled themselves a corporation, and made a contract with Johnson in the corporate name, which, however, did not expressly recite that it was a corporation. On breach of this contract by the company, Johnson seeks to hold the associates to full liability as partners. The defendants seek to confine Johnson to a remedy against the assets of the company. Are the associates individually liable as partners or principals on contracts made in the corporate name?

A. The association purports to be a corporation, but de facto existence has not been attained. *H. J. Hughes Co. v. Farmers' Union Produce Co.*, 194 N. W. 872, 110 Neb. 736, 37 A. L. R. 1314. The plaintiff, who has contracted with the defendants as an association purporting to be incorporated, should on principle be confined to remedies such as he would have had against a corporation. This is often spoken of as an "estoppel" to deny the corporate existence. To treat the members of the association as individually liable on the contract would be the creation of a different contract than either of the parties intended to make.

Private persons, by entering into contracts with a body which purports to be a corporation, and in which it is described by a corporate name, are usually held to admit the existence of the corporation for the purpose of remedies on the contract. While it is true that the majority of the decisions, nevertheless, favor holding the associates to individual liability, where there is neither a corporation de jure nor de facto, yet there is a tendency in some well-considered cases to deny individual liability, even where the de facto doctrine does not apply, by the so-called estoppel or contractual doctrine. In view of the fact that plaintiff consented to contract with the association on a corporate basis, there may be found an implied contractual limitation to such remedies as could be used if the associates possessed the corporate character. 13 Mich. Law Rev. 271; 8 Minn. Law Rev. 409; *Lowell-Woodward Hardware Co. v. Woods*, 180 P. 734, 104 Kan. 729; *Ingle System Co. v. Norris & Hall*, 178 S. W. 1113, 132 Tenn. 472, 5 A. L. R. 1578; *Blanch-*

ard v. Kaull, 44 Cal. 440; *Planters' & Miners' Bank v. Padgett*, 69 Ga. 159. See *Provident Bank & Trust Co. v. Saxon*, 48 So. 922, 123 La. 243.

For other cases see *Decennial Digests, Constitutional Law* ¶154(2); *Corporations* ¶28(1), 34(3, 4); *Partnership* ¶41.

Q. 21. A group of persons attempted in good faith to form under the laws of Delaware a corporation to develop timber resources in Tennessee. The "de facto corporation" thus created then proceeded to open an office and transact business in Tennessee, not having made any effort to comply with the conditions precedent of the Tennessee statute, which provides, under penalties, "that it shall be unlawful for any foreign corporation to do, or to attempt to do any business in this state" without filing certain documents. Defendants A, B, and C purchased stock in the corporation, supposing that all the formalities both of the Delaware and Tennessee law had been complied with. They received their dividends from time to time, but took no active part in the affairs of the company. P sold goods to the company in Tennessee, thinking it to be in all respects a valid corporation. Are A, B, and C, whom P is now suing in Tennessee, liable for the price of the goods?

A. If there was sufficient attempt to comply with the Delaware law to make a de facto corporation, there is no individual liability on the stockholders for the debts of the corporation merely because it did not become a de jure corporation in Delaware. *Finnegan v. Noerenberg*, 53 N. W. 1150, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Tisch Auto Supply Co. v. Nelson*, 192 N. W. 600, 222 Mich. 200. But it has been held by the Tennessee court that stockholders in a foreign corporation, which does business as such in that state without complying with the statutory requirements as to foreign corporations, are liable as partners on contracts made in the name of the corporation, although they did not know of such non-compliance. The fact that the plaintiff dealt with the company in the corporate name was held to create no "estoppel" (to deny corporate existence and hold stockholders liable). This holding seems unjust and contrary to decisions in some other jurisdictions. *Cunningham v. Shelby*, 188 S. W. 1147, 136 Tenn. 176, L. R. A. 1917B, 572; *Equitable Trust Co. v. Central Trust Co.*, 239 S. W. 171, 145 Tenn. 148. Cf. *Martin Bros. v. Nettleton* (Wash.) 244 P. 386; 15 Mich. Law Rev. 351.

For other cases see *Decennial Digests, Corporations* ¶28(1, 2), 215, 653, 659; *Partnership* ¶1, 41.

Q. 22. A statute permits three or more persons to form a corporation for any lawful business, by filing articles of incorporation with the secretary of state and recording a copy thereof with the register of deeds in the county where the principal place of business is located. A, B, and C signed articles for the L Laundry Company, which were filed with the secretary of state, but through an oversight of their attorney a copy was not recorded with the register of deeds. The L Company began business, and by reason of the negligence of the driver of one of their delivery trucks J and K were run over and injured. J sued the L Company and K sued A, B, and C individually. What judgment should be entered in each suit?

A. There has been a colorable compliance with a statute authorizing such a corporation, followed by "user" or purported corporate action. A de facto corporation therefore exists, which would be a defense to any claim of individual liability of the associates in contract. But it is not so clear whether there would not be individual liability in case of tort. 20 Harv. Law Rev. 456, 474; 35 Harv. Law Rev. 198. The injured person could sue the de facto corporation, if he so desired. *Frawley v. Tenaflly Transp. Co.*, 113 A. 242, 95 N. J. Law, 405, 22 A. L. R. 369. Judgment for J against the L Company.

K is suing A, B, and C individually on the theory that they should not be entitled to assert against him the corporate privilege of limited liability, because they have not substantially complied with the conditions prescribed by statute. But the doctrine of de facto existence is not based on estoppel or on dealings on a corporate basis, but on public policy and convenience. *Society Perun v. Cleveland*, 3 N. E. 357, 43 Ohio, 481. There is no justice or utility in permitting K to make a collateral attack inquiring into the details of incorporation, irregularities in which do not affect the merits of his claim. *Demarest v. Flack*, 11 N. Y. S. 83, 16 Daly, 337; *Lamming v. Galusha*, 30 N. Y. S. 767, 81 Hun, 247.

For other cases see Decennial Digests, Corporations ☞ 24, 28(1, 3), 29(2).

SECTION 3.—SUBSCRIPTIONS TO STOCK

Q. 23. D signed the following subscription paper: "For and in consideration of the promises of each other, we and each of us agree to subscribe for stock in the P Company in the amounts set opposite our names." Before the articles of incorporation were filed, D notified B, the promoter who obtained his subscription, that he refused to take any stock in the corporation. The corporation, when organized, tenders stock to D and sues him for his subscription. What decision?

A. Decision for D in most jurisdictions. Subscription papers may be so worded as to create binding contracts between the subscribers themselves. But the courts incline against construing subscriptions for stock as contracts between the subscribers, but interpret them rather as mere offers to the corporation, which do not become binding upon the subscribers until the corporation has been organized and the subscription accepted. Until then the subscribers have the right to revoke. This construction may be favored, because subscriptions are often obtained from the inexperienced and by means of high-powered salesmanship for stock in unsound and speculative ventures. *Bryant's Pond Steam Mill Co. v. Felt*, 32 A. 888, 87 Me. 234, 33 L. R. A. 593, 47 Am. St. Rep. 323. If the subscribers intend a mutual agreement, there is no reason why the promises, which induce the promises of the others, should not be held to constitute sufficient consideration for a contract which will inure to the benefit of the corporation contemplated by the parties, and therefore be held irrevocable. *Shelby County Ry. Co. v. Crow*, 119 S. W. 435, 137 Mo. App. 461. Even then the corporation would not be bound to recognize the subscriber as a stockholder unless it assented. According to some cases, such a subscription is a valid and binding contract between the subscribers individually, and upon the formation of the corporation, and any act of assent by it, they would be constituted stockholders in the corporation which they had agreed to form. *San Joaquin Land & Water Co. v. Beecher*, 35 P. 349, 101 Cal. 70. If the subscription be regarded as a mere offer, notice of revocation need not be given to all the other subscribers. It is sufficient to give notice to the person having control of the enterprise, the promoter. *Planters' & Merchants' Independent Packet Co. v. Webb*, 46 So. 977, 156 Ala. 551, 16 Ann. Cas. 529. Obtaining subscriptions to the entire capital stock is a condition precedent to liability on stock subscriptions in many states, unless waived. *Flury v. Twin Cities Dairy Co.* (Wash.) 240 P. 900.

For other cases see *Decennial Digests, Corporations* ¶¶76, 78, 81, 83.

Q. 24. A general incorporation law provides that any number of persons, not less than three, may incorporate for manufacturing purposes by making, acknowledging, and filing articles of incorporation, in which shall be set forth certain things, including "the number of shares each agrees to take." Before the articles of incorporation are drawn up or signed by any one, a preliminary subscription paper is circulated, reading, "We, the undersigned, hereby subscribe for the number of shares set opposite our names in the Berkeley

Brick-Making Company," specifying in detail the character of the company to be thereafter formed. This is signed by ten persons, each signifying the number of shares for which he subscribes. Afterwards A, B, and C, three of these subscribers make, sign, acknowledge, and file articles of incorporation conforming with the statute, stating the number of shares for which they subscribe. No others signed or acknowledged the articles. A, B, and C meet and organize and elect directors, but reject the subscriptions of the other subscribers, and refuse to recognize them in any way in connection with the corporation. X, Y, and Z, certain of the other subscribers, sue to set aside the election of directors. Have they any rights?

A. It has been asserted that, when subscriptions are made for stock in a corporation to be formed, the subscribers, for the purpose of effecting an organization, become stockholders by the very act of subscribing, if there are no conditions precedent in the subscription; that is, they acquire by their subscription an interest in the body corporate and a right to participate in its organization. All the subscribers stand upon the same footing, and to give vitality to the artificial entity they become stockholders, immediately upon the corporation being brought into existence. *Baltimore City Pass. Ry. Co. v. Hambleton*, 26 A. 279, 77 Md. 341. It is, however, somewhat difficult to reconcile this doctrine with the theory that a subscription is a mere offer, which may be accepted or rejected by the corporation. Who is authorized to organize, and accept or reject subscriptions? If the articles of incorporation designate directors for the first year, the directors may meet first and accept subscriptions, after which a stockholders' meeting may be held. If no directors are named in the articles, the incorporators—i. e., those who sign the articles—may meet and accept or reject subscriptions, after which the stockholders so created may proceed with the organization and the election of directors. 2 Neb. Law Bul. 46. Strictly, upon the theory generally advanced that a subscription is an offer, open to acceptance or rejection, there would seem to be no right in one who has merely signed a subscription paper to take part in a stockholders' meeting before his subscription is accepted. *Badger Paper Co. v. Rose*, 70 N. W. 302, 95 Wis. 145, 37 L. R. A. 162.

There are, in general, two methods by which one can become a shareholder in a corporation. One is by subscription accepted by the corporation; the other is by purchase of stock already subscribed for, either from the corporation direct or from other owners of its stock. It is sometimes difficult to draw the line between a subscription and a contract to purchase stock in an existing corpora-

tion and serious liabilities may turn on the question. See *Stern v. Mayer* (Minn.) 207 N. W. 737; Cf. *Reagan v. Midland Packing Co.* (D. C.) 298 F. 500; 11 Cornell Law Quart. 237.

For other cases see Decennial Digests, Bankruptcy ⚡254; Corporations ⚡77, 78, 170, 228.

Q. 25. Defendant gave his promissory note to the X corporation for a stock subscription which had been induced by fraud. The corporation was at this time a solvent, going concern. Later the corporation became insolvent, and a receiver was appointed in a creditors' suit. Some of the creditors had become such before the date of defendant's stock subscription, and others subsequently thereto. The receiver sold the note to plaintiff after maturity. Plaintiff now sues defendant on the note, and fraud is pleaded in defense. What decision?

A. Defendant takes the note subject to defenses good against the corporation. Whether a stockholder who has been induced by fraud to subscribe may rescind his subscription after the insolvency of the corporation depends on circumstances. In most cases the determining question is whether the stockholder exercised due diligence in rescinding the subscription after he discovered the fraud so that creditors might not be misled by his position. *Reid v. Owensboro Sav. Bank & Trust Co.*, 132 S. W. 1026, 141 Ky. 444; *Newton Nat. Bank v. Newbegin*, 74 F. 135, 20 C. C. A. 339, 33 L. R. A. 727; *Marion Trust Co. v. Blish*, 84 N. E. 814, 85 N. E. 344, 170 Ind. 686, 18 L. R. A. (N. S.) 347. It has been said by some courts that, as to creditors whose claims arise after the stockholder became such, their rights are superior to any right of rescission; but this distinction between prior and subsequent creditors is not observed by some decisions. *Stalnaker v. Gum*, 104 S. E. 730, 87 W. Va. 283; *In re Recording Devices Co.* (D. C.) 1 F.(2d) 474. If a considerable period of time has elapsed, if the stockholder has received dividends and actively participated in the affairs of the corporation, if there has been any want of diligence in discovering the fraud or in taking steps to rescind when the fraud was discovered, or if any considerable indebtedness has been since created, the right of the stockholder must be subordinated to the claims of creditors.

For other cases see Decennial Digests, Bankruptcy ⚡318(3); Corporations ⚡80(10, 12), 83, 268(2), 560(1, 2), 562(1).

Q. 26. The X corporation is authorized to begin business after 20 per cent. of its capital stock has been subscribed and paid in cash. After the corporation had begun business and incurred obligations,

A, B, and C were induced to subscribe to stock through fraudulent representations as to the purposes of the corporation and the amount of paid-up stock. A discovered the fraud very soon thereafter. B was assured repeatedly by the officers of the corporation that it was in a flourishing condition, and did not learn of the fraud until a short time before the insolvency of the corporation. C did not actually know of the fraud until after the insolvency of the corporation, which occurred about 18 months after the above contracts of subscription were entered into. A receiver having been appointed for the X corporation, A, B, and C seek to rescind their contracts. Should they succeed?

A. As to A, so far as appears, he has not acted with due diligence to rescind his subscription and remove his name from the corporate books. As to B, he may perhaps be excused by having been lulled into a belief of false security, and, even if he has received dividends from the corporation, this will not necessarily prevent rescission for fraud. *Johnson v. Nebraska Bldg. & Inv. Co.*, 190 N. W. 590, 109 Neb. 235. But see *In re Recording Devices Co. (D. C.)* 1 F.(2d) 474. C has the strongest case, unless he has been guilty of laches in not discovering the fraud more promptly. Even as to him, the rights of subsequent creditors, who became such partly in presumable reliance upon his subscription, might be regarded as superior. *Lamb v. Bonesteel*, 173 N. W. 13, 186 Iowa, 971. Misrepresentations as to the purposes of the corporation and the amount of paid-up stock are to be regarded as misrepresentations of fact, and so a basis of rescission. *Stone v. Walker*, 77 So. 554, 201 Ala. 130, L. R. A. 1918C, 839.

For other cases see *Decennial Digests*, Bankruptcy 318(3); Corporations 80(10, 12), 262(2).

Q. 27. D signed a subscription paper by which he agreed to unite with other subscribers in the formation of a corporation for the purpose of purchasing a patent for preserving fruit, erecting a building, and stocking it with fruits to be preserved. Some of the other subscribers organized a corporation, the objects of which were stated in the certificate of incorporation to be "the manufacture of preserved fruits and the canning and preserving of fruits and other articles." There were also certain defects in the incorporation proceedings, but a corporation *de facto* was created. The corporation sues to recover the amount of D's subscription. What decision?

A. Where a subscription is signed prior to the organization of a corporation, there is an implied condition that a *de jure* corporation

shall be formed. *Wright Bros. v. Merchants' & Planters' Packet Co.*, 61 So. 550, 104 Miss. 50, Ann. Cas. 1915C, 1111. Even if the corporation was legally organized, D is not liable, as the certificate authorizes branches of business to which D never consented to devote his contribution of capital. A departure as to purposes, powers, or objects changes the character and enlarges the risks of the business, and will discharge such of the prior subscribers as do not assent to it. *New Nueces Hotel Co. v. Weil Bros.* (Tex. Civ. App.) 243 S. W. 731; *Woods Motor Vehicle Co. of Buffalo v. Brady*, 73 N. E. 674, 181 N. Y. 146.

For other cases see *Decennial Digests, Corporations* ¶78, 81, 83, 84.

Q. 28. The Arizona Piano Company was engaged in disposing of its stock to various persons in Michigan, without having been authorized by the Michigan securities commission to sell its stock in that state. The sale to P was in conflict with the terms of the "blue sky" statute, but was not expressly declared to be void. P tendered back his stock and demanded the return of the consideration paid. Can he recover it?

(a) Suppose that P accepted dividends and attended stockholders' meetings, and when the company was adjudicated bankrupt two years later, attempted to rescind the purchase?

A. The purchase of stock from a corporation not authorized to sell was voidable by P. Upon rescission, he was entitled to be restored to what he had parted with. *Edward v. Ioor*, 172 N. W. 620, 205 Mich. 617, 15 A. L. R. 256; *Guaranty Mortgage Co. v. Wilcox*, 218 P. 133, 62 Utah, 184, 30 A. L. R. 1324.

(a) Even where the purchaser or subscriber may rescind the contract because of violation of the "blue sky law," it is optional with him to do so. He may elect to retain his stock. How long, then, may the stockholder wait, as against creditors of the corporation, before he will be estopped from electing to rescind? To permit the stockholder, when he has knowingly ratified the purchase, by accepting dividends and keeping the privileges of a stockholder, to rescind and assume the role of a creditor upon insolvency would be unjust to the general creditors. *In re Racine Auto Tire Co.* (C. C. A.) 290 F. 939.

Blue sky laws have been enacted in recent years in almost all states to restrain the sale of stock and securities of corporations, associations, and business trusts which represent nothing more valuable than "blue sky" and water. They have attempted to safeguard the public from exploitation by the oily promoter, usually by the

double check by licensing dealers and also requiring a permit for the sale of specific issues of securities. Application for such permits must be made to a corporation commission giving detailed information as to the company, its plans, property, contracts, and financial condition. Approval is withheld if the sale would work a fraud on the purchaser. Permits are subject to revocation, and are often issued on conditions, as that the promotion stock shall be deposited in escrow, to be delivered to the promoters for their patents, services, etc., only when the business has been established upon a paying basis. See 24 Columbia Law Rev. 79. Very often sales and contracts of purchase entered into in violation of the act are expressly made void (voidable) at the instance of the purchaser, who is given the right to recover the purchase price from the seller. A note given for stock sold contrary to the blue sky law is not enforceable as between the parties, but is valid in the hands of a purchaser without notice, for value, and before maturity. The note is voidable, not void. *Planters' Bank & Trust Co. v. Felton*, 124 S. E. 849, 188 N. C. 384.

For other cases see Decennial Digests, Bills and Notes ☞375; Corporations ☞76, 78; Licenses ☞39.

SECTION 4.—PROMOTERS

(a) *Contracts*; (b) *Fiduciary Obligations*

Q. 29. A, promoter of a corporation to be organized and called X, entered into a written lease with B, by the terms of which B leased certain real estate to A for a period of five years, reserving a rent which A covenanted to pay. The lease was executed by B and A "as agent of the corporation X, about to be formed." X was formed, and its directors and shareholders both voted, in meeting assembled, "to ratify and adopt" the said lease, and A assigned the lease to X. X for about one year paid the rent reserved to B by the lease, and then became insolvent. Can B hold A for the rent accruing for the balance of the five years of the lease?

A. In this country our courts have generally held that such a contract, made by a promoter on behalf of a corporation to be formed, may be "adopted" by the corporation after it comes into existence. There is, however, a difference of opinion as to the theory of the transaction. Some courts call it "ratification," but others prefer a theory of "adoption," because technically a principal must have been capable of doing the act at the time in order to ratify what purported to be done on its behalf. *McArthur v.*

Times Printing Co., 51 N. W. 216, 48 Minn. 319, 31 Am. St. Rep. 653. According to some courts, "adoption" is merely another name for the acceptance of a continuing offer. *Kirkup v. Anaconda Amusement Co.*, 197 P. 1005, 59 Mont. 469, 17 A. L. R. 441.

The promoter is personally liable upon a contract made in behalf of the proposed corporation, in the absence of provisions showing that credit was extended solely to the corporation, which was then in process of formation. *Carle v. Corhan*, 103 S. E. 699, 127 Va. 223; *Strause v. Richmond Woodworking Co.*, 65 S. E. 659, 109 Va. 724, 132 Am. St. Rep. 937. It seems on principle that, when the corporation assumes or adopts the contract, the liability of the organizer or promoter who made the contract should cease. This may be supported on the theory of novation, that the corporation agrees to take the place of the promoter, and that B, the other party, has assented to this in advance. See *Irwin Glass Co. v. Buchanan* (C. C. A.) 289 F. 348.

For other cases see *Decennial Digests, Corporations* ¶30(5), 448(1,2).

Q. 30. A, B, and C form a syndicate, buy mineral properties, reasonably worth \$1,000,000, and organize a corporation with a capitalization of \$3,750,000, divided into 150,000 shares of stock, with a par value of \$25 a share. When the corporation came into existence, A, B, and C became its directors. The directors immediately voted to buy the properties from the syndicate and to issue 130,000 shares of the corporate stock to themselves in payment therefor. They later voted to sell the remaining 20,000 shares to the public at par value. This is a representative suit, brought by the holders of the 20,000 shares of stock last issued, for alleged secret profits made by A, B, and C. What decision?

A. A representative suit seeks to compel the assertion of a corporate right of action. According to the federal courts, there is no corporate wrong if all persons interested in the corporation at the time assented to the transaction with full knowledge of the facts. It appears here that the sale of the property was consummated before the vote to offer stock to the public. It is therefore argued that, if any wrong was done, it was a fraud on the subsequent individual subscribers, and not on the corporation, when they paid the corporation \$25 per share for stock worth less than one-half this amount. *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 28 S. Ct. 634, 210 U. S. 206, 52 L. Ed. 1025. It is argued that no new right of action accrued to the corporation when new subscribers were taken in. If the corporation recovers, the

guilty as well as the innocent will get the benefit. *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 28 S. Ct. 634, 210 U. S. 206, 52 L. Ed. 1025; *Hamilton v. Hamilton M. Mines*, 223 P. 926, 110 Or. 546. But if there are at the time of the transaction any innocent stockholders or subscribers, who are kept in ignorance of the scheme, the corporation itself has a right of action against the promoters. *Davis v. Las Ovas Co.*, 33 S. Ct. 197, 227 U. S. 80, 57 L. Ed. 426; *Hughes v. Cadena De Cobre Min. Co.*, 108 P. 231, 13 Ariz. 52. In the Arizona case there was only one stockholder, who had no notice of the issuance of stock to the promoter, yet the corporation was allowed to recover for this fraud of the promoters. The weight of authority in the state courts seems to follow the Massachusetts view that promoters are liable to account to the corporation for secret profits from the sale of property to the corporation, where a fraud is intended and perpetrated upon subsequent subscribers to stock. 26 Col. Law Rev. 447, 13 Cal. Law Rev. 240; 8 Minn. Law Rev. 520.

For other cases see *Decennial Digests, Corporations* §30(2,3), 448(1).

Q. 31. A and B acquired mining property, intending to organize a corporation to purchase it from them at a huge profit to themselves. They limited the membership to insiders until the transaction of issuing a majority of the stock for the property at a gross overvaluation was completed between them and the corporation, and thereafter caused the balance of the capital stock to be sold at par to subscribers, who were kept in ignorance of the fact that the majority of the stock had been issued at much less than par.

(a) Can the corporation hold A and B liable (1) for the difference between the actual value of the property conveyed to it and the price paid by the corporation; (2) for the difference between the price paid by A and B and that paid by the corporation?

(b) Would a different rule apply if A and B had owned the property before forming the intention to organize a corporation?

A. There is a radical difference of opinion as to the promoter's liability to suit by or on behalf of the corporation for secret profits made at its expense, if the transaction is put through while the corporation is composed of shareholders, all of whom assent thereto. A fraud on subsequent stockholders was contemplated at the time assent was given. The right of the corporation is made to depend upon there being at least one honest man, who is concerned as stockholder or subscriber, and who does not assent, according to the federal courts. *Old Dominion Copper Mining &*

Smelting Co. v. Lewisohn, 28 S. Ct. 634, 210 U. S. 206, 52 L. Ed. 1025; American Barley Co. v. McCourtie, 185 N. W. 506, 150 Minn. 460. The Massachusetts court, followed by a majority of state courts, would hold A and B liable to the corporation as fiduciaries for the difference between the price paid by A and B and that paid by the corporation. The promoters were selling their own property to themselves as representatives of present and future stockholders. The promoters cannot be permitted to gain an unfair profit at the expense of future subscribers to stock. *Pietsch v. Milbrath*, 101 N. W. 388, 102 N. W. 342, 123 Wis. 647, 68 L. R. A. 945, 107 Am. St. Rep. 1017; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 74 N. E. 653, 188 Mass. 315, 108 Am. St. Rep. 479; *Id.*, 89 N. E. 193, 203 Mass. 159, 40 L. R. A. (N. S.) 314. The corporation is allowed by these courts to recover the profits realized by the promoter, in spite of the nominal, sham, or illusory corporate assent given by his co-conspirators. Even conceding that the substantial injury is in many cases to the individual innocent subscribers, rather than to the corporation in its collective interests, yet the impracticability of numerous suits, the prohibitive cost of such litigation to a small stockholder, and the inaccessibility of the evidence to the individual, strongly argue in favor of recognizing a corporate right of action for the benefit of those defrauded, rather than an individual one. If the corporate mechanism can be used to perpetrate a fraud on prospective stockholders, why should not the same mechanism be used to undo that fraud, where this is the only effective remedy for the wrong done? See *Matthews v. Headley Chocolate Co.*, 100 A. 645, 650, 130 Md. 523; 8 Minn. Law Rev. 520; 13 Cal. Law Rev. 240; 26 Col. Law Rev. 447; 30 Harv. Law Rev. 60.

(a) Where A and B acquire property for the purpose of a projected company, they are promoters when they acquire it, and it is not competent for them to sell at an advance without full disclosure of the facts, including cost. They are liable to account for their secret profit. *Victor Oil Co. v. Drum*, 193 P. 243, 184 Cal. 232.

(b) If the promoter owns the property before undertaking the promotion of the company, it seems that he is allowed to deal with the corporation without making full disclosure of the original cost to him. *Densmore Oil Co. v. Densmore*, 64 Pa. 43. He may set his own price for the property, providing it is reasonably worth the price he asks, and he discloses the fact that he has an adverse interest. He must not be guilty, however, of any affirma-

tive misrepresentation as to the cost. *Burbank v. Dennis*, 35 P. 444, 101 Cal. 90; *Nickel Plate Land Co. v. Broom*, 123 S. E. 594, 96 W. Va. 586; 31 W. Va. Law Quart. 67; *Arnold v. Searing*, 78 A. 762, 78 N. J. Eq. 146, 157; *Henderson v. Plymouth Oil Co.* (Del. Ch.) 131 A. 165, 179. See 3 Wis. Law Rev. 442.

For other cases see *Decennial Digests, Corporations* 30(1, 2, 3), 308(3), 320(4, 5, 6, 7), 448(1).

Q. 32. Defendant bought out a going partnership business for \$120,000, its fair value. He then organized a corporation with an authorized capital stock of \$1,500,000, divided into 15,000 shares of a par value of \$100 each. He subscribed for 7,500 shares, and two dummy associates subscribed for one share each in order to qualify as directors. Defendant transferred to the corporation, at an agreed valuation of \$870,000, the aforesaid business which he had just purchased, in exchange for which he received 7,500 shares of stock marked fully paid, and a promissory note for \$120,000, secured by mortgage, payable in five years. No other stock was subscribed for at this time. During the next three years the corporation made net earnings sufficient to pay the interest on the mortgage, and in the third year a 4 per cent. dividend was paid on the outstanding stock, the statute allowing dividends to be paid "out of surplus or out of net profits." The directors then determined to issue the remaining 7,498 shares of the authorized capital stock. Five hundred shares, marked fully paid, were issued gratuitously to defendant, and the same amount to each of his codirectors. The balance of 5,998 shares was offered at 50 cents on the dollar to the public, and was taken by plaintiffs at that price. Plaintiffs, having later learned the aforesaid facts regarding the financing of the corporation, want to know what, if anything, they can do about it. Advise them.

A. The issues presented here are: (1) Was the defendant, as promoter, guilty of a breach of his fiduciary obligation to the corporation when he obtained a profit of \$750,000 par value of stock on the transfer of the partnership business to the corporation? (2) Does the fact that all parties in interest at the time consent bind the corporation? (3) Do not promoters and directors owe some duty, even to future stockholders, to disclose the advantage which they have obtained? (4) Are not the 500 shares issued to the defendant and to the other directors subject to cancellation for fraud and lack of consideration?

It seems clearly a fraud upon the corporation for the directors to acquire stock without consideration, with a view to impose on

those who contribute capital by the subsequent purchase of stock. *Hinkley v. Sac Oil Co. & Pipe Line Co.*, 107 N. W. 629, 132 Iowa, 396, 119 Am. St. Rep. 564. But, as to the original transfer, if the promoters did not intend the immediate issue of further stock as an essential part of the scheme of promotion, it is doubtful whether plaintiffs have any remedy, either individually, or by a representative suit on behalf of the corporation. The United States Supreme Court has refused to permit recovery by the corporation, even where the intention of bringing in future stockholders existed from the start. *In re British Seamless Paper Box Co.*, L. R. 17, Ch. D. 467; *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 28 S. Ct. 634, 210 U. S. 206, 216, 52 L. Ed. 1025; 5 Ill. Law Rev. 87.

For other cases see Decennial Digests, Corporations ⇐78, 80(5), 88, 317 (4), 448(1).

SECTION 5.—POWERS

Q. 33. The directors of a domestic manufacturing corporation, owning land and machinery, pursuant to the vote of a majority of its stockholders, but against the protest of a minority, purpose in good faith to sell and transfer the whole property of the corporation to a new company, taking payment therefor in the shares of the new company. The minority stockholders desire to restrain the corporation and its directors from making such sale and transfer, on the ground that the sale will not be advantageous to the stockholders, which is a fact. They apply to you; what advice will you give them?

A. It is laid down as a general rule that the majority stockholders of a corporation have not the power to authorize the directors to sell out all the property of the company and thereby abandon the enterprise for which it was organized. There is, however, an exception to this rule that, when the business of the corporation has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, even though it may not be insolvent, the majority may sell out, even against the objection of the minority. *Geddes v. Anaconda Copper Mining Co.*, 41 S. Ct. 209, 254 U. S. 590, 65 L. Ed. 425. If the majority cannot sell for cash, the case is even stronger that there can be no sale of the assets of a prosperous corporation to another corporation controlled by the majority, in exchange for shares in the new company. The stockholder may not be required to embark upon a venture different from that to which he agreed. The dissenting minority may enjoin the sale. *Wm. B. Riker & Son Co.*

v. United Drug Co., 82 A. 930, 79 N. J. Eq. 580, Ann. Cas. 1913A, 1190. See E. H. Warren, 30 Harv. Law Rev. 364. The transfer of all the assets is closely connected with the power to dissolve. The majority may not discontinue the business of a corporation, for the purpose of turning it over to another corporation and excluding the minority stockholders. *Godley v. Crandall & Godley Co.*, 105 N. E. 818, 212 N. Y. 121, L. R. A. 1915D, 632; *In re Doe Run Lead Co.*, 223 S. W. 600, 283 Mo. 646.

For other cases see *Decennial Digests, Corporations* ⇨ 182, 189(2), 404 (1), 424, 592½.

Q. 34. Ninety-five per cent. of the stockholders of the X Company authorized and joined in a reorganization agreement, by which a new company with a larger capitalization was to be formed, with broader objects, to which all the property and assets of the X Company were to be transferred in exchange for 75 per cent. of the stock of the new company, and the stockholders of the X Company were to be permitted to subscribe at par for the balance. The X Company was then to be dissolved, and the shareholders were to receive for their old stock, share for share, stock in the new company. The agreement also provided that any stockholder not desiring to take the new stock in exchange should be paid its fair market value, to be determined by appraisement by disinterested appraisers. A, a dissenting stockholder, brings suit to enjoin the dissolution of the X Company and the transfer of its property to the new company. Can his suit succeed?

A. In some cases authority is given by general statute to a certain majority of the stockholders of a corporation to sell in good faith the entire property. *Allied Chemical & Dye Corporation v. Steel & Tube Co. (Del. Ch.)* 120 A. 486, 491 (1923). But, in the absence of statutory or charter provisions, a majority of stockholders of a prosperous and going corporation may not sell the property essential to its existence as a going concern, against the dissent even of a single stockholder. *Theis v. Spokane Falls Gas-light Co.*, 74 P. 1004, 34 Wash. 23. It has been held, however, in New Hampshire, that a minority stockholder of a corporation cannot object to the sale of its assets by the majority, because payment is to be made in the stock of another corporation, if he is given the option of taking payment for his stock in cash. *Bowditch v. Jackson Co.*, 82 A. 1014, 76 N. H. 351, L. R. A. 1917A, 1174, Ann. Cas. 1913A, 366. In most jurisdictions, however, A, the dissenting stockholder, may enjoin the dissolution of the X Company, where it is part of a scheme to turn over its business to another corpora-

tion. In the absence of statute, a corporation cannot compel its stockholders to venture upon a new and different enterprise, or lose their interest in the business and assets conveyed away. *Schwab v. E. G. Potter Co.*, 87 N. E. 670, 194 N. Y. 409; *Robinson v. Holbrook (C. C.)* 148 F. 107; *Godley v. Crandall & Godley Co.*, 105 N. E. 818, 212 N. Y. 121, 1. R. A. 1915D, 632; *Riker & Son Co. v. United Drug Co.*, 82 A. 930, 79 N. J. Eq. 580, Ann. Cas. 1913A, 1190.

The New York Stock Corporation Law provides that a corporation may, with consent of two-thirds of its stock, sell and convey its property or any part thereof to a domestic corporation engaged in business of the same general character. If any stockholder objects to such sale, he may demand payment for his stock and apply to the court for the appointment of appraisers to determine its value, to be paid by the corporation. *Bickerton v. New York Theatre Co.*, 133 N. E. 41, 232 N. Y. 1; *Matter of Bickerton*, 187 N. Y. S. 267, 196 App. Div. 231. Where statutory power is conferred, the discretionary power of the majority may extend to the dissolution of a prosperous corporation, which will result in a practical consolidation by the purchase of the property by another corporation. *J. H. Lane & Co. v. Maple Cotton Mills*, 226 F. 692, 141 C. C. A. 448.

For other cases see *Decennial Digests, Corporations* ¶66, 180, 182, 184, 189(2), 377(2), 386, 404(1), 424, 584.

Q. 35. The L corporation was organized for the purchase and sale of lumber and the carrying on of a general lumber business. C was a contractor. For the purpose of securing a sale of lumber to C, the corporation's salesman, S, signed its name to a bond securing the faithful performance of C's contract to erect a building for B. C having made default under his contract, B sued the corporation on the bond. S, after the execution of the bond, had acquired a majority of the stock of the L company and been elected its president. As such officer he instructed the L company's attorney to make no defense to B's suit. P, owning 10 shares of stock, files a bill against the company and B to enjoin the prosecution of B's suit. Should relief be granted?

A. The question turns on the issue whether the L corporation has a defense which it ought to assert against B, and this depends upon whether the guaranty of the faithful performance of C's contract with B was within the implied powers of L. A corporation has implied power to make all contracts reasonably incidental to

advancing its business. The power of corporations to become guarantors or sureties for the benefit of customers has been frequently implied, where the purpose was that of increasing sales or stimulating business. *Woods Lumber Co. v. Moore*, 191 P. 905, 183 Cal. 497, 11 A. L. R. 549. Compare *North Side Ry. Co. v. Worthington*, 30 S. W. 1055, 88 Tex. 562, 53 Am. St. Rep. 778. Whether a contract of guaranty will advance corporate interests is primarily for the officers of the corporation to decide, and courts will hold the contract *ultra vires* only when clearly foreign to the business authorized. See *Wm. Filene's Sons Co. v. Gilchrist Co.* (C. C. A.) 284 F. 664.

If the corporation has a defense, and the stockholder, P, can show that the directors and officers, by reason of their relation to the plaintiff, are not properly defending the suit, he may obtain equitable relief in the nature of a representative suit. *Blake v. Blake & Knowles Steam Pipe Works*, 94 A. 419, 84 N. J. Eq. 363; 33 Yale Law J. 581, 582.

For other cases see Decennial Digests, Corporations ¶447, 471, 484 (3), 506.

Q. 36. The X Railroad Company published a circular proposing the issue of bonds of \$1,000 each at 90 per cent., secured by a mortgage on its property and the delivery of one bond with five shares of its capital stock to any person advancing \$900 thereon. A subscribed for and was awarded \$100,000 of such loan. It had previously been agreed between A and the Y corporation, a bank, that to the extent of one-half the amount awarded to A he should subscribe for the same for the benefit and in the name of the Y corporation. A failing to do so, the Y corporation brings an action to recover the profits made by A. A defends on the ground that the Y corporation had no authority to make the contract. Is the defense valid?

A. Yes. The right of Y to sue A depends on its power to subscribe for stock and bonds in the X Railroad Company. It has been held that a bank cannot use the funds of the depositors and stockholders to traffic in stocks. Even if it has express authority to invest in stocks and bonds, this would not authorize it to indulge in hazardous promoting schemes. *Gause v. Commonwealth Trust Co.*, 89 N. E. 476, 196 N. Y. 134, 24 L. R. A. (N. S.) 967. The Y company would not be liable to A for failing to take the stock and bonds, and A is not liable to Y for breach of an executory *ultra vires* contract. *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am.

Rep. 14; *Jemison v. Citizens' Sav Bank of Jefferson*, 25 N. E. 264, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482; *Hunt v. Hauser Maiting Co.*, 96 N. W. 85, 90 Minn. 282; *Knowles v. Sandercock*, 40 P. 1047, 107 Cal. 629, 642. See 32 Yale Law J. 286. No constructive trust will be raised against A to prevent him from keeping the benefits of a contract made as agent, to enable the bank to reap the profits of a transaction in which it was not authorized to engage. A distinction may well be drawn between the implied power to purchase safe stocks or bonds as an investment of surplus funds, or in payment of a debt, or as security, or to provide facilities incidental to its business, and transactions which tend toward speculation.

For other cases see Decennial Digests, Banks and Banking ⇨92, 295; Corporations ⇨374, 377(1, 2), 432(12).

Q. 37. X was a stockholder in the Smith Company. On June 1, 1922, he bought from the Smith Company a note of John Jones for \$10,000, this note being secured by a first mortgage bearing interest at 5 per cent., and having been given to the company for certain goods purchased by Mr. Jones. X bought the note at a discount, giving in payment 40 shares of stock of the Smith Company, of \$100 par value, and \$5,000 in cash. The company was then insolvent, as X knew, and on August 1, 1922, was placed in a receiver's hands. Creditors of the corporation claim that this transaction with X should be rescinded. What decision, and why?

A. Creditors of a corporation, in case of insolvency, are entitled to look to the capital raised by the issue of stock as a trust fund for the payment of debts. Therefore a corporation may not properly purchase its issued stock, except out of surplus earnings or accumulated profits. The purchase of the Jones note, which was an asset of the insolvent Smith Company, was fraudulent as against creditors. The payment partly in stock was a withdrawal of capital by the stockholder to the extent that credit was allowed on the agreed price for the stock. If the Jones note was worth at the time more than \$5,000 cash paid, the transaction with X should be rescinded as invalid against creditors.

Lefker v. Harner, 186 S. W. 75, 123 Ark. 575, L. R. A. 1916F, 281.

For other cases see Decennial Digests, Banks and Banking ⇨313; Corporations ⇨376, 544(2).

Q. 38. Action against A by creditors of the W corporation, which is insolvent, to enforce the statutory liability of stockholders. A sets up by way of defense that, previously to the insolvency of

the corporation, the latter had bought back the shares held by him, and that he was therefore no longer a stockholder liable for the debts of the corporation.

(a) Is the defense valid?

(b) Would the following evidence, offered by A, be admissible? That he originally became a stockholder by receiving from the corporation his stock in exchange for his interest in a furnace; that thereafter, the furnace not proving as successful and profitable as had been expected, A was blamed by many of the stockholders for having induced the company to make the purchase, and was requested to take the furnace back and transfer to the company the stock he had received for it; and that to remove such dissatisfaction he had complied with the request.

A. (a) This depends upon power of a corporation to purchase its own stock. In England and in some states a corporation is prohibited from purchasing its own stock. *Fitzpatrick v. McGregor*, 65 S. E. 859, 133 Ga. 332, 25 L. R. A. (N. S.) 50; *Kom v. Cody Detective Agency*, 136 P. 1155, 76 Wash. 540, 50 L. R. A. (N. S.) 1073. By the weight of authority it may do so, if payment is made out of surplus profits, and not out of capital. The capital contributed by the stockholders constitutes the basis of credit and financial responsibility of a corporation. It is often described as a "trust fund," which is a rather inaccurate way of saying that it cannot be withdrawn by the stockholders to the prejudice of creditors. If all the stockholders should surrender their stock for the money and assets of the corporation, what would be left to pay creditors? Only worthless certificates. *Clapp v. Peterson*, 104 Ill. 26. It has been held that a note given by a corporation for the purchase of its own stock cannot be enforced as against creditors, if the corporation is insolvent at the maturity of the note. *In re Fechheimer Fishel Co.*, 212 F. 357, 129 C. C. A. 33; *In re O'Gara & Maguire, Inc.* (D. C.) 259 F. 935.

(b) Even a banking corporation may acquire its own stock by way of compromise to avoid or reduce losses. *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122, 23 L. Ed. 679; *Ralston v. Bank of California*, 44 P. 476, 112 Cal. 208, 214. A surrender of stock to the corporation by a stockholder, even by way of gift, would be invalid, if made for the purpose of avoiding liability to creditors.

For other cases see Decennial Digests, Banks and Banking ⚡74, 260(1); **Corporations** ⚡67, 82, 133, 244(4), 376, 544(2), 565(1), 566(1).

SECTION 6.—ULTRA VIRES CONTRACTS

Q. 39. Action by A and the W corporation, partners doing business under the name of A & Co., against B, to recover for work and labor performed and materials furnished to B. B, by special plea, averred that the suit could not be maintained, one of the plaintiffs being a corporation, having no power under its charter to enter into a partnership arrangement. Plaintiffs demurred to the plea. Should the demurrer be sustained?

A. In the absence of express provision, a corporation may not enter into a partnership, and no action will lie to enforce an agreement to form or continue a partnership. The objection seems to be to an undue delegation of the power of the directors to manage the business to the partner. *Hosher-Platt Co. v. Miller*, 131 N. E. 310, 238 Mass. 518. But in this case the contract has been executed by the partners, and the defense of ultra vires cannot be set up. Demurrer overruled. Thus, in an executed partnership transaction, the corporation must account to its copartner for profits received. *Boyd v. American Carbon Black Co.*, 37 A. 937, 182 Pa. 206. An individual or a corporation cannot escape liability to third persons as a partner, on the ground that the corporation was incapable of entering into the relation. *Moore v. Thorpe*, 158 N. W. 235, 133 Minn. 244, 249. So here the corporation and the individual may enforce contracts against third persons, irrespective of the power of the corporation to bind itself to form a partnership. *Wilson v. Carter Oil Co.*, 33 S. E. 249, 46 W. Va. 469. Even if the contract were executory, it would seem that it might be enforced by or against the alleged partners, as a corporation may enter a joint contract, and suit on this would not be enforcing the ultra vires partnership, which is something entirely collateral, and immaterial to the contract with the third party. The objection of ultra vires cannot be raised by one who is not a party to, nor injuriously affected by, the unauthorized transaction. A corporation may by statute or charter be authorized to form a partnership. *Marnet Oil & Gas Co. v. Staley*, 218 F. 45, 133 C. C. A. 108.

For other cases see *Decennial Digests*, Corporations ⚡379, 388(5), 487(1); Partnership ⚡5.

Q. 40. A river packet company was by its articles of incorporation empowered to engage only in the business of carrying freight and passengers on the Mississippi river. In course of time, without any amendment to its articles, it branched out into the additional business of dealing in wheat. It made a contract with a

wheat dealer to purchase 4,000 bushels of wheat at a fixed price and paid \$1,000 on account. In due time it sent its steamer to fetch the wheat, but, wheat prices having meanwhile gone up, the dealer refused to make delivery. The company sued (1) for the return of the \$1,000; (2) for damages for breach of contract; (3) for loss of the use of the boat sent to fetch the wheat. State what the company may recover on each of the three grounds?

A. According to the law in some jurisdictions, the company could not sue to recover damages for breach of an ultra vires contract, even though executed on its part. But, while an action may not be founded on the void agreement, the company may still sue to recover the part of the purchase money already paid. Neither party to an ultra vires contract may unjustly enrich himself by retaining what he has received without paying for it. *Luhrig Collieries Co. v. Interstate Coal & Dock Co.* (D. C.) 281 F. 265; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

Where a contract has been fully performed by one party, the defendant may not set up the defense of ultra vires, according to a majority of state courts, where it will not advance justice, but will accomplish a legal wrong. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. The idea is that to permit repudiation would serve no useful purpose and protect no legitimate interest. The theoretical notion that the corporation has violated some shadowy public policy has largely been abandoned. But there are still a number of jurisdictions which deny that the one receiving the benefits of performance is estopped to set up the ultra vires defense to an action founded on the contract, and only give relief in quasi contract. *Calumet & Chicago Canal & Dock Co. v. Conkling*, 112 N. E. 982, 273 Ill. 318, L. R. A. 1917B, 814.

Where a contract is only partly executed on one side, it is generally held that the contract is to be treated as executory as to the unexecuted part, so that the company could only recover damages for the nondelivery of one-fourth of the wheat contracted for. See *Day v. Spiral Springs Buggy Co.*, 23 N. W. 628, 57 Mich. 146, 58 Am. Rep. 352. If recovery is allowed on the contract, recovery could be had for damages for detriment caused by sending the boat. Of course, the company cannot recover the \$1,000 paid and also damages for breach of the contract, as these are inconsistent remedies.

For other cases see *Decennial Digests, Corporations* ¶388(1, 5), 446, 487(1).

Q.41. The X corporation was formed to carry on the business of life insurance. The directors began to carry on a fire insurance business in the name of the corporation and with its funds. Plaintiff owned one share of stock in the corporation, and was also a director and heavy stockholder in a rival fire insurance company. Plaintiff brought a bill to enjoin the directors from embarking the funds of the X corporation in the fire insurance business. Is it a sufficient answer to the bill:

(a) That plaintiff's motive was to further the interests of the rival company, which lent him the use of its general counsel to conduct the litigation? Or

(b) That a majority of the shareholders of the X corporation voted that the corporation should engage in fire insurance?

A. The right of a stockholder to enjoin the carrying on of ultra vires business is a direct right, personal to himself, and must be recognized, although all the other stockholders are arrayed against him. *Du Pont v. Northern Pac. R. Co.* (C. C.) 18 F. 467. The relation between a corporation and its stockholders is essentially contractual. The charter is the embodiment of the contract. No stockholder is bound to submit to the doing of ultra vires acts, contrary to his contract. *Natusch v. Irving*, 2 Cooper's Ch. 358; *Gow, Partnership*, 398. The suit is not to be regarded as a representative suit, brought in behalf of the corporation on a corporate right of action, but a suit against the corporation itself, to restrain it from violating a corporate duty which it owes to each stockholder individually. *Hyams v. Old Dominion Co.*, 93 A. 747, 113 Me. 294, L. R. A. 1915D, 1128; *Schwab v. E. G. Potter Co.*, 87 N. E. 670, 194 N. Y. 409. Thus a single stockholder may restrain a corporation, if it is solvent and prosperous, from selling the entire corporate property.

If this were a representative suit, filed in behalf of himself and all other shareholders of the company, and it appeared that he was a shareholder in a rival company, and instituted the suit at its direction and expense, this might be a defense. *Forrest v. Manchester, etc., Ry. Co.*, 4 De G., F. & G. 126. Compare *Rice v. Rockefeller*, 31 N. E. 907, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658. But in this case plaintiff's action is prosecuted on a direct right for his own benefit. Where the suit is based on complainant's own property rights, bad motives are immaterial. *Hodge*

v. United States Steel Corp., 53 A. 553, 64 N. J. Eq. 111; General Inv. Co. v. Bethlehem Steel Corp., 100 A. 347, 87 N. J. Eq. 234.

For other cases see Decennial Digests, Action ¶7; Corporations ¶189(1, 2, 3, 7), 310(1), 387(3); Joint-Stock Companies and Business Trusts ¶8.

Q. 42. A executes a deed of certain real estate and delivers it as a gift to X, a charitable corporation. Shortly afterwards A dies, leaving a will, by which he devises another parcel of real estate to the same corporation. The X corporation was authorized by its charter to acquire by gift or purchase and to hold \$1,000,000 worth of property. At the time of the deed, X corporation held \$1,000,000 worth of property, and at the time of A's death it held \$1,000,000 worth of property, in addition to the property covered by the deed of gift.

A. X acquired title by the deed of gift, and this executed transaction cannot be set aside, even though *ultra vires*. *Kerfoot v. Farmers' & Merchants' Bank*, 31 S. Ct. 14, 218 U. S. 281, 54 L. Ed. 1042. In all jurisdictions an executed *ultra vires* transaction, like a conveyance, may be the source or conduit of title. Strangely enough, however, the United States Supreme Court permits a corporation which acquires stock *ultra vires* to repudiate the liabilities incident to being a stockholder, even though it has received dividends. *California Nat. Bank v. Kennedy*, 17 S. Ct. 831, 167 U. S. 362, 42 L. Ed. 198.

With respect to the property devised by will, there is a conflict. The New York court has attempted a distinction between a gift made *inter vivos* by the owner and a devise, on the ground that the corporation, claiming under a will, asks the aid of the law to give the property to it. In *re McGraw's Estate*, 19 N. E. 233, 111 N. Y. 66, 2 L. R. A. 387. The Massachusetts court, however, denies that there is good reason for this distinction. A duly executed will does not materially differ from a delivered deed. It is not the probate which gives legal efficacy to the will. It merely establishes that a valid disposition of the property has already been made. *Hubbard v. Worcester Art Museum*, 80 N. E. 490, 194 Mass. 280, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025.

The charter or statute does not declare that any conveyance in excess of the limit shall be void. The danger to the public from large accumulations of property by corporations is sufficiently guarded by the power of direct attack by the state on the corporate

existence. It is of no concern to the heirs that a corporation is holding more real estate than its charter authorizes.

For other cases see Decennial Digests, Corporations ¶446; Charities ¶20(2).

Q. 43. X corporation was organized to engage in the brewing business. Having earned a large surplus, it purchased stock in the Y bank and held the same for 13 years as an investment for profit, and received the dividends with the knowledge of all the stockholders. Y became insolvent, and the receiver is suing X upon the statutory liability of stockholders in banks for an amount equal to the par value of their shares. What result?

A. X is not liable according to the United States Supreme Court. It seems according to the federal view, that an executed ultra vires transaction is utterly void, when made the basis of a suit to charge the corporation with liability, but valid when the corporation seeks to enforce advantages obtained through executed transactions. *California Nat. Bank v. Kennedy*, 17 S. Ct. 831, 167 U. S. 362, 42 L. Ed. 198; *Merchants' Nat. Bank v. Wehrmann*, 26 S. Ct. 613, 202 U. S. 295, 50 L. Ed. 1036. Compare *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; 29 Harv. Law Rev. 320. Many state courts would hold the corporation estopped to contest its liability as stockholder, when the transaction was executed and it had received the benefits of its purchase. *Olson v. Warroad Mercantile Co.*, 161 N. W. 713, 136 Minn. 310.

For other cases see Decennial Digests, Banks and Banking ¶259, 261(3); Corporations ¶262(1), 387(2) 446.

Q. 44. (a) The D Company, without power to do so, leased land from P for a period of years at an agreed rental of \$1,000 a year. The corporation went into possession of the land and has paid the rent to the end of the first year. This is an action by P to have the contract declared void and to recover possession of his property. What decision?

(b) In the foregoing case, suppose D Company refused to pay the agreed rental. P brings an action for \$1,000. What decision?

A. The United States Supreme Court has refused to grant rescission of an ultra vires lease on the ground that the parties were in *pari delicto*. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 12 S. Ct. 953, 145 U. S. 393, 36 L. Ed. 748. The same court, however, allowed quasi contractual recovery for benefits received by one who failed to perform an executed ultra vires contract. *Pullman's Palace Car Co. v. Central Transp. Co.*, 18 S. Ct. 808, 171 U. S. 138, 43

L. Ed. 108. Most courts, holding that an ultra vires lease was invalid, would grant the lessor a decree that the lease was null and void. *McIlvaine v. Foreman*, 126 N. E. 749, 292 Ill. 224. To deny relief is to effectuate the ultra vires lease. See *Cleveland, C., C. & St. L. R. Co. v. Hirsch*, 204 F. 849, 123 C. C. A. 145; *Mallory v. Han-aur Oil Works*, 8 S. W. 396, 86 Tenn. 598.

(b) Federal courts would not allow an action on the lease to recover the agreed rental, but would permit a quasi contractual recovery of the value of use and occupation. Most state courts would enforce payment of rent for use and occupation had under an ultra vires lease. The lessee is bound by the lease so long as he remains in possession. *Bath Gaslight Co. v. Claffy*, 45 N. E. 390, 151 N. Y. 24, 36, 36 L. R. A. 664. If the lease has been so far executed that the parties cannot be restored to their original situations, as by the making of improvements, New York courts grant specific performance of an option to purchase contained in a lease acquired for an ultra vires purpose. *Mutual Life Ins. Co. of New York v. Stephens*, 108 N. E. 856, 214 N. Y. 488, L. R. A. 1917C, 809.

For other cases see Decennial Digests, Cancellation of Instruments 4; Contracts 138(1); Corporations 387(1), 487(1); Landlord and Tenant 116(2); Railroads 134(7); Specific Performance 57.

Q. 45. A banking corporation, through B, its president, entered into a contract with P & Co. cotton brokers, for the purchase of cotton on the stock exchange. The brokers bought the cotton for the bank. The bank was notified of the fact of the purchase, and was inquired of as to where the cotton should be delivered. The bank notified the brokers that it would not receive the cotton. No money had passed. The brokers brought suit in a state court. The defendant demurred, and insisted that the contract was ultra vires. How would you decide whether the brokers have any claim which they can enforce against the bank? Give your reasons.

A. Assuming that B had all the authority to act for the bank that the directors could give, yet the speculative contract was ultra vires, and the bank is not liable. The contract had not been so far executed on the part of P & Co. as to estop the bank from setting up the defense of ultra vires. There had been no delivery or transfer of title to the bank. *Jemison v. Citizens' Sav. Bank of Jefferson*, 25 N. E. 264, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482; *Nowell v. Equitable Trust Co.*, 144 N. E. 749, 249 Mass. 585; 38 Harv. Law Rev. 522. If the bank had received the benefit of performance, a majority of American courts would hold the defendant "estopped." Insecurity to stockholders and depositors would result, if banks

were allowed to speculate with their capital or deposits. The defense of ultra vires is more favored with banks and fiduciary corporations than with business and trading corporations.

For other cases see *Decennial Digests, Banks and Banking* ¶261, 315 (1); *Corporations* ¶501.

Q. 46. The Poor Garage Company was organized with articles stating its objects as follows: "The general nature of its business shall be to conduct a garage for the storage and repair of automobiles, and the sale of parts and accessories." The company for several years conducted an auto livery business, and by resolution of its directors contracted for the purchase of a car from Mr. Good for use in this business. The company now repudiates the contract, and refuses to pay for or to accept delivery of the car, on the ground that the auto livery business was ultra vires. Mr. Good knew of the purpose for which the car was purchased, and that the company was engaged in the auto livery business, but had not seen the incorporation papers. Good now sues the company for breach of contract. Discuss the case in the light of the different objections urged against the enforcement of ultra vires contracts.

A. In most jurisdictions, where the contract is wholly executory on both sides, no action can be based thereon, either by the corporation or against it, even though, as here, the result is most unjust. A number of objections have been raised by different courts to giving effect to ultra vires contracts:

(1) That the corporation had not the power or capacity to make such a contract. This, however, seems inconsistent with the validity of executed transactions, like conveyances.

(2) That such contracts are illegal and contrary to public policy, and that the defense of ultra vires is necessary for the public interest to prevent the usurpation of powers. But modern authorities recognize that, in general, the public has no interest in confining a private corporation to the objects specified.

(3) That the defense is aimed to prevent a breach of trust or obligation to the stockholders, in order that their funds may not be diverted to unauthorized ventures. This seems the most substantial basis; but, where the ultra vires business, as here, has been carried on openly in the name of the corporation for such a period that stockholders have had a fair opportunity to restrain its continuance, the stockholder should take the responsibility.

(4) Even if the corporation has the capacity, the objects and purposes of the corporation limit the authority of the directors, and outsiders must take notice of the limitations contained in the articles.

The instances in which collateral attack on liability for ultra vires acts is now denied by the weight of authority are as follows:

(1) Where the corporation has conveyed property acquired by it without authority, or is holding property without authority, contrary to restriction, or foreign to its purposes.

(2) Where its employees have injured some one by a tort in the course of an ultra vires transaction.

(3) Where a contract made outside its authority has been wholly performed by either party. Some courts, however, restrict the recovery in such cases to quasi contract, and say there is no estoppel to set up the defense of ultra vires to actions on the contract itself. *Paterson & Edey Lumber Co. v. Bank of Mobile*, 84 So. 721, 203 Ala. 536, 10 A. L. R. 1037.

(4) Where the corporate officers have made a contract for an ultra vires purpose, or upon the determination of questions of fact, and the ultra vires purpose or circumstances could not have been ascertained by the third party from inspection of the articles. *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322. So where the power, or rather authority, of a corporation to make a contract, depends upon the value of property, the determination of the value by the directors is conclusive as to its power as to third persons dealing with it in good faith. *Dunne v. Independent Order of Foresters*, 196 P. 41, 185 Cal. 211, 18 A. L. R. 639.

In the problem case, it would seem that the defense of ultra vires cannot properly be sustained on the theory of incapacity, nor on the theory of illegality, nor on the theory of protecting the stockholder. On true principle, the stockholders ought to bear the burden of abuse of authority by their chosen representatives, in whose undertaking they have acquiesced.

For other cases see *Decennial Digests, Banks and Banking* ¶261; *Corporations* ¶462, 466.

Q. 47. In state M corporations could be formed under a general act for the purpose of carrying on any lawful business. The "purposes" of any corporation formed thereunder were required to be stated in the articles of association. The articles could be amended at any time by a vote of the holders of two-thirds of the stock, so as to add any purposes which might have been included in the original articles. Corporation X was formed under this law for the purpose of buying and selling cotton goods. Later the directors voted that it would be to the interests of X also to manufacture cotton goods, and reported at a meeting of the stockholders that they proposed to use the funds of X to acquire a plant for the manufacture. No stock-

holder objected. The directors thereafter, in the name of X, entered into a contract with A for the purchase of a cotton factory. Some of the stockholders, on learning of this, objected, on the sole ground that the price was too high. X declined to perform. Is A entitled to a decree for the specific performance of the contract?

A. It has been urged that, on principle, if (1) all the shareholders of X at the time authorized or ratified the contract or the transaction of the business in the course of which the contract was made, and (2) if A did not know and could not reasonably be charged with knowledge that the contract was outside the scope of X's chartered purposes, then X should not be allowed to defend on the ground that the contract, though executory, was *ultra vires*. Warren, 24 Harv. Law Rev. 534, 543. It is generally held, however, that the defense of *ultra vires* is available to the corporation, in all cases of executory contracts, unless the corporation is estopped to set up *ultra vires*, and that one dealing with a corporation is bound to take notice of the extent of its powers. *Jemison v. Citizens' Sav. Bank of Jefferson*, 25 N. E. 264, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482; 38 Harv. Law Rev. 522.

Some courts would hold that an *ultra vires* agreement made by the officers may be defended, even though made with the assent of all the stockholders. Others would hold that the corporation is estopped by the assent of the stockholders. *Olson v. Warroad Mercantile Co.*, 161 N. W. 713, 136 Minn. 310. The defense of *ultra vires* is primarily allowed to protect the stockholders against the unauthorized diversion of their capital. When they have assented, though in an informal manner, there is no merit in allowing them to use this technicality simply to back out of a bad bargain made by their representatives.

For other cases see Decennial Digests, Banks and Banking Ⓒ295; Corporations Ⓒ262(1), 487(1).

Q. 48. The Arizona statute relating to incorporation of corporations contains a provision to the effect that the articles of incorporation of all corporations organized under the laws of Arizona must contain, among other things, "the highest amount of indebtedness or liability direct or contingent to which the corporation is at any time to subject itself, which must not exceed two-thirds of the amount of the capital stock." A corporation organized under this law, with an authorized capital stock of \$90,000, specifies in its articles of incorporation that its indebtedness shall at no time exceed \$60,000. At a time when the corporation is already indebted

on its promissory note to the extent of \$60,000, the corporation borrows from a bank the sum of \$40,000 and executes its promissory note to the bank for said sum. The corporation fails to pay the same when due, and the bank brings suit to recover on the note. At the trial of the suit, all of the indebtedness above mentioned still remains unpaid. Is the bank entitled to judgment?

A. By the weight of authority, indebtedness created in excess of the debt limit fixed by the articles is valid, at least to the extent of the consideration received. *Auerbach v. Le Sueur Mill Co.*, 9 N. W. 799, 28 Minn. 291, 41 Am. Rep. 285; *Grand Valley Water Users' Ass'n v. Zumbrunn* (C. C. A.) 272 F. 943; *H. Scherer & Co. v. Everest*, 168 F. 822, 94 C. C. A. 346. To allow the plea of *ultra vires* would work injustice to him who has been misled by acts done within the general scope of its powers. But see *American Southern Nat. Bank v. Smith*, 186 S. W. 482, 170 Ky. 512, Ann. Cas. 1918B, 959. It is usually said that a person who deals with a corporation must, at his peril, take notice of its charter or articles of incorporation. It follows that, so far as the authority of any agent, or even of the board of directors itself, is defined or limited by the articles, the limitation of their powers must always be considered as disclosed. But persons dealing with the corporation in good faith would not be bound to investigate as to extrinsic matters, to see if the power to borrow has been exhausted. The note would therefore be a valid debt, unless the bank had notice that the borrowing power had been exhausted. *Kraniger v. People's Bldg. Soc.*, 61 N. W. 904, 60 Minn. 94. If the corporation received the money, plaintiff could in any case recover, if not upon the note, at least for money had and received. But see *Baroness Wenlock v. River Dee Co.*, L. R. 19 Q. B. Div. 155; *In re Wrexham, Wold & Connah's Quay Ry. Co.*, L. R. 1 Ch. 440; *Sinclair v. Brougham* [1914] A. C. 398, 426; L. R. A. 1917A, 804, 806, 810, 1034, notes.

For other cases see *Decennial Digests*, Banks and Banking ☞101; Bills and Notes ☞367; Corporations ☞370(2), 450.

Q. 49. The X Company is chartered for the limited purpose of maintaining and conducting a garage business. It engages in the business of auto trucking. A makes a contract with it for the carriage of certain goods from Hartford to New Haven. When the goods are ready, the company refuses to call for them as required by its contract, and A starts for the company's office to ascertain the reason. While so doing he is negligently run down by one of the company's trucks and severely injured. He thereupon brings an action to recover damages for the injuries and an action to re-

cover damages for the breach of contract, as the failure to carry the goods caused him a large loss on subsidiary contracts for which the goods were intended. The company defends on the ground of *ultra vires*. What decision, and why?

A. The X company is liable for torts committed by its servant acting within the scope of his employment. The defense of *ultra vires* is not available in tort cases. *Chamberlain v. Southern California Edison Co.*, 140 P. 25, 167 Cal. 500; *Bissell v. Michigan Southern Ry. Co.*, 22 N. Y. 258.

A cannot recover damages for breach of contract to carry the goods, because the contract is still entirely executory, and it is held except perhaps in one or two states, that either party to an executory contract may defeat its enforcement by a plea of *ultra vires*. The principal basis of this defense would seem to be the protection of the interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not authorized by the stockholders in the articles of incorporation. *Jemison v. Citizens' Savings Bank of Jefferson*, 25 N. E. 264, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482; Cf. *Harris v. Independence Gas Co.*, 92 P. 1123, 76 Kan. 750, 13 L. R. A. (N. S.) 1171.

As we have already seen, if the stockholders have acquiesced in the business of auto trucking and taken the profits of it, there seems no merit in allowing the company to escape from contracts on the ground of lack of authority, any more than from tort liability.

For other cases see *Decennial Digests*, Banks and Banking Ⓔ295; Carriers Ⓔ306(4); Corporations Ⓔ388(5), 491, 590(4); Railroads Ⓔ266.

SECTION 7.—TORTS AND CRIMES

Q. 50. One of the employees of the A corporation, in the course of the latter's business, which was *ultra vires*, willfully and wantonly assaulted B.

- (1) Has B a tort action against the A corporation?
- (2) Could B recover punitive damages against the A corporation?

A. (1) There are many cases to the effect that a corporation may be liable for a tort of its employees, committed in the course of an *ultra vires* undertaking. If the servant was acting in the scope of his employment, the corporation cannot escape liability by a plea of *ultra vires*. *Nims v. Mt. Hermon Boys' School*, 35 N. E. 778, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467. But it has been argued that, in order to fix the liability of the corpora-

tion for the tortious act of one of its employees, the business must be connected with that which is authorized, or at least acquiesced in and ratified by the stockholders. The directors are only agents themselves, and their authority to employ is limited within the scope of the purposes for which the corporation was created. *Brokaw v. New Jersey, R. & Transp. Co.*, 32 N. J. Law, 328, 90 Am. Dec. 659; 1 Tex. Law Rev. 52, 57; *Central R. & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; 2 Cambridge Law J. 180.

The doubtful question in many cases is whether the agent or employee was acting within the scope of his employment or not. The fact that the wrong was willful and wanton will not prevent this, if it is done in the course of the employer's business. See *Vowles v. Yakish*, 179 N. W. 117, 191 Iowa, 368, 13 A. L. R. 1132; *Concoff v. Hippodrome Theatre Co.*, 182 P. 273, 180 Cal. 626.

(2) Many courts permit a jury to award punitive or exemplary damages against a corporation by reason of the malicious acts of those whom it has put in charge of its affairs, whose wrongful motives are imputed to the corporation. Other courts deny such liability, except in the case of the act of directors or highest officers. *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 S. Ct. 261, 147 U. S. 101, 37 L. Ed. 97; *Kennelly v. Kansas City Rys. Co.* (Mo. App.) 214 S. W. 237; *Emmke v. De Silva* (C. C. A.) 293 F. 17, 22; 33 Harv. Law Rev. 1113.

For other cases see Decennial Digests, Carriers ⇨319(2), 382(6); Corporations ⇨423, 491, 498; Innkeepers ⇨10; Trial ⇨296(11).

Q. 51. Plaintiff, an inmate of a charitable home for incorrigible boys, brought suit, by his father and next friend, against the corporation maintaining the same, alleging in his declaration that on several occasions he was maliciously assaulted and beaten by the officers and employees of the defendant while in the regular course of their employment. The charter of the corporation gave it power to maintain the home for the purpose above indicated. It was provided that its members should be those persons who should contribute a stated sum for the purpose of maintaining the institution, and these members were given power to elect a board of directors who should administer its affairs. Power was also given to receive gifts, bequests and devises to be devoted to the carrying out the purpose of the corporation. It was declared that the corporation was not to be conducted for profit, but wholly for the reformation of the boys committed to it, and that all moneys received by it should be devoted to this purpose and no other. Upon these facts, what were the rights of the plaintiff?

(a) Suppose an employee negligently ran over a stranger in the course of his employment?

A. Where the plaintiff is a beneficiary of the charity, a charitable corporation is generally not liable for the torts of servants. *Roosen v. Peter Bent Brigham Hospital*, 126 N. E. 392, 235 Mass. 66, 14 A. L. R. 563; *Phillips v. Buffalo General Hospital*, 146 N. E. 199, 239 N. Y. 188. But a charitable corporation is generally held liable to strangers—that is, to persons other than beneficiaries—for the torts of its employees within the line of their employment. *Schloendorff v. Society of New York Hospital*, 105 N. E. 92, 211 N. Y. 125, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581; *Hamburger v. Cornell University*, 148 N. E. 539, 240 N. Y. 328. Contra, *Bachman v. Y. W. C. A.*, 191 N. W. 751, 179 Wis. 178, 30 A. L. R. 448. Some authorities deny the liability either to patient or third party, on grounds of public policy or the diversion of trust funds from the purpose intended. *Foley v. Wesson Memorial Hospital*, 141 N. E. 113, 246 Mass. 363. But see *Mulliner v. Evangelischer Diakonniessverein of Minnesota Dist. of German Evangelical Synod of North America*, 175 N. W. 699, 144 Minn. 392. Others recognize liability only where due care is not exercised in the selection of employees. 5 Mich. Law Rev. 552, 662; 10 Mich. Law Rev. 645; 22 Mich. Law Rev. 259; 72 Univ. Pa. Law Rev. 443; 6 Cornell Law Quart. 65; 9 Cornell Law Quart. 269; 11 Cornell Law Quart. 62; 34 Yale Law J. 316.

For other cases see Decennial Digests, Charities ⇨45(2).

Q. 52. The Revised Statutes of the United States describe certain nonmailable matter, and provide that any person who shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by the statute to be nonmailable shall for each offense be fined on conviction or imprisoned at hard labor, or both. An indictment against the X newspaper corporation alleges that the defendant "did knowingly deposit and cause to be deposited" in the United States mail certain nonmailable matter, and that when such deposit was made the corporation "well knew the contents of the same." The corporation demurred to the indictment, on the ground that a corporation cannot be guilty of the offense charged. Should the demurrer be sustained?

A. No; it has, indeed, been declared that a corporation cannot be indicted or punished for treason, felony, or other crime involving evil intent as an essential element. *State v. Morris & E. R. Co.*, 23 N. J. Law, 360. Some judges, however, have said that

"there is no more difficulty in imputing to a corporation a specific intent in a criminal proceeding than in a civil." *U. S. v. Nearing* (D. C.) 252 F. 223, 231. This, however, overlooks the fundamental principle that vicarious civil liability in damages for acts of agents and vicarious punishment are two different things. The maxim, "respondeat superior," in general, pertains to tort liability only. Criminal law ordinarily does not punish the employer for the crime of the servant, unless the employer has incited or procured the servant to commit it. By punishing a corporation, we punish its innocent members, or stockholders, or creditors, who did not take part in the crime. A corporation may properly be prosecuted, where an individual employer would be under absolute liability for the criminal act of his servant, without regard to his own fault or intent. Such are police regulations, where no criminal intent is required, public nuisances, food laws, anti-trust laws, labor laws, criminal libel, and certain other offenses punishable by fine. 2 Brit. Rul. Cas. 249. *Griffiths v. Studebakers, Ltd.* [1924] 1 K. B. 102. To fasten knowledge of the obscene matter upon the corporation, it would seem to be enough that the directors were aware of it. *U. S. v. New York Herald Co.* (C. C.) 159 F. 296; 18 Ill. Law Rev. 305.

For other cases see *Decennial Digests, Corporations* ¶526, 529; *Post Office* ¶31.

SECTION 8.—DIRECTORS AND OFFICERS

Q. 53. A brings to you for examination an abstract to a tract of land which he has agreed to purchase from B, subject to your approval of B's title. You examine the abstract and find that on January 1st of this year a good and valid title to the land was vested in the C Company. The abstract further shows that the C Company is a mercantile company organized under the laws of Arizona; the abstract also shows a deed to the land from C Company to B, signed in the name of C Company, by its president and secretary, with the corporate seal affixed. State whether you will approve the title as it appears, or whether you will require any further showing, and why?

A. The fact that the corporate seal was affixed affords prima facie evidence that the officers executing the deed had due authority, from the board of directors; but this presumption is rebuttable, and may be overcome by proof that it was unauthorized. *O'Brien v. O'Brien*, 131 N. E. 177, 238 Mass. 403. When the corporate seal is not attached, the authority of the officers to execute it must be other-

wise shown. *Fischer v. Lukens*, 182 P. 967, 41 Cal. App. 358. The authority to convey the real estate should appear in the form of a resolution by the board of directors duly assembled, and duly passed and recorded. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.*, 74 P. 851, 141 Cal. 308, 99 Am. St. Rep. 75. You should not approve B's title until a certificate is obtained from the secretary, under the corporate seal, that at a meeting of the directors, held at such and such a place and date, a quorum being present, a vote or resolution was passed authorizing or ratifying the deed by the C Company to B.

For other cases see *Decennial Digests, Bills and Notes* ¶113; *Corporations* ¶398(2), 656; *Evidence* ¶370(5), 383(7).

Q. 54. The board of directors of a corporation consisted of five members. Under the law and by-laws a majority of three or more were necessary to form a quorum. At a meeting of the directors a resolution was adopted which purported to authorize the officers to execute a deed to A, one of the directors. There were but three directors present, including the grantee. At a subsequent meeting of the stockholders, a resolution was adopted by a majority vote (counting the stock of the grantee) to ratify the conveyance to A. The corporation now sues to set aside the conveyance. Should it succeed?

A. Where one of the directors is adversely interested, he cannot be counted to make a quorum, according to some authorities. *Hotaling v. Hotaling*, 224 P. 455, 193 Cal. 368. Since A was disqualified to vote or be counted, the execution of the deed was never effectively authorized by the board of directors, in whom was vested the sole power to give such authorization. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607. A meeting of stockholders is wholly incompetent to authorize a corporate act of this character. See *Hendren v. Neeper*, 213 S. W. 839, 279 Mo. 125, 5 A. L. R. 927. It is also said that the stockholders, as such, may not ratify that which they could not authorize. But some courts hold that the shareholders may waive the necessity for a formal meeting of the directors as a board for the transaction of business, because the requirement of action as a board is for their benefit, and that shareholders may authorize acts to be done by agents, or ratify unauthorized acts which have been done, and bind the corporation. *Cunningham v. German Ins. Bank*, 101 F. 977, 41 C. C. A. 609; *Wootten Land & Fuel Co. v. Ownbey* (C. C. A.) 265 F. 91; *Garman v. Lawton*, 53 S. E. 669, 124 Ga. 876, 110 Am. St. Rep. 207;

Merchants' & Farmers' Bank v. Harris Lumber Co., 146 S. W. 508, 103 Ark. 283, Ann. Cas. 1914B, 713. See 11 Cornell Law Quart. 82. The power of ratification would be subject to scrutiny, as to whether fraudulent and oppressive to the minority. *United States Steel Corp. v. Hodge*, 54 A. 1, 64 N. J. Eq. 807, 60 L. R. A. 742; *Russell v. Henry C. Patterson Co.*, 81 A. 136, 232 Pa. 113, 36 L. R. A. (N. S.) 199.

For other cases see *Decennial Digests, Corporations* ¶195, 298(1, 5), 398(2), 415, 425(2), 426(2), 442, 477(3).

Q. 55. A, a member of a board of five directors of corporation X, purchased from it certain real estate at its then fair market value. A was present at the meeting of the board of directors, at which was passed a resolution authorizing the sale of the property, but he did not vote. Subsequently, the land having increased in value, the corporation brings suit for a rescission of the contract, alleging in its complaint that the defendant, who purchased the property, was one of the board of directors, and was present at the meeting which passed the resolution authorizing the sale, and that the value of the property at the time of bringing suit was largely in excess of the price which the defendant paid for it. Defendant demurs. Who is entitled to judgment?

A. Some states are very strict in holding that a deed or other transaction between a corporation and one of its directors or officers is voidable by the corporation, irrespective of its fairness. *Munson v. Syracuse, G. & C. Ry. Co.*, 8 N. E. 355, 103 N. Y. 58, 74; *Alabama Fidelity Mortgage & Bond Co. v. Dubberly*, 73 So. 911, 198 Ala. 545. By the growing weight of authority, such transactions, in which any or even a majority of the directors are adversely interested, cannot be avoided by the corporation, if there is no showing that unfairness was practiced by the directors. 11 Va. Law Rev. 636; *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 156 N. W. 255, 132 Minn. 277; *Corsicana Nat. Bank of Corsicana v. Johnson*, 40 S. Ct. 82, 251 U. S. 68, 90, 64 L. Ed. 141. According to high authority, transactions resulting from the agency of officers acting at the same time for both parties must be deemed presumptively fraudulent, unless expressly authorized or ratified by the stockholders, or shown to be entirely fair upon adequate consideration. *Cleveland-Cliffs Iron Co. v. Arctic Iron Co. (C. C. A.)* 261 F. 15, 19, 171 C. C. A. 611. The burden is upon those who would maintain the validity of the conveyance to show its entire fairness. The mere fact that A was present at the meeting, where the corporation was represented by an independent quorum, or

that the land subsequently enhanced in value, would not invalidate the transfer.

For other cases see Decennial Digests, Banks and Banking Ⓒ253; Corporations Ⓒ316(1), 318, 401.

Q. 56. B sues to secure the cancellation of a certificate for 100 shares of stock of the D corporation, issued to the defendant H, on the ground that it was illegally issued to him for alleged services. Two directors were present at the meeting which authorized the issue, but Director A was not present and was not notified of the meeting. Is action taken at such a meeting valid?

A. All the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the action taken may be binding on the corporation. If the meetings are regular, then notice is implied. Of other meetings express notice must be given, unless all the directors are present. Acquiescence in meetings of the board, without notice to an inactive director, may preclude objection that the meeting was illegal for failure to give notice.

Whitehead v. Hamilton Rubber Co., 27 A. 897, 52 N. J. Eq. 78.

Berman v. Minneapolis Photo Engraving Co., 174 N. W. 735, 144 Minn. 146.

For other cases see Decennial Digests, Corporations Ⓒ298(3), 432(2).

Q. 57. The president of a corporation sues the corporation to recover for services rendered by him as president. The complaint alleges that he rendered the services at the request of the corporation, that he duly and faithfully performed all the duties required of the president to be performed, and that the services were reasonably worth the sum of \$10,000. The defendant demurs. Who is entitled to judgment?

A. Judgment for the corporation. An officer of a corporation cannot claim compensation from the company for the performance of the regular duties of his office, unless some provision is made, before the services are rendered, either by charter, by-law, or resolution of directors. "The general rule is that, in the absence of an express contract, an officer or director of a corporation cannot recover for services rendered without proving that they were outside of his duties as such officer or director, and in addition thereto that the same were rendered with the expectation by both parties that they should be paid for." Alexander v. Equitable Life Assur. Soc. of United States, 135 N. E. 509, 233 N. Y. 300; Marcy v. Shelburne Falls & Colrain St. R. Co., 96 N. E. 130, 210 Mass. 197; Fields v. Victor Building & Loan Co., 175 P. 529, 73 Okl. 207. Demurrer sustained.

Equity has power, at suit of a minority stockholder, to review and correct abuse of discretion by the directors in allowing unreasonable and excessive salaries, which absorb earnings which should go in dividends. But the court will not lightly interfere with the judgment of the board. *Seitz v. Union Brass & Metal Mfg. Co.* 189 N. W. 586, 152 Minn. 460, 27 A. L. R. 293.

For other cases see *Decennial Digests, Corporations* ⇨308(1, 2, 11), 320(6, 11).

Q. 58. A, B, and C were stockholders in the D corporation, which held the state agency for Reo automobiles. The term of the agency was about to expire. A secured the agency for himself, although he was at the time a director and manager of the D corporation. B's stock is rendered worthless by the loss of the agency. What remedy is open to B and D?

A. The corporation has a remedy in equity to claim the agency for itself, which has been obtained by A in violation of his fiduciary obligation. B's remedy is to demand that the corporation bring suit against A, and, if the directors fail or refuse to act, to bring a representative suit in equity against the D company and A, to enforce the claim of the corporation for the benefit of all stockholders.

A corporation may recover secret profits made by its promoters, directors, or officers by virtue of their position, even though the corporation was not damaged. *Western States Life Ins. Co. v. Lockwood*, 135 P. 496, 166 Cal. 185. A manager and director may not acquire a lease of lands which the corporation occupies as a tenant and desires to continue to lease. *Pikes Peak Co. v. Pfuntner*, 123 N. W. 19, 158 Mich. 412. Directors and officers owe the active duty of loyalty and good faith to the corporation, and may not hinder or defeat the plans of the corporation in the development of its business, or seize opportunities which properly belong to the corporation, as by the purchase of a patent when the corporation is manufacturing patented articles by license under it, and was able to make the purchase for its own benefit. *Farwell v. Pyle National Electric Headlight Co.*, 124 N. E. 449, 289 Ill. 157, 10 A. L. R. 363; 4 Minn. Law Rev. 513.

For other cases see *Decennial Digests, Corporations* ⇨313, 314(1, 2).

Q. 59. Your client states that a corporation, in the hands of a receiver because insolvent, is greatly in debt to him, and the assets will not pay over 5 per cent.; that its insolvency was due to flagrant neglect of the president, to whom the board of directors had committed the sole and exclusive management of the corporation's affairs.

The directors held no meetings and took no part in the management or direction of the affairs of the corporation. In this case, what would you advise your client to do?

A. Directors, who willfully fail to hold or attend meetings of the board, and who negligently fail to manage or supervise its business, are guilty of breach of an obligation, owed to the corporation for the benefit of shareholders and creditors, to exercise at least ordinary care and diligence in the supervision and administration of the corporate affairs. *Bowerman v. Hamner*, 39 S. Ct. 549, 250 U. S. 504, 63 L. Ed. 1113; *Besseliew v. Brown*, 97 S. E. 743, 177 N. C. 65, 2 A. L. R. 862. The position of director is not a mere post of honor or publicity, devoid of responsibility. *Kavanaugh v. Commonwealth Trust Co. of New York*, 119 N. E. 237, 223 N. Y. 103. Directors have something more to do than merely to elect the officers of the bank and to make declarations of dividends. They must use ordinary diligence in ascertaining the condition of the business and exercise reasonable control and supervision of the officers. But courts have often been overindulgent in condoning the carelessness and negligence of directors. *Briggs v. Spaulding*, 11 S. Ct. 924, 141 U. S. 132, 35 L. Ed. 662; *Wallach v. Billings*, 115 N. E. 382, 277 Ill. 218, L. R. A. 1918A, 1097; *Bates v. Dresser*, 40 S. Ct. 247, 251 U. S. 524, 64 L. Ed. 388.

A receiver's suit in equity against the delinquent directors, to collect the corporate claim for the benefit of creditors, would seem to be the proper remedy. *Chicago Title & Trust Co. v. Munday*, 131 N. E. 103, 297 Ill. 555. *Emerson v. Gaither*, 64 A. 26, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114. Compare, however, *Dykman v. Keeney*, 48 N. E. 894, 154 N. Y. 483.

For other cases see Decennial Digests, Banks and Banking Ⓒ58(4), 82 (1), 253, 314; Corporations Ⓒ310(2), 319(2), 351.

Q. 60. The directors of the X Company purchased for the corporation shares of stock in the Y Company, after having been advised by legal counsel for the company that the act would not be ultra vires. Subsequently, and while the X Company still owned the stock, the Y Company became insolvent, and this action is brought by a stockholder for the benefit of other stockholders and the corporation, to recover from the directors the amount paid out for the stock. Can the action be sustained?

A. If directors of a corporation willfully do what is beyond their authority, they are liable to the corporation, for the benefit of the stockholders and creditors, for the damages resulting. *Williams v.*

McDonald, 7 A. 866, 42 N. J. Eq. 392; Fergus Falls Woolen Mills Co. v. Boyum, 162 N. W. 516, 136 Minn. 411, L. R. A. 1918A, 919; North Hudson Mutual Building & Loan Ass'n v. Childs, 52 N. W. 600, 82 Wis. 460, 33 Am. St. Rep. 57. It has been said, however, that if the directors mistake the extent of their powers, and the mistake was made notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the company, they ought not to be liable. Sperring's Appeal, 71 Pa. 11, 24, 10 Am. Rep. 684. Compare *People ex rel. Perkins v. Moss*, 80 N. E. 383, 187 N. Y. 410, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309. If the ultra vires transaction is carried on with the acquiescence of the stockholders, an action cannot be maintained by the corporation against the officers. *Holmes, Booth & Haydens v. Willard*, 25 N. E. 1083, 125 N. Y. 81, 11 L. R. A. 170; *Holmes v. Crane*, 182 N. Y. S. 270, 274, 191 App. Div. 820. See note, 4 Minn. Law Rev. 206.

While directors ought not to be liable for honest mistakes as to the extent of their authority, the law in this country does not seem as yet to be clearly settled whether they are not absolutely liable for exceeding their authority. If the directors are liable to the corporation, a stockholder may bring a representative suit, in case the corporation fails to assert its right of action, and proper demand on the corporation is made or excused, as elsewhere explained.

For other cases see *Decennial Digests, Banks and Banking* ¶294; *Corporations* ¶310(1, 2), 312(4, 7).

Q. 61. P and D had been partners, and D had the larger interest in the business. They agreed to incorporate the business, and that stock should be issued to them in proportion to their interests. D agreed to furnish P employment for life by the corporation, and that P should always share in the management of the business as a director, and that the company, though nominally a corporation, should in fact, as between P and D, be a partnership. Later D voted his stock for other persons as directors, thus ousting P from the management. D also caused P's discharge as manager or employee of the company. P sues D for \$50,000 damages for breach of contract. What decision?

A. P cannot recover. Such an agreement is invalid, as against public policy. In order to perform it, D was bound to vote his stock for P as director, and secure the election of other directors who would vote to retain P in the service of the corporation in some managerial capacity. A director may not bargain away in advance

the judgment which he is supposed to exercise for the best interests of the corporation. A contract to put or maintain a certain person in an office of a corporation is void. *Manson v. Curtis*, 119 N. E. 559, 223 N. Y. 313, Ann. Cas. 1916E, 247; *Seitz v. Michel*, 181 N. W. 102, 148 Minn. 80, 12 A. L. R. 1060; *Cone v. Russell*, 21 A. 847, 48 N. J. Eq. 208. This does not mean, however, that stockholders may not combine, either through the agency of a voting trust or by private pooling agreement, to secure and retain control, and insure permanency in the management of corporate affairs, and promote the best interests of all the stockholders. *Chapman v. Bates*, 47 A. 638, 61 N. J. Eq. 658, 88 Am. St. Rep. 459.

For other cases see Decennial Digests, Contracts $\S$ 113(3), 121; Corporations $\S$ 198, 199, 378.

Q. 62. A, the president of the B corporation, indorsed checks payable to it and deposited them to his personal account in the C bank, which collected the proceeds and paid them out on the personal checks of the president. The B corporation sues the C bank for the proceeds of the checks. What result?

A. The corporation should recover. Any person taking checks made payable to a corporation, which can act only by agents, does so at his peril, if the agent who indorses them is without authority. Of course the corporation may, by negligent acquiescence, be estopped to set up lack of authority in the agent. In general, however, a person who receives checks drawn by or payable to a corporation, signed by one of its officers, with knowledge that they are being used by the person who signed them for his individual benefit, is liable to the corporation for conversion, or for money had and received. In the present case the bank had no reason to suppose that the president had any actual or apparent authority so to use the funds of the company. The checks upon their face told the bank that it was the company's property, and not his own, that it was receiving from him.

Wagner Trading Co. v. Battery Park Nat. Bank, 126 N. E. 347, 228 N. Y. 37, 9 A. L. R. 340.

Rochester & C. Turnpike Road Co. v. Paviour, 58 N. E. 114, 164 N. Y. 281, 52 L. R. A. 790.

Hill Syrup Co. v. Frederick & Nelson, 233 P. 663, 133 Wash. 155, 9 Minn. Law Rev. 678.

For other cases see Decennial Digests, Banks and Banking $\S$ 130(3); Corporations $\S$ 414(2), 425(6), 429, 430.

BAL. PROB. LAW

SECTION 9.—RIGHTS OF STOCKHOLDERS

(A) Inspection

Q. 63. A buys 10 shares of common stock in the United States Steel Corporation, and at once demands the privilege of inspecting the stock ledger at the office of the company, in order to compile a list of the stockholders, with their addresses, in order to circularize them for the sale of mining stock. He also demands to inspect the cash books, journals, correspondence, and contracts of the company, without giving any reason for his demand. What are his rights?

'A. A stockholder, in this country, generally has the right to inspect the books and records of the corporation at a proper time and for a proper purpose. If this privilege is refused by the officers in charge, a writ of mandamus may issue, with suitable safeguards to protect the interests of all concerned. Statutes have been passed in many states with a view to enlarge the common-law right, and give the stockholder an opportunity fully to inform himself in reference to the affairs of the corporation. There is a conflict of authority whether the statutory right can be enforced by mandamus, regardless of the stockholder's motives.

Shea v. Parker, 126 N. E. 47, 234 Mass. 592.

State ex rel. Dempsey v. Werra Aluminum Foundry Co., 182 N. W. 354, 173 Wis. 651, 22 A. L. R. 1.

22 Col. Law Rev. 590.

For other cases see Decennial Digests, Corporations ☞ 181(1,8); Mandamus ☞ 129.

(B) Voting Rights

Q. 64. Foster, Markham, and Smith entered into an agreement whereby they were to purchase in equal portions 42,000 shares of the S Railway Company then on the market. It was further agreed that this stock should be pooled for a term of five years, and that it should be voted as a unit at all meetings and in accordance with the wishes of a majority of the three. In this manner they intended to control the company. The stock was accordingly purchased, and 14,000 shares transferred on the books of the company to the name of each of the three parties to this agreement. Prior to the day for election of directors, a conference was called to be held between Foster, Markham, and Smith, to determine by ballot how the pooled stock would be voted at the next meeting of stockholders. Smith notified Foster and Markham that he withdrew from the pool and would not attend the conference. Foster and Markham attended and determined that the stock should be voted for L for director.

At the ensuing stockholders' meeting Smith tendered the vote of his own shares. Foster, however, was permitted to vote Smith's stock in accordance with the pooling agreement. If Smith's votes had been received, he would have been elected director in place of L. Action is now brought to have it declared that Smith was duly elected director. What result?

A. The validity of voting trusts and pooling agreements is doubtful in some jurisdictions. In a California case, on similar facts, it was held that such an agreement amounted to an irrevocable proxy, authorizing the vote of all the stock to be cast in accordance with the determination of the majority of the three. *Smith v. San Francisco & N. P. R. Co.*, 47 P. 582, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119. It was contended that such an agreement should be invalid, since its object was to give a minority of the stockholders power to control the corporation against the will of the majority, and that the officer presiding at the meeting could not reject votes offered by persons registered as stockholders on account of some agreement entered into by them with other stockholders.

A voting trust is an entirely different thing from an irrevocable proxy. The legal title to the stock is transferred to trustees, who issue trust certificates of beneficial ownership, which are transferable subject to the trust. This separates the voting power from the beneficial ownership, which raises a question of policy. Some courts have held that the holder of a trust certificate may rescind the agreement and call for his stock at any time. *Luthy v. Ream*, 110 N. E. 373, 270 Ill. 170, Ann. Cas. 1917B, 368. The courts of most states will probably recognize the validity of voting trusts, where there is no unfairness or improper purpose, such as restraint of trade or oppression of other stockholders. New York and Maryland have enacted statutes which authorize them. They are useful (1) to insure the carrying out the provisions of a judicial decree; (2) to enable a group to continue a corporate business policy; (3) in case of reorganization, to insure a responsible management, and protect the bondholders against shifting of control and business policy. See 29 Harv. Law Rev. 433; 22 Col. Law Rev. 627; 18 Col. Law Rev. 123; 25 Col. Law Rev. 951.

The objection to voting trusts probably arises from the supposed danger of concentrated or unified control of one or many corporations by a few individuals or banking firms. There are also arguments of policy against allowing the stockholder owners to be utterly divorced from the exercise of the power to elect directors, and so to influence, if not to determine, the corporate policy. Some hold to

the theory that power and responsibility should be linked to the beneficial ownership of the property. But in view of the tendency to increased centralization of the control of business by the device of holding companies and by the retention of the entire directorial and voting power in certain classes of stock it seems likely that the device of voting trusts will not be condemned, except when abused. But see W. Z. Ripley, from "Main St. to Wall St.," 139 *Atlantic Monthly* 97, Jan., 1926.

For other cases see *Decennial Digests, Corporations* ¶198.

(C) *Dividends*

Q. 65. The X Company, engaged in manufacturing, had accumulated a surplus largely in cash, and far larger than was needed for its business, which was and had been for many years exceedingly profitable. The directors proposed to use the surplus to enlarge the company's plant, although it appeared that this would not increase the corporation's profits, but that it would enable the corporation to sell its product cheaper, and would also enable the corporation to hire more employees at high wages. A minority stockholder sought equitable relief to prevent the carrying out of this project, and to compel the directors to declare a cash dividend of such part of the surplus as was not needed in the business. Judgment for whom? Give reasons.

A. The directors of a corporation have a wide discretion in deciding whether to declare a dividend or not. Even as to the preferred stock, the profits may be allowed to accumulate and remain invested in the business and used for expansion. The courts will not interfere with the directors' discretion, unless it is used oppressively and in bad faith. *Spear v. Rockland-Rockport Line Co.*, 93 A. 754, 113 Me. 285, 6 A. L. R. 793. But, in cases such as this, where the surplus profits greatly exceed all reasonable needs for expansion or for reserves, such as for working capital, depreciation, bad accounts, insurance, expenses, improvements, taxes, and fluctuations in business activities, the discretion of the directors does not extend to withholding the surplus for purely humanitarian motives. "A business corporation is organized and carried on primarily for the profit of the shareholders. The powers of the directors are to be employed for that end. * * * The discretion does not extend to the reduction of profits, or to the nondistribution of profits among stockholders, in order to devote them to other purposes." *Dodge v. Ford Motor Co.*, 170 N. W. 668, 204 Mich. 459, 3 A. L. R. 413. An unrea-

sonable or arbitrary refusal to declare dividends furnishes ground for equitable relief at the instance of the stockholder. But in general the dividend disbursement is essentially a question of business expediency, as to what amount of the yearly earnings should be re-invested and what may be wisely paid out. No dividends may be declared, except out of net profits or surplus.

For other cases see *Decennial Digests, Corporations* ⇨ 152.

Q. 66. On July 1, 1921, the directors of the A B Company declared a dividend of 5 per cent. on its capital stock, payable on September 1, 1921. C was the owner of 10 shares of the stock of this company on July 1, 1921, and on August 15, 1921, sold them to D, who at once had them transferred on the books of the company into his own name. On August 25, 1921, the directors, at a duly warned meeting, revoked the action of the directors, taken on July 1st, in declaring the dividend of 5 per cent., and consequently the dividend was not paid on September 1st.

(1) If the dividend had been paid on September 1st, as originally provided in the vote of the directors on July 1st, who was entitled to this dividend on the 10 shares of stock above referred to?

(2) What was the legal effect of the action of the directors taken on August 25, 1921?

A. (1) In the absence of other provision in the resolution declaring the dividend, the right to the dividend accrues to the owner of the stock at the time of the declaration. *Matter of Kernochan*, 11 N. E. 149, 104 N. Y. 618. The general rule is that any dividend already declared when the stock is transferred belongs to the transferor, and does not pass by the transfer. The fact that the dividend is payable at a future time, though after the transfer does not alter the rule. *Wallin v. Johnson City Lumber & Mfg. Co.*, 188 S. W. 577, 136 Tenn. 124, L. R. A. 1917B, 323. But the directors have the power to specify to whom the dividends are payable, and may make them payable to stockholders of record upon some future date. *Richter & Co. v. Light*, 116 A. 600, 97 Conn. 364; *Nutter v. Andrews*, 140 N. E. 744, 246 Mass. 224. According to the rules of the New York Stock Exchange, dividends declared pass with the stock until the time of closing of the transfer books. After that the stock passes "Ex dividend." See *Ford v. Snook*, 199 N. Y. S. 630, 205 App. Div. 194; 38 Harv. Law Rev. 245.

(2) When the directors have declared a dividend, the corporation becomes a debtor to each stockholder for the amount due to him. The directors cannot revoke the declaration, since this

would disturb a vested right. It has been held, however, that a stock dividend may be revoked, since this merely changes the evidence of the stockholder's interest. *Staats v. Biograph Co.*, 236 F. 454, 149 C. C. A. 506, L. R. A. 1917B, 728.

For other cases see *Decennial Digests, Corporations* ¶151, 155(2, 4).

Q. 67. The X corporation had a provision in its charter: "Holders of the preferred stock shall receive a fixed yearly dividend of six per cent. before any dividend shall be paid on the common stock." X issued both preferred and common stock. There was nothing further regulating the rights of the preferred and common shareholders inter se. Are preferred shareholders entitled: (a) To participate in dividends above six per cent.? (b) To a preference in the distribution of the assets of the corporation?

A. (a) There is a conflict of authority as to whether preferred stock is entitled to participate equally with common stock in the distribution of profits, after the common stock has received for the same period an amount equal in rate to that of the preference. In a Pennsylvania case it was held that the preferred holders were entitled to participate in all profits distributed in any year after the common stockholders had received for that year 6 per cent. *Englander v. Osborne*, 104 A. 614, 261 Pa. 366, 6 A. L. R. 800. It would seem, however, that the word "fixed" creates a limitation to 6 per cent. In general, it would seem to be a fair implication from the preferential rights given that the preferred shareholder agrees to accept such preference in lieu of equal participation with the common. 19 Mich. Law Rev. 463; *Stone v. United States Envelope Co.*, 111 A. 536, 119 Me. 394, 13 A. L. R. 422. The provisions of the articles and by-laws of a corporation, and not alone the recitals in the certificate of stock, are to be considered in determining the rights of the different classes of stockholders. *Continental Ins. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.* (C. C. A.) 290 F. 87, 31 A. L. R. 1320.

(b) Preferred stock has no preference in the distribution of assets of the corporation upon dissolution, in the absence of stipulation for it. *Lloyd v. Pennsylvania Electric Vehicle Co.*, 72 A. 16, 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119.

For other cases see *Decennial Digests, Corporations* ¶156, 629.

Q. 68. A is the owner of noncumulative 7 per cent. preferred stock in the B corporation. The corporation had in 1923 a surplus from which it might have properly declared dividends. The di-

rectors refused to do so, but employed the surplus in the business. What are the rights of the stockholder, if any? Can the corporation declare a dividend on the common stock in 1924, without paying the preferred dividend for 1923?

A. It requires a strong showing of abuse of discretion by the directors to compel a declaration of dividend, where they employ surplus earnings in the business. But the corporation probably cannot declare a dividend on the common stock in 1924, without first paying the preferred dividend for 1923 out of profits retained.

Preferred stock may be either cumulative or noncumulative. It has been commonly supposed that, in case of the latter, dividends once "passed" or omitted are lost forever. But a series of recent New Jersey cases hold that holders of noncumulative preferred stock have rights in any surplus profits accumulated by failure to declare the preferred dividend. *Bassett v. United States Cast Iron Pipe & Foundry Co.*, 73 A. 514, 75 N. J. Eq. 539; *Moran v. Same*, 123 A. 546, 95 N. J. Eq. 389; *Id.*, 126 A. 329, 96 N. J. Eq. 698. *Day v. Same*, 126 A. 302, 96 N. J. Eq. 736. The directors cannot withhold profits from the preferred for one or more years, and then declare the accumulated earnings all in favor of the common stock. Does this place noncumulative stock on the same footing as cumulative? No. Dividends passed in prior years are payable only out of surplus accumulated by withholding those dividends. Arrears of preferred dividends are not payable out of current earnings, and need not be made up for years in which no profits were earned. "All or part of the dividends earned upon, but not paid to, the preferred stock, may be paid at any later time to the preferred stockholders out of the preferred surplus fund." *A. A. Berle, Jr.*, 23 Col. Law Rev. 358; note, 23 Mich. Law Rev. 779, 74 Univ. Pa. Law Rev. 605; *Collins v. Portland Electric Power Co.*, 12 F.(2d) 671.

For other cases see Decennial Digests, Corporations ¶156.

Q. 69. The X Company had two classes of stock, preferred and common. By the terms of the preferred, the holders were entitled to a dividend of 7 per cent. per annum, payable quarterly. The company failed to pay these dividends for three years, and then went into liquidation. The preferred shareholders insist that, before the common stockholders are entitled to receive any distribution, they shall receive the unpaid dividends, together with the par value of their stock. Is their contention, or any of it, correct?

A. The articles or certificate of incorporation contain the contract fixing the rights as between common and preferred stock-

holders. In the absence of agreement that dividends shall be cumulative, unpaid dividends for past years cannot be claimed. A "cumulative dividend" is one which, if not paid in any one year, shall be payable out of surplus earnings for subsequent years, before dividends on the common stock. *Lockwood v. General Abrasive Co.*, 205 N. Y. S. 511, 210 App. Div. 141. Upon the winding up of a corporation the preferred stockholders are entitled only to the preference set forth in the certificate of incorporation. Stockholders, common and preferred, share alike in the assets of a liquidating corporation, if the preference specified is only as to dividends. *Continental Ins. Co. v. U. S.*, 42 S. Ct. 540, 259 U. S. 156, 181, 66 L. Ed. 871; *Lloyd v. Pennsylvania Electric Vehicle Co.*, 72 A. 16, 75 N. J. Eq. 263, 21 L. R. A. (N. S.) 228, 138 Am. St. Rep. 557, 20 Ann. Cas. 119.

Even if there were a provision for cumulative dividends these would not be payable on dissolution, unless there were surplus assets and profits available. If no profits have been made, no dividends could be claimed. The amount on hand would represent capital. *Michael v. Cayey-Caguas Tobacco Co.*, 180 N. Y. S. 532, 190 App. Div. 618. See *Johnson v. Johnson & Briggs*, 122 S. E. 100, 138 Va. 487. The preferred stockholders are therefore without right, in dissolution, to receive dividends or the par value of their stock in preference to repayment of the common shares, or to receive any unpaid dividends at all. If there were no profits to be divided in any year, the dividend for that year was lost forever. Each year would mark the beginning of a new dividend period.

For other cases see *Decennial Digests, Corporations* ¶155(2), 629.

Q. 70. Jones owned 100 shares of the preferred stock of the A Company, the authorized capital of which consisted of 200,000 shares of common and 200,000 shares of 6 per cent. preferred stock. At a stockholders' meeting an amendment was adopted to the certificate of incorporation, by which three kinds of preferred stock were authorized: (1) Prior preferred stock; (2) participating preferred stock; and (3) 6 per cent. preferred stock without voting power. It was provided that the old preferred stock outstanding should thereafter be considered 6 per cent. preferred stock, which should be junior to the two new classes of preferred stock, though still prior to the common stock. Jones assails the right of the corporation to adopt, by way of amendment, such an alteration of its capital structure, by which his stock was made junior to two new classes of preferred stock, and by which the right to vote was taken away and vested in the common stock.

A. An attempt by mere resolution or by-laws to deprive a stockholder of voting or other rights under the certificate or articles would be ineffectual. But the majority may, by amendment, change the relative rights and priorities of the stockholders, where the power is granted by the incorporation law in force at the time the original preferred stock was issued. *Peters v. United States Mortgage Co.*, 114 A. 598, 13 Del. Ch. 11; *Morris v. American Public Utilities Co.* (Del. Ch.) 122 A. 696; *Salt Lake Automobile Co. v. Keith-O'Brien Co.*, 143 P. 1015, 45 Utah, 218; *General Inv. Co. v. American Hide & Leather Co.* (N. J.) 129 A. 244 (minority stockholder denied an injunction to restrain the issuance of prior preferred stock under amendment of certificate of incorporation); 8 Minn. Law Rev. 617; 11 Cornell Law Quart. 78.

It may be a doubtful question of statutory construction whether the statute as to amendments gives the power to issue new classes of preferred stock and subordinate outstanding issues, making them secondary as to dividends, by less than unanimous consent.

For other cases see Decennial Digests, Constitutional Law ¶93(1), 154 (2); Corporations ¶40, 77, 174, 192.

SECTION 10.—REPRESENTATIVE OR STOCKHOLDERS' SUITS

Q. 71. P, a stockholder in X corporation, brings a stockholder's bill in equity against X and D, setting forth that P is a nonresident stockholder; that D was indebted to X to a large amount; that the statute of limitations would have run in D's favor in six months from the filing of the bill; that he, P, had requested the directors of the corporation to bring suit, and that they had unanimously refused; that two of the five directors were personal creditors of D to large amounts, and were suing him; that D's property was insufficient to pay both the obligations due to X and to the two directors. State why these allegations are, or are not, sufficient to maintain the cause (a) in a state court; (b) in a federal court?

A. (a) A representative suit in equity by a stockholder, alleged to be brought in behalf of himself and all other stockholders, must show that the corporation is in default in its obligation to him as a stockholder in not asserting its rights. The plaintiff must establish that he has exhausted all available means to obtain action by the corporation itself, unless the circumstances excuse him from so doing. If he fails to induce the managing officers to take remedial action, some courts hold that he must apply to the stockholders, unless such application would be useless. In this case

there is both a demand and refusal, and a showing that a demand would be useless as far as directors are concerned, and probably as far as stockholders are concerned. Stockholders cannot control the discretion of the directors, and the remedy of refusing to reelect them involves too much delay. *Continental Securities Co. v. Belmont*, 99 N. E. 138, 206 N. Y. 7, 51 L. R. A. (N. S.) 117, Ann. Cas. 1914A, 777. The allegations would seem sufficient in most state courts, if it appears that suit is brought on behalf of all others similarly situated. *Bartlett v. New York, N. H. & H. R. Co.*, 109 N. E. 452, 221 Mass. 530.

* (b) In the federal courts, under federal equity rule 27 (formerly 94), there must be an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares devolved upon him since by operation of law, and that the suit is not a collusive one, to confer jurisdiction on a federal court. It must also set forth with particularity the efforts to secure action by the directors and shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort. *Wathen v. Jackson Oil & Refining Co.*, 35 S. Ct. 225, 235 U. S. 635, 59 L. Ed. 395; *Myers v. Occidental Oil Corp.* (D. C.) 288 F. 997.

For other cases see *Decennial Digests, Corporations* ¶211(4), 320 (2, 4, 7, 8).

Q. 72. A is a shareholder in the X Company, and brings a suit in equity on behalf of himself and other stockholders against the X Company, and its directors, to recover for the company the profits made by the directors upon a contract between it and the directors, and also to enjoin the further continuance of the contract and its cancellation. A was not a stockholder at the time the contract was made, and in fact bought his stock subsequently from one of the directors against whom he complains. May he maintain his bill? Assuming that he may, what must be his jurisdictional allegations, and whom must he join as defendants?

A. In most jurisdictions A cannot maintain a representative suit, if he is a transferee of one who participated in the wrong against the corporation which is the basis of the suit. *Berman v. Minneapolis Photo Engraving Co.*, 174 N. W. 735, 144 Minn. 146, 150; *Babcock v. Farwell*, 91 N. E. 683, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74. Indeed, in some jurisdictions a stockholder cannot sue in behalf of a corporation to complain of corporate wrongs occurring prior to his acquisition of stock. There is no sound reason for this limitation, because the litigation, if successful, re-

dounds to the benefit of all stockholders. 21 Harv. Law Rev. 195; Pollitz v. Gould, 94 N. E. 1088, 202 N. Y. 11, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912D, 1098. The theory is advanced by some courts that the right of action is for special injury to the stockholder, and that, in buying the shares, he does not buy his vendor's right of action. Home Fire Ins. Co. v. Barber, 93 N. W. 1024, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716. This seems a wrong idea. The true theory of the stockholder's suit is that the corporate right of action is a corporate asset, and that the corporation owes an obligation to all the stockholders to assert its rights. If the corporation neglects to sue, a stockholder may demand that such action be brought by notice to the directors, and, if the demand is refused, he may sue in equity for specific performance of the obligation, joining the corporation and the wrongdoers as defendants. Any recovery is for the benefit of the corporation. Harris v. Cheetham (Sup.) 180 N. Y. 106. If the transferee purchased in good faith, there is no good reason why he should not sue because his transferor was a wrongdoer. Parsons v. Joseph, 8 So. 788, 92 Ala. 403.

For other cases see Decennial Digests, Banks and Banking ¶55(4); Corporations ¶211(2), 298(1), 320(4, 6).

SECTION 11.—TRANSFER OF STOCK

Q. 73. A, being the owner of stock, pledges the same to B, a stockbroker, to secure his indebtedness to B, indorsing the stock certificates in blank. B, in turn, without any authority so to do, pledges the same stock certificates to C to secure a loan, delivering the certificates indorsed in blank by A. B then goes into bankruptcy. Can C hold the stock certificates until his loan is paid in full, or must he return them to A?

A. C may hold them as a bona fide purchaser. Where the true owner delivers the indorsed certificate to a pledgee or other person, thereby clothing him with the apparent ownership of the stock, he cannot recover it from a bona fide pledgee or transferee without payment of the debt for which the pledge was made. The possession of a certificate indorsed in blank gives the holder all the indicia of ownership. McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; National Safe Deposit, Savings & Trust Co. v. Hibbs, 33 S. Ct. 818, 229 U. S. 391, 57 L. Ed. 1241. The certificate of stock is not negotiable, but it is the evidence of title usually relied on by business men, and the doctrine of estoppel places the loss on the one whose misplaced confidence made the wrong possi-

ble. If the owner of stock places in the hands of another the certificate therefor, either indorsed in blank or with a separate instrument of transfer, or power of attorney, such person can pass a good title by sale or pledge to one who takes in good faith and for value, in reliance on this evidence and appearance of title, and power of disposition, with which the owner has clothed him. Otherwise, stock purchases would be perilous indeed. *Baker v. Davie*, 97 N. E. 1094, 211 Mass. 429, 37 L. R. A. (N. S.) 944.

For other cases see *Decennial Digests, Corporations* ¶94, 123(11), 126; *Estoppel* ¶72.

Q. 74. A was the owner of 260,000 shares of stock in X Company. The certificates for these shares, indorsed in blank, were left in B's hands to secure money advanced by B to A for expenses in a venture in which both were interested. A needed more money, and B was unable to advance it, whereupon A telegraphed B to sell part of the stock at not less than 50, or borrow from Y whatever amount he could and pledge the stock to secure the loan. Y knew the stock belonged to A. B went to see Y, who offered to purchase the stock at 10, and asked B if he had the right to sell at that price. B replied he had, sold to Y, got the money, and used it to pay a debt he owed to another party. As soon as A ascertained the facts, he sued Y to get the stock. What are his rights? Why?

A. Y may be compelled to reassign the stock to A. A purchaser of stock with notice of the capacity in which the agent holds is bound to inquire into the scope of his authority. He must not trust to any mere assumption or assertion of authority by the agent. The owner is entitled to a decree for restoration of the stock upon repayment of the amount paid to the agent. *Sloan v. Brown*, 77 A. 821, 228 Pa. 495, 139 Am. St. Rep. 1019.

The purchaser cannot rely on the agent's possession of the certificate indorsed in blank, where he knows that he is acting as agent. The burden of proving the agent's authority rests upon the party who alleges it. The alleged agent's own declarations, as distinguished from his sworn testimony as a witness, are not admissible to establish or enlarge his authority.

For other cases see *Decennial Digests, Principal and Agent* ¶147(2,3), 148(4).

Q. 75. A, the owner of a stock certificate, indorsed it in blank to a reputable bank as a pledge for a loan. The cashier misappropriated it, and sold it to a bona fide purchaser, B, who secured a transfer to himself on the books of the company. B sells his new

certificate to C, also a bona fide purchaser. Must the corporation recognize C as a stockholder, and, if so, can the corporation recover damages against B? Compare the case of a bond under similar circumstances.

A. It has been held in a similar case that the owner was not estopped to assert his title against B, the innocent purchaser. It was admitted that, if the wrongful sale was the act of the bank, to which the certificate was intrusted, the owner would be estopped, as he had clothed the bank with the indicia of title. But it was held that the cashier's act in abstracting and selling the certificate was not the act of the pledgee bank, but of the officer personally. He had "access," but he was not intrusted with possession. *Bangor Electric Light & Power Co. v. Robinson* (C. C.) 52 F. 520; *Schumacher v. Greene-Cananea Copper Co.*, 134 N. W. 510, 117 Minn. 124, 38 L. R. A. (N. S.) 180, Ann. Cas. 1913C, 1115. It is somewhat hard to understand, however, why the act of the cashier should not be regarded as the act of the bank. *National Safe-Deposit, Savings & Trust Co. v. Hibbs*, 33 S. Ct. 818, 229 U. S. 391, 57 L. Ed. 1241.

C, who took the new certificate from B, who has been recognized as a stockholder by the corporation, and held out as such, gets a claim for damages at least against the corporation by estoppel. But the corporation can recover against B on an implied warranty of title to the certificate, which he presented for transfer. *Boston Tow Boat Co. v. Medford Nat. Bank*, 121 N. E. 491, 232 Mass. 38; 34 Harv. Law Rev. 304. In case of a negotiable bond, B would acquire title even from a finder or thief.

For other cases see *Decennial Digests, Banks and Banking* ¶112; *Corporations* ¶112, 134, 147; *Estoppel* ¶72.

Q. 76. (a) A was the owner of 100 shares of stock in the X Company. His confidential clerk, having access to his vault, stole his certificate, forged A's name on the back, and sold the shares to B, to whom a transfer was made by the company on its stock register. B then sold to C, to whom a transfer was also made by the company. What are the respective rights of A, C, and the X Company?

(b) X purchased 100 shares of stock from Y, who, in turn, had purchased it from Z, who had stolen the certificate indorsed in blank from A, the real owner. The corporation had transferred the stock to Y, who appeared on its stock register as the owner at the time of X's purchase. What are the respective rights of X, Y, and the corporation?

A. (a) A, the owner, cannot be deprived of title to his shares by forgery, even though the certificates pass thereby into the hands of an innocent purchaser. A is still entitled to be recognized as owner of 100 shares by the company. *National City Bank of Chicago v. Wagner*, 216 F. 473, 132 C. C. A. 533. The owner has never conferred an apparent title or indicia of ownership upon the clerk. But when the company, by fraud or error, is induced to make a transfer to B and issue him a new certificate, which untruthfully declares that B is owner of certain shares, and then C purchases from B on the faith of the certificate, the company is estopped from denying C's title. C's remedy is an action for damages for refusal to recognize him as a shareholder. *Fifth Ave. Bank of New York v. Forty-Second St. & Grand St. Ferry Ry. Co.*, 33 N. E. 378, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712. A certificate is said to be a declaration by the company that the person to whom it is given is a shareholder in the company.

(b) If a certificate of stock indorsed in blank is stolen from the real owner, and transferred to an innocent purchaser, the true owner is not estopped. The certificates are not negotiable, in the absence of statute like the Uniform Stock Transfer Act. Where an agent or servant simply has access to the certificate indorsed in blank, this is not like intrusting him with it. Y acquired no rights to the stock, but X gets a claim against the corporation by estoppel, as in part (a), above.

For other cases see *Decennial Digests, Corporations* ⇐ 100, 108, 123 (11), 149.

Q. 77. A, the registered owner of stock, delivers his certificate indorsed in blank to B, a purchaser for value. Subsequently, and before B presents the certificate to the corporation for transfer, A, dies. His executors, thinking the certificate was lost, apply to the corporation for a transfer of the stock and a new certificate, and have the stock transferred to their names on its books, and obtain a new certificate issued in their names. This certificate they sell to C, an innocent purchaser, for value, at the same time delivering to C their certificate indorsed in blank. C at once presents the certificate to the corporation, and has the stock transferred on the books to his name, and a new certificate issued to him in his name, before the corporation knows anything about the previous transfer of the original certificate to B.

B brings suit against the corporation, praying that he be adjudged the owner of the stock, and that the corporation be required to issue to him a new certificate in his name, and that the corpora-

tion pay to him the dividends that had accrued on the stock from the time the certificate was transferred to him. C is not made a party to the suit. The corporation defendant demurs. Who is entitled to judgment? What are rights of C?

A. B is entitled to be adjudged owner. He acquired the stock by A's delivery of the certificate indorsed in blank. The corporation cannot safely transfer the stock upon its books, or issue a new certificate, unless the old certificate is first surrendered. *Joslyn v. St. Paul Distilling Co.*, 46 N. W. 337, 44 Minn. 183. If a certificate of stock is lost, stolen, or destroyed, the corporation should not issue a new certificate, unless a bond is given to indemnify it against liability to possible bona fide purchasers or holders of the original certificate. *Will's Adm'r v. George Wiedemann Brewing Co.*, 188 S. W. 778, 171 Ky. 681, Ann. Cas. 1918E, 62. But see *Guilford v. Western Union Tel. Co.*, 61 N. W. 324, 59 Minn. 332, 50 Am. St. Rep. 407. The corporation is liable in damages to C by estoppel, since the new certificate was a representation that the executors were stockholders.

For other cases see Decennial Digests, Corporations ¶127, 147.

Q. 78. The plaintiff, a charitable corporation, owned 5 one thousand dollar bonds of R Company, which were registered on the books of the R Company in the name of plaintiff. T was treasurer of plaintiff and had custody of these bonds. He delivered them to B, a broker, together with a certified copy of a resolution of the plaintiff's directors, purporting to authorize their sale, and a power of attorney, executed in the name of the corporation, authorizing the transfer of the bonds to bearer. Both the certificate of the directors' vote and the power of attorney were forgeries. B delivered these documents to R Company and obtained bearer bonds in exchange, which he sold to C, paying over the proceeds to T. T absconded. Can the plaintiff recover the bonds or their value from either C, B, or R Company? If your answer holds any one of these parties liable, can such party recover over from either of the others?

A. The corporation is liable to the charitable corporation for allowing the transfer on the forged resolution. The fact that the transfer agent was deceived by misrepresentations and forgeries does not relieve the R Company from liability for unauthorized transfer. B, the broker, is liable, because he had no right to sell the bonds without the owner's authority, and he is not excused because he also was deceived. As between the R Company and

the broker, the loss must fall upon the broker, who innocently presented the forgeries. C, the innocent purchaser of the bearer bonds issued by the R Company, is not liable to the plaintiff, as they were negotiable instruments taken in due course, cutting off equities good against B, the innocent converter. *Clarkson Home for Children v. Missouri, K. & T. R. Co.*, 74 N. E. 571, 182 N. Y. 47. The registration of a bond makes it payable to order, and requires transfer by duly authorized indorsement. 2 Machen Corp. § 1743.

For other cases see Decennial Digests, Brokers 94, 101; Corporations 472; Railroads 174.

SECTION 12.—RIGHTS OF CREDITORS AND STOCKHOLDERS' LIABILITY

Q. 79. B T & Co., a partnership, organized a corporation, the B T Corporation, to which they transferred their entire stock in trade, good will, and personal assets. The corporation issued to the members of the firm 2,500 shares of stock for the firm property, which was found by the directors to be of the value of \$250,000, the par value of the stock. The directors voted, in accepting the transfer of the assets of the firm, to assume all the indebtedness of the firm, and to hold the firm and the partners harmless from all liability thereon. C, a creditor of the firm, seeks to prove his claim against the insolvent estate of the corporation, in competition with corporate creditors. Can he do so?

A. No. The objection is not merely that the assumption of the firm debts was without consideration, or that it was a mere matter of form. The real objection is that the assumption is in effect a promise to return to the subscribers for stock a portion of the subscription price or capital contribution. Suppose A subscribes for 10 shares of stock at par, and in consideration of the subscription the B T Corporation assumes and agrees to pay A's personal debts to the amount of \$1,000. That would be a contract to repay the stockholder the entire amount of his contribution to the capital, making it an entirely fictitious one, in violation of the trust fund doctrine. If the value of the firm assets had been sufficient to pay the par value of the stock, and also to furnish a reasonable equivalent for the assumption of the firm debts, there would be no objection to the firm creditor's claim.

Smith v. Bowker Torrey Co. (D. C.) 207 F. 967.

For other cases see Decennial Digests, Corporations 30(6), 565(1).

Q. 80. A Company, having authority to do so, transfers all of the property of A Company to B Company, and provides that all the shares of A Company shall be surrendered and canceled, and an equal number of shares in B Company shall be issued to the former shareholders in A Company. This is done. Immediately before this, C was an unsecured creditor of A Company. The agreement of transfer said nothing about the obligations of A Company, and C has not been paid, when B Company undertakes to mortgage all of its property, including that received from A Company. What are the rights of C? Indicate fully, with reasons.

A. A transaction by which a corporation sells and transfers all its property, upon an agreement that the consideration or price shall be distributed to the stockholders of the selling corporation, is in effect fraudulent as to creditors. *Cooper v. Utah Light & R. Co.*, 102 P. 202, 35 Utah, 570, 136 Am. St. Rep. 1075. Even if the transferee, the B Company, had assumed and agreed to pay the debts of A Company, yet the creditor could not be forced to change his debtor, and could follow the assets in equity. *Cole v. Millerton Iron Co.*, 30 N. E. 847, 133 N. Y. 164, 28 Am. St. Rep. 615. This is sometimes explained on the theory that the corporate capital is a trust fund for creditors, but that theory is not needed to sustain the holding. 36 Harv. Law Rev. 509, 547; *Luedecke v. Des Moines Cabinet Co.*, 118 N. W. 456, 140 Iowa, 223, 32 L. R. A. (N. S.) 616. The purchaser of all the assets of a corporation should act in good faith toward its creditors, and not make itself a party to a withdrawal of the capital stock by the stockholders. The consideration should be paid into the corporate treasury. *Jennings, Neff & Co. v. Crystal Ice Co.*, 159 S. W. 1088, 128 Tenn. 231, 47 L. R. A. (N. S.) 1058. The successor corporation will not be personally liable for the debts of the transferor, unless there is a technical merger or consolidation or reincarnation of the old company, an assumption of the liability by contract, or unless the purchasing corporation may be regarded as a mere continuation of the seller formed to evade its liabilities by a new name. *Skirvin Operating Co. v. Southwestern Electric Co.*, 174 P. 1069, 71 Okl. 25, 15 A. L. R. 1104.

For other cases see *Decennial Digests, Corporations* ¶540, 542(1,3,4), 547(1), 579(2), 590(3).

Q. 81. A, a corporation, was liable for damages for a tort to B, and thereafter A sold and transferred to another corporation, C, all of its capital stock, assets, contracts, and franchises, and ceased

to do business. B sued C for damages on the tort committed against him by A. Can B recover from C for the tort committed by A?

A. B may follow in equity the assets of A into the hands of C, on the theory of fraudulent conveyance, if A did not receive an adequate consideration. But C is not personally liable for the debts or torts of A, because of the purchase of all its assets, unless there is a consolidation, merger, or assumption of liabilities. *Cole v. Millerton Iron Co.*, 30 N. E. 847, 133 N. Y. 164, 28 Am. St. Rep. 615; *Luedecke v. Des Moines Cabinet Co.*, 118 N. W. 456, 140 Iowa, 223, 32 L. R. A. (N. S.) 616. It has been held, however, in some cases, that, where a corporation purchases all the assets of another corporation, or a partnership, it is responsible for its contracts or torts, if the sale was made without consideration or in bad faith, and amounts simply to a change in the name and form of carrying on the same business by the same persons. *Valley Bank v. Malcolm*, 204 P. 207, 23 Ariz. 395; *Andres v. Morgan*, 56 N. E. 875, 62 Ohio St. 236, 78 Am. St. Rep. 712; *Blanc v. Paymaster Min. Co.*, 30 P. 765, 95 Cal. 524, 29 Am. St. Rep. 149. Compare *McAlister v. American Ry. Express Co.*, 103 S. E. 129, 179 N. C. 556, 15 A. L. R. 1090; 30 A. L. R. 558; 29 Yale Law J. 662. The doubtful question in these cases is whether C, the successor corporation, is liable beyond the extent of the assets received.

For other cases see *Decennial Digests, Banks and Banking* ¶67; *Corporations* ¶30(6), 445, 542(1), 543, 547(1,4), 579(2), 590(1,3) 591; *Fraudulent Conveyances* ¶215; *Railroads* ¶129(2).

Q. 82. The X corporation bought property of A for common stock of \$10,000 par value. The directors of the corporation, friends of A, knew that the property would not bring over \$7,000 in the market, but believed that its value would exceed \$10,000 within two years. The stock was transferred for value to D, who had no knowledge of the way it had been originally paid for. While D held the stock, P, who knew all about the original issue, sold goods to X on credit. X is insolvent. The property is now worth \$12,000. What rights, if any, has P against D, or against A?

A. There are two rules recognized in different states to test the adequacy of the payment of the par value of stock: (1) The "true value" rule, that the property must be the actual equivalent of the face of the shares; (2) the "good faith" rule. Under this rule, the valuation by the directors is conclusive, in the absence of fraud. Gross and intentional overvaluation is strong evidence of fraud. *Coit v. North Carolina Gold Amalgamating Co.*, 7 S. Ct. 231,

119 U. S. 343, 30 L. Ed. 420; *Clinton Mining & Mineral Co. v. Jamison*, 256 F. 577, 167 C. C. A. 607. It is the present cash value, and not the hopes as to the future value, which must be taken as the basis of exchange. See *v. Heppenheimer*, 61 A. 843, 69 N. J. Eq. 36. D, as an innocent transferee without notice that the stock was watered, would not incur liability. *Rhode v. Dock-Hop Co.*, 194 P. 11, 184 Cal. 367, 12 A. L. R. 437. P, who knew the circumstances of the original issue, could not complain in most jurisdictions, even as against A, as he was not misled by the stock-watering. *Spencer v. Anderson*, 222 P. 355, 193 Cal. 1, 35 A. L. R. 822; *First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co.*, 44 N. W. 198, 42 Minn. 327, 335, 6 L. R. A. 676, 18 Am. St. Rep. 510. "It is only those creditors who have relied, or whom the law presumes to have relied, upon the amount of the capital stock of the company, in whose favor equity will set aside a fictitious arrangement for its payment." But see *Easton Nat. Bank v. American Brick & Tile Co.*, 64 A. 921, 70 N. J. Eq. 743, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84. In New Jersey the liability on watered stock does not depend on the theory of fraud or "holding out." In that state A might be held liable to pay up the balance of \$3,000 on the par value of the stock received, for the benefit of creditors, prior or subsequent, and with or without notice.

For other cases see *Decennial Digests, Corporations* ⇨ 232(2, 3), 233, 240(1), 241½, 243(6), 244(5, 7).

Q. 83. A Company was a corporation capitalized at \$50,000. It owned some oil and gas leases, which it valued at \$25,000. Its members concluded that these could be better handled by another corporation, and therefore organized B Company, with a capitalization of \$1,000,000, all of which was to be issued for the oil and gas leases, and distributed to the shareholders of A Company in proportion to their holdings in A Company. This was done, the certificates issued by B Company being marked fully paid and nonassessable. B Company then borrowed \$10,000 from P bank, for which a note was given. When this was due, it was not paid. The bank sued B Company, got judgment, took out execution, failed to get anything, whereupon it sued the stockholders to compel them to pay up their stock. How should the ruling be? Why?

A. The stockholders are liable. If we apply the "good faith" rule, the exchange of property, valued by the parties concerned at \$25,000, for stock of a par value of \$1,000,000, involved an overvaluation that was both gross and intentional. The defendants' stock was not fully paid up. By launching the corporation with a nominal issued cap-

ital of \$1,000,000, the stockholders incurred the risk of personal liability to creditors to pay up the par value. Presumably the bank extended credit on the faith of the nominal capitalization. *First Nat. Bank v. Northup*, 109 P. 672, 82 Kan. 638, 136 Am. St. Rep. 119.

The stockholders of the A Company, to whom the watered stock of the B Company was distributed, after being issued for the oil and gas leases, are not bona fide purchasers, and are liable to pay up the balance of the par value, so far as needed to meet the demands of subsequent creditors. They occupy the position of holders of bonus stock.

For other cases see *Decennial Digests, Corporations* ¶227, 232(1,2).

Q. 84. Upon the organization of the X Company, its capital stock was fixed at \$1,000,000. Of this one-half was delivered to A in exchange for certain property, including real estate, good will, patents, etc., worth not to exceed \$100,000; the balance was issued to subscribers as full-paid for \$50 per share, the par value being \$100. A sold all of his stock at prices ranging from \$75 to \$90 per share. A was the principal promoter of the company, and himself controlled the board of directors during the time the stock was issued. The corporation becoming insolvent, its receiver brings an action against Y, an original subscriber, for \$50 for each share held by him, against Z, a purchaser from an original subscriber, for the same amount, against M, a purchaser from A, for \$80 for each share held, and against A for the \$400,000. Can he recover in any of these actions?

A. A has obtained \$500,000 in par value of stock for property not worth over \$100,000. Where stock is issued to a subscriber as being fully paid up, when not in good faith adequately paid for, the subscriber becomes liable to creditors for the difference between the par value and the amount paid. A then came under a potential liability of \$400,000. Under the theory that the stockholder's liability on watered stock is based on fraudulent representations, a trustee in bankruptcy or receiver, as successor to the property of the corporation, is not the proper person to sue the stockholders. The liability is a direct one to the creditors, and not an asset of the corporation. *Courtney v. Georger*, 228 F. 859, 143 C. C. A. 257; *State Bank of Commerce v. Kenney Band Instrument Co.*, 173 N. W. 560, 143 Minn. 236. When A sold his stock, it is doubtful whether his liability would continue. In general, when a stockholder makes a complete transfer in good faith,

and the transfer is duly registered, a novation or substitution is accomplished, and the transferee becomes liable for the unpaid balance due on the stock. But, if Z and M acquired their stock without notice that it was but partially paid for, they cannot be held liable. *Rhode v. Dock-Hop Co.*, 194 P. 11, 184 Cal. 367, 12 A. L. R. 437. Y, as an original subscriber, is liable, for the unpaid balance on the stock held by him, to creditors who presumably extended credit in reliance on the issued stock being fully paid up.

For other cases see *Decennial Digests*, *Bankruptcy* ¶145(2); *Corporations* ¶175, 232(3), 244(5, 7).

Q. 85. X Corporation, organized with an authorized capital stock of \$1,000,000, of which \$500,000 was originally issued at par, subsequently issues the remaining \$500,000 at 50 per cent. of its par value, in order to raise funds to pay off a floating debt incurred in the extension of its plant. Fifty per cent. was the best price that the directors could obtain for the stock, and, in their judgment, this was the best way of providing for the liquidation of the floating debt. What are the rights of judgment creditors of the X corporation as against the holders of the last issue of stock: (a) Under the common law as applied in the federal courts? (b) Under the New York law?

A. (a) The holders of the last issue may have a defense against the usual liability on watered stock, under the doctrine that an embarrassed corporation may, for the purpose of paying its debts, issue stock and dispose of it for the best price that can be obtained as full-paid. The subscribers cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original issue of stock at a discount. *Handley v. Stutz*, 11 S. Ct. 530, 139 U. S. 417, 35 L. Ed. 227. This exception cannot be explained on the "trust fund" or "holding out" theories. It has been explained as resting on the practical business difference between an original issue, where stock-watering cannot be excused, and a subsequent issue, where, if the market price of the old stock has fallen below par, the new stock cannot be sold except at a discount. The issue of stock below par may be the last resort of a financially embarrassed corporation; the only alternative to borrowing the necessary funds on ruinous terms. *Bonbright, Shareholder's Defenses*, 25 Col. Law Rev. 408, 429; *J. F. Lucey Co. v. McMullen*, 173 P. 1000, 178 Cal. 425.

(b) In New York the contractual liability for stock subscrip-

tions alone is enforced; that is, the creditors can in any case collect no more from the stockholder than he agreed to pay the corporation for his stock. *Jeffery v. Selwyn*, 115 N. E. 275, 220 N. Y. 77, 6 A. L. R. 1111. Under New Jersey statutes, the federal rule is held not to apply.

For other cases see *Decennial Digests, Corporations* ¶90(1), 232(1,2).

Q. 86. The entire authorized capital stock, \$5,000,000 par value, of the X Company, is issued to A, B, and C, the promoters, by dummy directors, in payment for an option, a patent, a mining claim, an oil lease, or other consideration of uncertain value. The directors pass a resolution that the value of the property thus acquired is equal to the par value of the stock issued in exchange for it, but on the market the value is only \$5,000. The promoters "donate" back to the corporation, as "treasury stock," one-half of the stock for which they have just paid in full, which is now sold to the public, S, U, C, K, and R, for less than par, as fully paid up and nonassessable.

(a) Are the promoters liable to creditors for the "water" in the stock held by them?

(b) Are the purchasers of "treasury" stock liable to creditors?

A. (a) The promoters are probably liable to creditors, who extend credit to the corporation in ignorance that the issued stock was not fully paid. The theories on which this liability for watered stock is based are: (1) The "trust fund" theory; but this fails to explain it, and is now regarded as unscientific. 7 Minn. Law Rev. 79, 85. (2) The fraud, or holding out, theory, that the stockholder participates in a representation on which the creditor presumably relies. This is popular, but entirely artificial. (3) The "prescribed obligation" theory, that an obligation is imposed by law on the subscriber and his transferee with notice to contribute to the corporate capital the par value of the stock as a substitute for his individual liability on corporate debts. Ballantine, 7 Minn. Law Rev. 92; *Smith v. Schmitt*, 231 P. 176, 112 Or. 687; 38 Harv. Law Rev. 176; *Macbeth v. Banfield*, 78 P. 693, 45 Or. 553, 106 Am. St. Rep. 670. Statutes authorizing non-par stock are intended to do away with stockholders' liability to contribute more than the consideration agreed to be paid for the stock. *Johnson v. Louisville Trust Co. (C. C. A.)* 293 F. 857, 36 A. L. R. 785.

(b) Bona fide purchasers of stock from the original subscribers, or their transferees, without notice that the stock was not fully

paid, are not liable to creditors. *Davies v. Ball*, 116 P. 833, 64 Wash. 292, Ann. Cas. 1914B, 750.

For other cases see *Decennial Digests, Corporations* 99, 228, 230, 232 (2), 244(7).

Q. 87. Under the statutes of state M, a corporation might issue shares of stock having no par value, and might reduce its capital stock at any time by filing specified papers. Corporation X was formed in M, and issued, for property then worth \$1,000,000 20,000 shares of stock having no par value. The business of X was conducted at a loss for several years, so that in 1922 its assets were worth \$800,000 and its liabilities amounted to \$300,000. The stock was held by A, B, C and D, each owning 5,000 shares, and they were the only directors. Disagreements arose between them, D being opposed to policies approved by the others. It was orally agreed between them that X should buy D's stock, at \$30 a share, and a written contract to that effect was made between X and D, pursuant to a resolution adopted at a directors' meeting which A, B, and C attended. D now files a bill against X for specific performance of this contract. If X were an individual, D would be entitled to specific performance of the contract. The financial condition of X has not changed substantially since the contract was made. Should the contract be specifically enforced?

A. The power of the corporation to bind itself to purchase its own non-par stock from one of its stockholders will depend on the question of what is capital and what is the surplus of a corporation with non-par stock. It would seem that the total consideration received for true non-par stock must be attributed to capital, unless part of the consideration is expressly paid in as surplus. The fund which is contributed by the stockholders, and thus permanently dedicated to capital purposes, is subject to the same safeguards as a capital fund raised by the issue of shares having a par value. A. A. Berle, *Problems of Non-Par Stock*, 25 Col. Law Rev. 43, 48; *North American Petroleum Co. v. State Charter Board*, 181 P. 625, 105 Kan. 161.

There are two distinct types of non-par stock. These have been called, for convenience, (1) "stated value" non-par stock; (2) true non-par stock. Under the first type, where a stated amount of contribution has been agreed upon or specified in respect of each share, this amount, multiplied by the number of shares issued, is the capital attributable to such shares. 25 Col. Law Rev. 46. The fact that the corporation is solvent will not justify the with-

drawal of capital by the stockholders as dividends or otherwise. *Mackall v. Pocock*, 161 N. W. 228, 136 Minn. 8, L. R. A. 1917C, 390.

For other cases see *Decennial Digests, Bankruptcy* ¶145(1); *Corporations* ¶648.

Q. 88. The articles of incorporation of a corporation organized under the laws of Arizona, for the purpose of conducting a brokerage and investment business, contain the provision that the private property of the stockholders shall be exempt from the corporate debts. This provision is lawful in Arizona. The articles of incorporation also contain the provision that the principal place of business of the corporation shall be in Arizona, but the corporation may transact business and establish branch offices in any of the states of the United States. This provision is also a lawful provision under the laws of Arizona. The laws of California provide that stockholders of foreign as well as domestic corporations shall be liable for their proportionate part of the debts of the corporation incurred in California. After the corporation has transacted business exclusively in Arizona for several years, the corporation, by action of its board of directors, approved by the majority of its stockholders, proposes to establish a branch office and transact business in California. A, a minority stockholder, brings a suit to enjoin the corporation from transacting business in California, upon the ground that the transaction of business in California will subject him to liability for the debts of the corporation incurred in California, contrary to the provisions of the articles of incorporation:

(a) Is A's contention that he will be liable for a portion of the debts of the corporation incurred in California correct or incorrect?

(b) Has A the right to enjoin the corporation from transacting business in California for the reason stated?

A. A's contention that stockholders in a foreign corporation doing business in California will come under a proportionate individual liability for debts incurred by the corporation in California is correct. *Thomas v. Wentworth Hotel Co.*, 110 P. 942, 158 Cal. 275, 139 Am. St. Rep. 120. If the foreign corporation is expressly authorized to do business in California, the case is clear. *Pinney v. Nelson*, 22 S. Ct. 52, 183 U. S. 144, 46 L. Ed. 125. If the articles expressly exempt the stockholder from liability, this can hardly overcome the express provision that the corporation may transact business in any of the states. *Thomas v. Matthiessen*, 34 S

Ct. 312, 232 U. S. 221, 58 L. Ed. 577; *Provident Gold Mining Co. v. Haynes*, 159 P. 155, 173 Cal. 44. This general authorization is sufficient consent to render the stockholders liable to California law. The test of liability is said to be whether the stockholder has authorized the corporation to bind him. *Ward v. Joslin*, 22 S. Ct. 807, 186 U. S. 142, 46 L. Ed. 1093, 2 Cal. Law Rev. 315.

(b) A has no right to enjoin the corporation, because the transaction of business in California is not ultra vires. The provision against individual liability is intended to give exemption as far as the law permits, not to limit the authority of the corporation to do business in other states, which impose a statutory stockholder's liability. Note that the contractual liability on the unpaid subscription to stock, the liability on watered stock issued for insufficient consideration, and the additional statutory liability to creditors upon fully paid stock, are three very different kinds of stockholder's liability. Additional statutory liability is commonly imposed only upon bank stock, except in California and Minnesota.

For other cases see *Decennial Digests, Corporations* ⇐216, 217.

Q. 89. The A Company, with a bonded indebtedness of \$5,000,000, secured by mortgage on its entire plant, makes default. B, trustee for bondholders under the mortgage or deed of trust, brings suit to foreclose. A protective committee of bondholders calls for a deposit of bonds. Four million dollars of bonds are deposited. The court fixes an "upset price" of \$3,000,000, to see that the property brings something like its true value, as there will be no real competitive bidding. The foreclosure sale takes place, and a representative of the bondholder's committee buys in the property for \$3,000,000 and expenses of suit, including compensation to trustee and counsel. These expenses amount to \$50,000. The purchase price is paid in bonds, but the nondepositing bondholders must be paid their proportion of the net proceeds (or \$590 per \$1,000 bond) in cash. The B Company, a new corporation, is formed, the assets purchased on foreclosure are transferred to it, and stock in the new corporation is issued to reimburse the bondholders who deposited their bonds. In order to raise enough cash to reimburse the committee for the \$640,000 cash advanced to pay off the expenses of foreclosure and the nondepositing bondholders, and provide working capital, a new issue of bonds is made. To raise further capital, stock is sold to the stockholders in the defunct A Company on more favorable terms than to the general public. In fact, the purchase price is called an "assessment." No

similar offer, however, is made to the general creditors. C, an unsecured creditor, seeks to subject the assets acquired by the B Company through the foreclosure sale to the debt of the A Company. What decision?

A. Decision for C. Under the doctrine of *Northern Pac. Ry. Co. v. Boyd*, 33 S. Ct. 554, 228 U. S. 482, 57 L. Ed. 931, if a creditor is not provided for in the reorganization, he can assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. The sale to the old stockholders of new stock on favorable terms recognizes and preserves their interest at the expense of the prior rights of creditors, even though the assets at the sale brought much less than the mortgage debt. *Western Union Tel. Co. v. United States & Mexican Trust Co.*, 221 F. 545, 555, 137 C. C. A. 113. It is only where the old stockholders receive an interest in the new corporation for stock held in the old that adequate provision must be made in the reorganization plan for unsecured creditors. *Male v. Atchison, T. & S. F. R. Co.*, 129 N. E. 458, 230 N. Y. 158, 15 A. L. R. 1098. The assets of a corporation constitute a trust fund for the payment of corporate liabilities, which creditors can follow as against stockholders. 8 Minn. Law Rev. 604; *Wabash Ry. Co. v. Marshall*, 195 N. W. 134, 224 Mich. 593; *Safety Car Heating & Lighting Co. v. United States Light & Heating Co.* (D. C.) 2 F.(2d) 384. In *Phipps v. Chicago, R. I. & P. Ry. Co.* (C. C. A.) 284 F. 945, 28 A. L. R. 1184, the federal court went to the extent of returning the property to the old corporation without a judicial sale, under a plan of reorganization, approved by the court, by which the unsecured creditors dissenting from the plan were given securities, instead of a cash alternative, to which they would have been entitled, had the property been sold. It has not yet been held that nonassenting secured creditors may be required to accept securities in the reorganized corporation in payment of their claims, and restrained from resorting to foreclosure suit for the collection of their claims in cash. See *In re Prudential Outfitting Co. of Delaware* (D. C.) 250 F. 504.

For other cases see Decennial Digests, Bankruptcy ⚡252, 262(1); Corporations ⚡542(4), 579(2), 628; Railroads ⚡30.

SECTION 13.—FOREIGN CORPORATIONS

Q. 90. The International Text-Book Company of Pennsylvania conducts a correspondence school from its offices in Scranton, Pa., where instruction papers are published and sent to students throughout the United States. Local and traveling agents are employed to procure and forward applications, and collect and send to the company payments made by students. The solicitor general, in Kansas, maintains his office at his own expense, but is paid a salary by the company and a commission on applications secured and collections made. D subscribed for a scholarship in Kansas, but failed to pay. The Kansas statute provided that no foreign corporation could do business in Kansas without paying certain fees and filing certain papers with the secretary of state, which the Text-Book Company had not done. It brought suit in Kansas courts against D, and was denied a remedy on its claim. Was the ruling right? Why?

A. No; intercourse between persons in different states by means of correspondence through the mails is commerce among the states. The state cannot prescribe, as a condition of the right of the foreign corporation to do interstate business, that it shall pay fees and file papers with the secretary of state. Such conditions operate as a burden and a restriction on interstate commerce, and are in violation of the company's constitutional rights under the commerce clause of the federal Constitution. So the circulation of newspapers throughout the country is interstate commerce. *International Text-Book Co. v. Pigg*, 30 S. Ct. 481, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

But every foreign corporation may be required to obtain a license to do business of an intrastate character. The question of what constitutes doing business in a state is often a difficult one, and is important, not only as to the imposition of restrictions and license fees, but also as to rendering the corporation amenable to suit and the service of process. A foreign corporation can be subjected to a judgment in personam by service on its officers and agents only when it is "doing business" within the state. "Doing business," for purposes of service of process, may by some authorities be less than for the purpose of qualification or of license tax, though in the main the same. 35 Harv. Law Rev. 87; Isaacs, 25 Col. Law Rev. 1018, 1024. Single and isolated transactions do not ordinarily constitute the doing of business.

If a foreign corporation makes a contract without having com-

plied with statutory requirements, there is great conflict and confusion as the result, depending partly on the construction of various statutes, whether their effect is merely upon the power of the unlicensed foreign corporation to sue or defend, or whether they render the contract itself void, voidable, or unenforceable. See 25 Col. Law Rev. 806, "Enforceability of Contracts of Unlicensed Foreign Corporations;" *David Lupton's Sons Co. v. Automobile Club of America*, 32 S. Ct. 711, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, 699.

For other cases see *Decennial Digests*, Commerce 661(6); Corporations 661(6).

SECTION 14.—AMENDMENT AND REPEAL OF CHARTERS

Q. 91. State doctrine of *Dartmouth College Case*, and how doctrine thereof has been overcome by the several states.

A. Since the decision of the United States Supreme Court in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, it has been established that the charter of a private corporation is a contract, within the protection of the clause of the United States Constitution that "no state shall * * * pass any law impairing the obligation of contracts." Section 10, art. 1, Const. U. S. Such being the case, most of the states have preserved the power of legislative control by reserving in their Constitutions or statutes the power to alter, repeal, or amend the charters of private corporations. This reserved power is held to enter into and form a part of the charter contract of corporations afterwards organized.

The reservation of the power to alter, amend, or repeal the charter of a corporation gives the Legislature no right to take away or impair vested rights of property of the corporation, its stockholders, or creditors. It has even been held that this power does not authorize the Legislature to provide that stock, which was before nonassessable, may by vote of two-thirds of the stockholders be made assessable. But this seems an extreme view.

Garey v. St. Joe Mining Co., 91 P. 369, 32 Utah, 497, 12 L. R. A. (N. S.) 554. Compare *Somerville v. St. Louis Min. & Mill Co.*, 127 P. 464, 46 Mont. 268, L. R. A. 1915F, 811.

For other cases see *Decennial Digests*, Constitutional Law 125, 126; Corporations 38, 40, 41.

Q. 92. The *Windsor Locks Ferry Company* was incorporated under a special act of the General Assembly of the state of Connecticut and authorized to operate a ferry between *Windsor Locks* and *Warehouse Point*, and to transport between said points pas-

sengers and freight for hire. The company was organized, expended \$25,000 in the purchase of a ferryboat, and was carrying on its operations. Later the Windsor Locks & Warehouse Point Bridge Company was incorporated by a special act of the General Assembly of the state of Connecticut, and authorized to build a bridge over the Connecticut river between Windsor Locks and Warehouse Point, and to collect tolls for the use of said bridge. The company organized, and its capital in the amount of \$100,000 was paid in. The bridge would greatly damage, if not destroy, the value of the ferry. The Windsor Locks Ferry Company brought a suit to the superior court for Hartford county, asking for an injunction restraining the Windsor Locks & Warehouse Point Bridge Company from the construction of its bridge. Judgment for whom, and why? (Connecticut.)

A. The first question is whether the ferry company had an exclusive franchise to operate a ferry between the termini mentioned. Such a privilege, being in derogation of public right, will be strictly construed. The fact that a corporation is given the right of constructing a toll bridge does not of itself prevent the Legislature from granting a similar privilege to another corporation in the same vicinity, though the effect may be to impair the value of the first franchise. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773. Often an exclusive ferry franchise is granted, in order to insure accommodation for the public at all times. 11 R. C. L. "Ferries," 923; 7 Fletcher, Corp. § 4296. It is generally held that the erection of a bridge is as much an infringement of an exclusive ferry franchise as the establishment of another ferry. *Norris v. Farmers' & Teamsters' Co.*, 6 Cal. 590, 65 Am. Dec. 535; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396. See *Menzel Estate Co. v. City of Redding*, 174 P. 48, 178 Cal. 475.

For other cases see *Decennial Digests*, Bridges ⚡15; Ferries ⚡11, 16, 19.

CRIMINAL LAW AND PROCEDURE

By JUSTIN MILLER, Professor of Law, University of Minnesota

Section

1. The Nature of Criminal Offenses.
2. Effect of Consent, Condonation, Contributory Negligence, etc.
3. Criminal Intent, General and Specific.
4. The Criminal Act.
5. Various Defenses—Coercion, Mistake, Insanity, etc.
6. Principals and Accessories.
7. Homicide.
8. Offenses against Property.
9. Criminal Procedure.

SECTION 1.—THE NATURE OF CRIMINAL OFFENSES

Q. 1. A stole goods from B. B sued A, and recovered the value of them. Thereafter A was prosecuted for larceny. Was the recovery a bar to his conviction for crime? Distinguish tort and crime.

A. Satisfaction of the injured party is no bar to criminal prosecution. The same act may constitute both a tort and a crime. The first is regarded as an offense against the individual, compensable in damages. The second is regarded as an offense against the state, an offense so harmful in its effects to the whole community that the state should, by apprehending and punishing the wrongdoer, protect the public against the repetition of such offenses.

Edwards v. Wessinger, 43 S. E. 518, 65 S. C. 161, 95 Am. St. Rep. 789.
People v. Kenyon, 52 N. W. 1033, 93 Mich. 19.

For other cases see Decennial Digests, Assault and Battery $\S$ 34; Criminal Law $\S$ 43.

Q. 2. A was charged by indictment with having committed a crime. Under the common law of England, the act which he committed was criminal, but it was prohibited by no statutory enactment of the United States, or of the state in which he lived and where the act was done. Can he be successfully prosecuted either in the federal or the state court?

A. 1. In the federal court he cannot. There are no so-called common-law crimes against the United States. The Supreme Court has said: "A sufficient statutory authority should exist for declaring any act or omission a criminal offense." U. S. v. Eaton, 12 S. Ct. 764, 144 U. S. 677, 36 L. Ed. 591.

2. The rule varies in the state courts.

(a) In some it has been held, in accord with the United States rule, that common-law crimes are entirely unrecognized, and that there must be statutory authority declaring the crime.

(b) In others the common law is still effective in declaring and defining crimes, except in so far as it has been repealed or modified by statute.

(c) In most jurisdictions it is held that the common law may be looked to for definition and interpretation, where the statute declares a crime under a name known to the common law, but fails to define it. *State v. Eastern Coal Co.*, 70 A. 1, 29 R. I. 254, 132 Am. St. Rep. 817, 17 Ann. Cas. 96; *State v. Stephanus*, 99 P. 428, 53 Or. 135, 17 Ann. Cas. 1146.

For other cases see *Decennial Digests*, Criminal Law, ¶10, 13; *Monopolies* ¶8.

Q. 3. Defendant was charged with the crime of assault and battery upon B. The judge gave the following instruction: "If the jury believe from the evidence that the defendant went to the meetinghouse yard and called B out for the purpose of having a difficulty with him, they should find him guilty." Was the instruction correct?

A. No. The general rule is that, in order to find a man guilty of crime, there must be a union or concurrence of act and intent. Conceding a criminal intent on the part of defendant, there is no concurring act here done toward the commission of the offense of assault and battery. Abusive or insulting language does not constitute assault.

Yoes v. State, 9 Ark. 42.

Reed v. Maley, 74 S. W. 1079, 115 Ky. 816, 62 L. R. A. 900, 2 Ann. Cas. 453.

For other cases see *Decennial Digests*, Assault and Battery ¶49; *Torts* ¶8.

Q. 4. Defendant, a policeman, was informed that an offense was about to be committed in a certain house, and entered the house for the purpose of preventing it. After getting into the house and arresting the offending person, he wrongfully picked up and carried away articles of jewelry lying in the house. He was charged with the crime of burglary, which required an unlawful breaking and entry. Is it possible to hold that the unlawful act done after entering the house can make the original entry unlawful?

A. No; the civil-law rule of trespass ab initio does not apply in criminal cases. There must be an actual concurrence of act and in-

tent, and it is impossible to carry back a subsequently formed unlawful intention to give an unlawful character to an act previously done.

Milton v. State, 24 So. 60, 40 Fla. 251.

See 37 Harv. Law Rev. 626.

For other cases see Decennial Digests, Criminal Law ¶1.

SECTION 2.—EFFECT OF CONSENT, CONDONATION, CONTRIBUTORY NEGLIGENCE, ETC.

Q. 5. A, a magnetic healer, at the request of a girl of 18 years and with the consent of her father, gave her a "treatment," which consisted of massaging her naked body for 15 minutes. He then held her in his lap and took some indecent liberties with her person. He was charged with assault and battery. Did the fact that the father and the girl both consented prevent the defendant from being guilty?

A. No; in the absence of consent, the defendant would be clearly guilty of criminal assault. If a person upon whom such acts are committed consents thereto because of ignorance, that should not excuse the defendant. The general rule is that the consent of the injured person to an unlawful act does not excuse the person who commits a crime. Consent will often prevent injurious acts from being crimes, as in football games, boxing matches, and other lawful sports.

Bartell v. State, 82 N. W. 142, 106 Wis. 342.

For other cases see Decennial Digests, Assault and Battery ¶59.

Q. 5a. Defendant went to the home of prosecutrix, at the request of the latter's sister, for the purpose of persuading her to refrain from drinking liquor and having illicit relations with other men in the absence of her husband. Defendant pretended to her that he was an officer who had been sent to arrest her. She begged not to be arrested, and finally permitted defendant to have sexual intercourse with her in order to induce him not to arrest her. Is he guilty of rape?

A. No; if prosecutrix was of such an age and possessed of such mental faculties that she understood the nature of the act and consented thereto, defendant is not guilty. This is the rule in a majority of the states, even though actual fraud be practiced upon the woman in procuring her consent. So it has been held that, if a woman seeks the advice of a physician, and he advises her that the treatment which she needs is sexual intercourse, and procures her

consent thereto by telling her that, if she does not consent, it will be necessary to operate upon her with instruments which will probably kill her, it is no rape. Some states have established a contrary rule, where such fraud is practiced. If the prosecutrix does not actually consent to the act, either because she does not know what is being done to her, or because her inclination to resist is overcome by drugs, or because her resistance is overcome by the use of actual force, other than the force incident to the act of intercourse itself, or fear of death or bodily harm, then the defendant is guilty of rape. The same is true, if the prosecutrix be of such an age that by statute she is declared incapable of giving her consent.

People v. Cavanaugh, 158 P. 1053, 30 Cal. App. 432.

State v. Still (S. D.) 202 N. W. 479.

Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283.

For other cases see *Decennial Digests*, Rape $\S$ 6, 10, 11, 43(1).

Q. 6. Dolan, a former employee of a packing company, was solicited by defendant to assist in stealing a shipment of goods. Dolan communicated this fact to the company, and the latter agreed to let the plan be carried out, in order to trap and convict defendant. The original plan failed. Thereafter the company requested Dolan to arrange again with defendant to steal goods. This Dolan did, and he, together with defendant, worked out a joint plan. This was communicated to the company. The company prepared a shipment of goods, placed it on the platform, and instructed the platform boss to make delivery to the defendant when he should claim them. The plan was carried out, and defendant took the goods and converted them to his own use with criminal intent. Did the actions of the company in this case constitute such consent or acquiescence as to prevent defendant from being guilty?

A. Yes; although the general rule is that the consent of the aggrieved party does not license or excuse a criminal act, still in some classes of cases there can be no crime, except where there is a lack of consent by the victim. This is true of such crimes as larceny, robbery, and rape of adult females.

Topolewski v. State, 109 N. W. 1037, 130 Wis. 244, 7 L. R. A. (N. S.) 756.
118 Am. St. Rep. 1019, 10 Ann. Cas. 627.

For other cases see *Decennial Digests*, Larceny $\S$ 13.

Q. 7. Defendant wished to remove from the public records a certain indictment. The law made it a crime for him to do so. He offered a bribe to the assistant district attorney to procure the indictment for him. The assistant, with the knowledge and advice of the

district attorney and for the purpose of trapping defendant, delivered the indictment. Defendant was immediately arrested. Can he defend on the ground that the participation of the public officer constituted consent on the part of the state, which prevented it from being a crime?

A. No; an officer has no power to consent to the doing of an unlawful act such as this, and consequently it is generally held there can be no consent on the part of the state, which will excuse an act otherwise criminal. This situation has come to be referred to as the practice of "Entrapment," and some courts refuse to hold men guilty of crime, where there is evidence of participation by a public officer in the commission of the crime. Conceding that there should be a limit beyond which officers should not be allowed to go in inveigling suspected men into the commission of crime, the proper rule to apply would seem to be that, if the defendant initiated and planned the offense himself, and carried it through either alone or in collaboration with another, he should be found guilty.

See 33 Yale Law J. 555.

20 Ill. Law Rev. 309.

People v. Mills, 70 N. E. 786, 178 N. Y. 274, 67 L. R. A. 131.

Ford v. City of Denver, 51 P. 1015, 10 Colo. App. 500.

Butts v. U. S. (C. C. A.) 273 F. 35, 18 A. L. R. 143.

U. S. v. Certain Quantities of Intoxicating Liquors (D. C.) 290 F. 824.

For other cases see Decennial Digests, Action ⚡9; Criminal Law ⚡37.

Q. 8. Defendant, a professional horse trainer, was pursuing an escaped animal. He was on horseback, riding rapidly in pursuit. W lived on the street along which the chase was taking place. He was an old man, who used a cane in getting about. Seeking to help defendant, he walked out into the street and by flourishing his cane tried to stop the escaping horse. It swerved and went by him. W then started back to the sidewalk, but was run down and killed by the horse on which defendant was riding. Defendant, being charged with manslaughter, defended on the ground of contributory negligence on the part of W. Does negligence on the part of the injured party, contributing to his injury, operate to prevent defendant's act from being a crime?

A. No. "Contributory negligence, if shown, is never a defense or excuse for crime, nor can it in any degree serve to purge an act, otherwise constituting a public offense, of its criminal character." The offense is against the state, not against the individual. The aged, the infirm, the young, are entitled to make reasonable use of public highways, and drivers of automobiles and other vehicles are,

for the sake of public safety, punishable for culpable negligence, causing death.

State v. Moore, 106 N. W. 16, 129 Iowa, 514.

State v. Peterson, 190 N. W. 345, 153 Minn. 310.

For other cases see Decennial Digests, Criminal Law ¶35; Homicide ¶293.

Q. 9. Defendant represented to M that he had a warrant for M's arrest on a criminal charge. M, to prevent the arrest, gave defendant his watch and a diamond ring, believing that defendant was an officer with a valid warrant for his arrest. Did the fact that M parted with his property as an inducement to the supposed officer to violate the law and his duties prevent defendant's act from being a crime?

A. No; the offense is against the state. It is immaterial whether or not the injured person was himself guilty of wrongdoing, even in connection with the same transaction. If there are two wrongs done, the state should punish both, rather than to permit one rogue to escape merely because another happened to be the victim and the complaining witness.

Horton v. State, 85 Ohio St. 13, 96 N. E. 797, L. R. A. (N. S.) 423, Ann. Cas. 1913B, 90; *Mixell's Cases on Criminal Law*, 78.

State v. Posey, 70 S. E. 612, 88 S. C. 313.

For other cases see Decennial Digests, Criminal Law ¶36; False Pretenses ¶19.

Q. 10. Defendant swindled one W out of \$100. He was arrested and indicted for cheating and swindling. After the arrest, but before indictment, defendant paid to W the amount previously taken and secured a full and complete settlement from W. Can the settlement and condonation of defendant's offense be set up by the defendant as a bar to prosecution?

A. No; for the same reason as in cases of consent to crime, and of contributory negligence and wrongful acts on the part of the injured person, the defendant cannot avail himself of condonation or forgiveness on the part of the complaining witness. The offense is against the state, and if forgiveness is to come from any one presumably it should come from the state. Though settlements and compromises are favored and encouraged as to civil liability, they are forbidden and of no effect as to criminal prosecution, except where statutory provision has been made therefor.

Williams v. State, 31 S. E. 546, 105 Ga. 606.

For other cases see Decennial Digests, False Pretenses ¶22.

Q. 11. Defendant and three others committed a crime. They were apprehended and indicted. In order to avoid conviction and punishment, defendant agreed to give evidence against the three others, in consideration for the promise of the district attorney not to prosecute the case against defendant. Before the trial the district attorney died, and a new one was appointed, who refused to recognize the promise of immunity given by his predecessor. Can defendant use the promise to have the indictment dismissed, or plead it in bar on trial?

A. The promise would probably be recognized in most cases, but more as a matter of keeping public faith, pledged by the district attorney, than as a matter of right or privilege on the part of defendant. The courts have generally refused to recognize such promises, where the district attorney refuses to do so, and, except in jurisdictions where the district attorney may enter *nolle prosequi*, even an express agreement for immunity is not enforceable, except on dismissal with the approval of the court. Condonation on the part of the state should come in the form of pardon, parole, or mitigation of sentence. In some jurisdictions, statutes have been passed providing for immunity in special types of cases.

Commonwealth v. St. John, 54 N. E. 254, 173 Mass. 566, 73 Am. St. Rep. 321.

U. S. v. Ford, 99 U. S. 594, 25 L. Ed. 399.

Heike v. U. S., 30 S. Ct. 539, 217 U. S. 423, 54 L. Ed. 821.

For other cases see Decennial Digests, Criminal Law ¶42.

Q. 12. Defendant was indicted for stealing hogs. He defended on the ground that it was the custom of the community in which he lived for any one to kill unmarked hogs over one year of age running at large on the range. Does a custom of this kind, which is directly contrary to the law of the state, prevent defendant's act from being a crime?

A. No; a general law of a state cannot be repudiated or subverted, even by general agreement among the people of a community. Nor does the fact that a law has not been enforced for a long time justify one in violating it. Even a religious belief, such as that which justified the practice of polygamy, is not sufficient to excuse an act which is otherwise a crime. *Lawrence v. State*, 20 Tex. App. 536; *Everhart v. People*, 130 P. 1076, 54 Colo. 272; *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244. So a religious belief in faith healing would be no lawful excuse to a parent for failing to furnish medical attendance to his children under a statute requiring it. It is doubtful whether the parent would be criminally responsible, in the absence of statute, on grounds of negligence.

State v. Beck (Okl. Cr. App.) 233 P. 495; 23 Mich. Law Rev. 912; 30 Yale Law J. 748.

For other cases see Decennial Digests, Bigamy ⇨2; Criminal Law ⇨31, 34; Parent and Child ⇨17(2).

Q. 13. A, in order to prevent B from violating the law by selling intoxicating liquors, led a mob of 100 persons to B's place of business and demanded that he cease violating the law or leave town within 24 hours. A, on being charged with rioting, defends on the grounds that he had no intention of violating the law, but, on the contrary, was inspired by the desire to secure observance of the law. Is this a good defense?

A. No; motive must be distinguished from intent. A man's motive may be of the highest, but, if his intention is to do an act which is contrary to the law, his good motive is no defense. Crawford v. Ferguson, 115 P. 278, 5 Okl. Cr. 377, 45 L. R. A. (N. S.) 519; Schmidt v. U. S., 133 F. 257, 66 C. C. A. 389. This has sometimes been illustrated in treason, where rebels may be patriots if they succeed, or traitors if they fail, in their attempt at revolution. It is also illustrated by the "conscientious objectors."

For other cases see Decennial Digests, Criminal Law ⇨22.

SECTION 3.—CRIMINAL INTENT, GENERAL AND SPECIFIC

Q. 14. A statute prohibited railroad companies from obstructing highways with standing trains for longer than certain designated periods of time. The defendant railroad company permitted a train to stand in such a position as to block a highway for a much longer time than the law allowed. The defendant was charged with crime, and upon the trial introduced evidence to show that the delay in removing the train was caused by the malicious meddling of a third person, who tampered with the air brakes. This was in support of the defense that there was no criminal intent. Is it necessary that the state prove an intent to commit the crime?

A. Not under the circumstances of this case. The general rule is that there must be a union of act and intent in order to constitute a crime, and that the absence of either is fatal to a conviction. General intent need not be proved, except by proof of the act; but the defendant may negative mens rea by showing mistake of fact, coercion, insanity, infancy, act of third party, etc. In certain statutory police regulations, like the present, it is held, contrary to the general rule, that no culpability at all is necessary. With regard

to police regulations, the statute may often be construed as intended to make one act at peril, to "impose criminal penalties, irrespective of any intent to violate the law; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." The object is effective enforcement, rather than punishment of wrongdoing. So, for selling diseased meat or narcotics, absolute liability may be imposed, regardless of whether or not there was an intentional breach of the law, negligence, good faith, scienter, ignorance, or mistake as to the facts.

35 Harv. Law Rev. 462.

20 Mich. Law Rev. 911.

People v. Roby, 18 N. W. 365, 52 Mich. 577, 50 Am. Rep. 270.

Com. v. New York Cent. & H. R. R. Co., 88 N. E. 764, 202 Mass. 394, 23

L. R. A. (N. S.) 350, 132 Am. St. Rep. 507, 16 Ann. Cas. 587.

U. S. v. Balint, 42 S. Ct. 301, 258 U. S. 250, 66 L. Ed. 604.

For other cases see Decennial Digests, Criminal Law ⚡20, 33; Intoxicating Liquors ⚡168; Railroads ⚡246.

Q. 14a. A rented a room from B, and requested B to move his trunk from the railroad station to his house. B took his automobile to the station to move the trunk. It was placed in the automobile, and B started to drive home, when the car broke down. Thereupon A appropriated another car, which was parked nearby, belonging to D, a stranger, placed his trunk in it, and started again for B's house, accompanied by B. On the way A opened the trunk, took therefrom one bottle out of a case of whisky, from which he drank along the way. B, becoming fearful that A would become drunk and wreck the car, removed the bottle from A's pocket and concealed it in his own pocket. Just at that moment A and B were placed under arrest.

(a) Is B guilty of transporting liquor?

(b) Can B's automobile be confiscated, on account of its use for the transportation of liquor?

(c) Can D's automobile be confiscated for the same reason?

A. (a) There is considerable conflict on this point, depending upon the language of the particular statute and the rule of the particular jurisdiction as to the necessity of a criminal intent. Some courts take the position that in this case, as in others of statutory prohibition, to do the prohibited act is sufficient, in the absence of a requirement of specific intent. On the other hand, some courts hold that guilty intent is a necessary element of the crime. Com. v. Mixer, 93 N. E. 249, 207 Mass. 141, 31 L. R. A. (N. S.) 467, 20 Ann. Cas. 1152; Locke v. City of Ft. Smith, 244 S. W. 11, 155 Ark. 158; State v. Lough, 124 S. E. 606, 97 W. Va. 241.

(b) B's automobile may be confiscated, even though B was unaware of the fact that it had been used for such an unlawful purpose, on the theory that only in this way can the public interest in checking a prohibited practice be effectually protected. Some statutes permit the innocent owner to prevent forfeiture by proving his lack of guilty knowledge. *Jones v. Com.*, 126 S. E. 238, 141 Va. 459; *State v. Davis*, 184 P. 161, 55 Utah, 54.

(c) D's automobile should not be subject to confiscation. He is an entire stranger to the whole transaction, and has never in any way authorized the use of his car. While in the case of B's automobile it may fairly be said that the owner was in possession, himself driving the vehicle, and hence he was in fact transporting the liquor, in the case of D's automobile it is impossible to connect the owner with the prohibited act any more closely than through the fact of ownership alone. It has been suggested that the due process clause of the Fourteenth Amendment would prevent confiscation. The few judicial declarations in point indicate that confiscation, in such a case, would be held improper. *U. S. v. One Saxon Automobile*, 257 F. 251, 252, 168 C. C. A. 335.

For other cases see *Decennial Digests, Intoxicating Liquor* ⇨ 6, 42, 131, 138, 250, 251.

Q. 15. Defendant was a switchman. By reason of his failure properly to perform his duties in adjusting switches, a train was wrecked, and a passenger thereon was killed. It was found that defendant was guilty of gross negligence, but except for that fact it was not suggested that he had any intention to cause the death of the passenger. Was there a sufficient intent in this case?

A. Yes; it is not necessary that there shall be intentional or willful wrong on the part of defendant, to hold him guilty of manslaughter. In this case his omission to perform his duty amounted to gross or culpable or criminal negligence, which makes him criminally accountable. Criminal "intent" unfortunately is a vague term, which is used to refer to various different mental elements of criminal responsibility, which are easily confused.

(1) General intent, or "mens rea," must be carefully distinguished from the specific intent, which is part of the definition of certain particular offenses, the intent to kill, to steal, to burn, to wound, malicious motives, etc.

(2) General intent includes such diverse mental conditions of culpability or punishability as (a) intent to do the act prohibited; (b) intent to do some other crime; (c) intent to do something morally wrong; (d) wicked or culpable negligence; (e) scienter, or

knowledge of the circumstances. *State v. O'Brien*, 32 N. J. Law, 169; *Clemens v. State*, 185 N. W. 209, 176 Wis. 289, 21 A. L. R. 1490 (manslaughter—reckless driving of automobile). Criminal negligence may consist in nonfeasance, or failure to perform a duty on which the safety of human life depends, or in misfeasance, as in driving an automobile in a dangerous and reckless manner, resulting in the killing.

For other cases see Decennial Digests, Homicide ¶74, 79.

Q. 16. Defendant boarded a vessel lying at a pier in Hoboken, inquired for Mayor Gaynor, placed a revolver within a few inches of the mayor's head and fired. One Edwards threw himself between defendant and Gaynor, and was wounded by a shot from defendant's revolver. Defendant was charged by indictment with an assault upon Edwards with intent to kill him. He defended on the ground that his intent was to kill Gaynor, and that therefore, as the indictment charged an offense requiring a specific intent against Edwards, it must be expressly so proven, or the charge would fail. Is defendant's contention correct?

A. No; the general rule is that, where an offense is so defined as to require a specific intent, such intent must be proved as charged, or the charge will fail. So it has been held that specific intent will not be inferred from the firing of a loaded pistol at another, but the presence or absence of specific intent to kill may be inferred from surrounding circumstances. By the doctrine of constructive intent it is held that the specific intent to commit a crime upon one person may be proved in support of an allegation of specific intent to commit the same offense upon another. In the problem stated, it appeared that defendant assaulted Edwards. He had the specific intent to commit an assault with intent to kill. It is immaterial, for purposes of punishment, whether the person actually shot was the one he intended to shoot or not.

State v. Taylor, 39 A. 447, 70 Vt. 1, 42 L. R. A. 673, 67 Am. St. Rep. 648.

State v. Gallagher, 85 A. 207, 83 N. J. Law, 321.

People v. Maciel (Cal. App.) 234 P. 877.

For other cases see Decennial Digests, Criminal Law ¶25, 312, 369(3), 568; Homicide ¶86, 142(10), 145.

SECTION 4.—THE CRIMINAL ACT

Q. 17. Defendant was possessed of a quantity of intoxicating liquors, which he had purchased and stored in his home prior to 1915. Under a law of Georgia adopted in 1917, it was made unlawful to possess such liquors. Defendant did nothing thereafter, except to

leave the liquors stored in his house. Has he done any act which is sufficient to make him guilty of crime?

A. Yes; his unlawful act consists in continuing to possess the liquor after the enactment of the law. While the law requires, for a person to be guilty of crime, that he must do some act, it is not necessary that such act should be an affirmative one. Neglect or omission to do some act may be sufficient in itself.

Samuels v. McCurdy, 45 S. Ct. 264, 267 U. S. 188, 69 L. Ed. 568, 37 A. L. R. 1378.

For other cases see *Decennial Digests, Constitutional Law* ⇨ 197, 319.

Q. 18. A, B, and C agreed to burglarize a bank. They made complete plans for the burglary, including the fixing of the time, the place, and the part to be performed by each. They prepared a chart, showing the location of the bank, the surrounding streets, the doors and windows of the bank and surrounding buildings, the location of telephone and burglar alarm wires, and the location of barrels, boxes, and pillars which might be used as hiding places. Their plans were overheard, and they were arrested before they had a chance to carry out the crime. Was there any sufficient act here to constitute a crime?

A. Yes; the acts set out, when coupled with a criminal intent, are sufficient to constitute the crime of conspiracy. Although all of the things done by A, B, and C, if done by one alone, would not have been sufficient to establish guilt, the joint participation of all of them in the plans, preparations, and negotiations gives the character of conspiracy thereto, and brings it within the prohibition of the law.

At common law it was unnecessary that there should be any overt act whatsoever in order to prove conspiracy, and this is still the general rule in the absence of statute. The statutes of different states establish different rules as to what is necessary to prove conspiracy. Some require overt acts in conspiracies to commit the more serious offenses, and not for lesser offenses.

U. S. v. Rabinowich, 35 S. Ct. 682, 238 U. S. 78, 86, 59 L. Ed. 1211.

See 37 *Harv. Law Rev.* 1121.

For other cases see *Decennial Digests, Criminal Law* ⇨ 147.

Q. 19. A requested B to burn C's house, paid B \$100, and agreed to pay \$100 when the house was burned. B did not burn the house. Is A guilty of any crime?

A. In most jurisdictions A could be indicted for the crime of solicitation. A few jurisdictions hold that merely soliciting a per-

son to commit a crime is not in itself an offense. Some others hold that, in order to constitute an offense, the solicitation must have been to commit a felony. The proper rule would seem to be that there is no logical reason why guilt or innocence should be determined on the basis of the arbitrary division between felonies and misdemeanors, but instead that any act of solicitation which "especially affects public society to its injury" is criminal.

State v. Schleifer, 121 A. 805, 99 Conn. 432, 35 A. L. R. 952.

Com. v. Randolph, 23 A. 388, 146 Pa. 83, 28 Am. St. Rep. 782.

State v. Butler, 35 P. 1093, 8 Wash. 194, 25 L. R. A. 434, 40 Am. St. Rep. 900.

For other cases see Decennial Digests, Criminal Law ¶45.

Q. 20. A was the proprietor of a gambling resort. B, a policeman, in order to see what was going on in A's establishment, bored a hole in the roof. A discovered this fact, and one night, believing that B was looking through the hole, fired deliberately at it. The bullet passed through the hole, but did not hit B, because he was for the moment at a different place on the roof. Did A do any sufficient act to make him guilty of a crime?

A. Yes; an attempt to commit a crime, if it goes far enough toward its commission, may be itself a crime. It is necessary in such a case that there should be an intent to commit a crime, and that some act or acts should have been done by the defendant actually calculated, if not interrupted, to result in the commission of the intended crime. It is necessary, also, that there should be a present capacity or ability on the part of the defendant to commit the crime. If either of the three elements is missing, then there is no attempt. So a mere act of preparation is not sufficient. Neither is it sufficient if, at the time, it is not even apparently possible for the defendant to commit the crime. What acts amount merely to preparation, and when it is not sufficiently possible for defendant to commit the crime, are difficult questions of degree, and the cases are not in accord. In some jurisdictions it is held that an attempt to commit a misdemeanor is no offense.

People v. Lee Kong, 30 P. 800, 95 Cal. 666.

Com. v. Peaslee, 59 N. E. 55, 177 Mass. 267.

See 21 Mich. Law Rev. 595.

For other cases see Decennial Digests, Arson ¶13; Homicide ¶89(1).

SECTION 5.—VARIOUS DEFENSES—COERCION, MISTAKE, INSANITY, ETC.

Q. 21. Defendant, a woman, was examining rings at a counter in company with a man. The clerk turned aside for a moment to speak to another customer, whereupon the defendant took one of the rings from the tray and attempted to make her escape. The only defense relied on by defendant was that, as the act was committed in the presence of the man, whom she testified was her husband, she must be presumed to have been acting under the coercion of her husband, and hence was not guilty of the crime. Is the contention correct?

A. No; the old common-law rule, to the effect that, when an act which would otherwise have been a crime was committed by a wife in the presence of her husband, she would be presumed to be acting under his coercion, has been taken over practically without modification in some states, sometimes with almost absurd results. In others, the presumption has been abolished by statute. In most jurisdictions, the presumption is still allowed, but it is held to be a rebuttable one. There would seem to be no good reason why a married woman should not be required to prove affirmatively the existence of coercion, if she relies upon it for a defense.

Com. v. Adams, 71 N. E. 78, 186 Mass. 101.

State v. Miller, 62 S. W. 692, 162 Mo. 255, 85 Am. St. Rep. 498.

For other cases see Decennial Digests, Husband and Wife ¶108.

Q. 22. Defendant, a private in the army, was detailed, with others, to go to the home of one T. While the detachment was there, trouble occurred, and T was shot and killed. Defendant was indicted and tried for murder, and defended on the ground that he was acting upon command of his superior officer. Is this a good defense?

A. Under ordinary circumstances this would be a good defense, if the defendant was actually engaged in carrying out the lawful orders of his superior at the time of the killing, and the death resulted from his acts while so engaged. A private is bound to follow the lawful orders of his superior, and is only liable if the order is so clearly illegal that a man of ordinary sense and understanding would know, "as soon as he heard the order read or given, that such order was illegal." In cases other than in military service, the command of a superior officer would be no defense under such circumstances, not even if the command were accompanied by threats of death or great bodily injury, unless the threats were con-

tinuing, and the defendant was under real coercion and compulsion during the whole of the time during which the act was being done.

Riggs v. State, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272.

People v. Repke, 61 N. W. 861, 103 Mich. 459.

See 8 Journal Criminal Law and Criminology, 190.

For other cases see Decennial Digests, Army and Navy ⚡36; Criminal Law ⚡38; Homicide ⚡126.

Q. 23. Defendant was indicted under a law which prohibited all except physicians from carrying intoxicating liquors to church. He defended on the ground of necessity, because of the fact that his wife suffered from heart trouble, and he had been advised by his physician always to carry liquor with him. Is necessity a good defense?

A. No; the necessity must be great and unavoidable, in order to justify doing an act which would otherwise constitute a crime. It would have been possible for defendant to have left his wife at home, to have carried other medicine, or to have taken along a physician. Any such alternative is sufficient to defeat the contention of necessity. In some cases it has been held that, where death is the only other alternative, the defendant is justified in doing the act; but, where the act consists in taking the life of another in order to save his own, the cases generally deny that defendant's necessity is a sufficient excuse.

Bice v. State, 34 S. E. 202, 109 Ga. 117.

U. S. v. Ashton, 2 Sumn. 13, Fed. Cas. No. 14,470.

U. S. v. Holmes, 1 Wall. Jr. (U. S.) 1, Fed. Cas. No. 15,383.

For other cases see Decennial Digests, Homicide ⚡126; Intoxicating Liquors ⚡139; Seamen ⚡34.

Q. 24. A, a business man of good repute, sought advice of a competent attorney as to how he should conduct his business in order to conform to a law recently passed by the Legislature. He received the advice and acted accordingly. On being indicted for a violation of the law, it was urged in his defense that he should not be held guilty because of his mistake as to the meaning of the law. Is this a good defense?

A. According to the general rule that ignorance of or mistake as to what the law forbids excuses no one, A would have no defense. The rule has one recognized exception, in cases which require specific intent, under circumstances such that a mistake of law can be said to prevent the existence of such an intent. An honest mistake as to the title to property under a particular set of facts may negative the existence of a criminal intent to steal.

This, of course, would not apply in a case where no criminal intent is required.

See 38 Harvard Law Review, 96.

State v. Hunt, 54 A. 937, 25 R. I. 75.

Cutter v. State, 36 N. J. Law, 125.

State v. O'Neil, 126 N. W. 454, 147 Iowa, 513, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912B, 691.

Landen v. U. S. (C. C. A.) 299 F. 75.

For other cases see Decennial Digests, Courts $\Leftrightarrow$ 100(3); Criminal Law $\Leftrightarrow$ 32.

Q. 25. Defendant and his first wife were first cousins, who had married in Iowa, where such marriages were valid. They moved to Nebraska, where such marriages, consummated in Nebraska, were void. There defendant was threatened with prosecution, if he did not abandon his relations with his cousin. Defendant sought advice from three attorneys, each of whom advised him that the marriage was void. Thereupon he and his cousin separated. A year later he heard that his cousin had died. A few months later, having heard nothing more about her and believing her dead, defendant married again. As a matter of fact, the cousin was still alive, and the Iowa marriage was valid in Nebraska. Defendant was prosecuted in Nebraska for bigamy. Was defendant's honest belief that the marriage with his cousin was void, and that she was dead, a good defense?

A. No; his belief that the first marriage was void was a mistake of law, as to which it is generally held that ignorance or mistake is no defense. Staley v. State, 131 N. W. 1028, 89 Neb. 701, 34 L. R. A. (N. S.) 613. His belief that his wife was dead was a mistake of fact. On this point the authorities are not in accord. Some of them follow the leading English case, Regina v. Tolson, 23 Q. B. D. 168, holding that such a mistake prevents the existence of a mens rea, or of a criminal intent, and excuses the defendant. A large majority of the American cases reject the reasoning of the Tolson Case, holding instead that the bigamy statute, requiring as it does no specific intent, is satisfied if there be an intention on the part of the defendant merely to do the act, to wit, the act of remarriage. People v. Spoor, 85 N. E. 207, 235 Ill. 230, 126 Am. St. Rep. 197, 14 Ann. Cas. 638.

For other cases see Decennial Digests, Bigamy $\Leftrightarrow$ 2.

Q. 26. Defendant's house was surrounded at night by a boisterous "Calathumpian" band, which made a great noise, including the firing of guns and pistols. During the excitement defendant's daughter, who had been sleeping near a window, ran to him with

blood on her face. Defendant thought she had been shot. As a matter of fact she had only run into a table. Hastily picking up a gun, defendant fired into the crowd and wounded the prosecutor. Was defendant entitled to present this evidence on the trial in his defense?

A. Yes; a mistake of fact is generally held to be a good defense in criminal cases, contrary to the general rule applied to mistakes of law. Where the offense is of such character that merely committing the prohibited act is all that the law requires, then even mistake of fact may not excuse. *State v. Nash*, 88 N. C. 618; *Welch v. State*, 129 N. W. 656, 145 Wis. 86, 32 L. R. A. (N. S.) 746; *People v. Hartman*, 62 P. 823, 130 Cal. 487. See 3 Cal. Law Rev. 452, 7 Cal. Law Rev. 1; 35 Harv. Law Rev. 462; 20 Mich. Law Rev. 109. "Mistake of fact is a defense, not merely because it negatives specific intent, but also because it negatives guilt and the conscious choice of wrongful conduct. According to *Reg. v. Prince*, L. R. 2 C. C. 154, mistake of fact is no defense if the defendant knows he is doing an act immoral or evil in itself. Notwithstanding the mistaken belief, there is a guilty state of mind." *Brown v. State*, 74 A. 836, 23 Del. (7 Pennewill) 159, 25 L. R. A. (N. S.) 661; *Maguire v. People*, 76 N. E. 67, 219 Ill. 16.

"The general subjective conditions of criminality, presupposed as a general rule, in addition to the particular state of mind, motive, or intent included in the definition of various crimes, are then as follows: (1) Competent age; (2) some degree of sanity; (3) freedom from overpowering coercion; and (4) a "punishable state of mind"—i. e., some blameworthy form of intentionality, consisting either of intent to commit some crime or to do some serious wrong. Gross or culpable negligence may, in the case of a killing and perhaps of assault, take the place of intent to do wrong. While a guilty mind or conscious wrongdoing is usually an essential ingredient of crime, yet this fourth element may be excluded in police regulations for the sake of practical enforcement, and persons may be held to act at their peril, even where they labor under ignorance or mistake as to the circumstances and no intent to break the law or to do a forbidden act is proved. The doctrine of constructive intent, or criminal liability for the accidental consequences of attempts to carry out some criminal purpose, involves intent to do something wrong in itself. This is applicable only where the criminal intent is to do something *malum in se*, and not where it is merely to do something *malum prohibitum*." *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362; *State v. Horton*, 51 S. E.

945, 139 N. C. 588, 1 L. R. A. (N. S.) 991, 111 Am. St. Rep. 818, 4 Ann. Cas. 797, Beale's Cases Crim. Law, p. 239; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cases Crim. Law, p. 300; Ballantine, "Criminal Responsibility of the Insane," Journal of Criminal Law and Criminology, vol. 9, No. 4, pp. 490, 491, 493.

For other cases see Decennial Digests, Assault ⚡49, 66; Bigamy ⚡1; Criminal Law ⚡21; Food ⚡15; Homicide ⚡2, 62; Prostitution ⚡1, 2.

Q. 27. The defendant was convicted of the crime of manslaughter, for having thrown a brick from the roof of a house, which struck deceased on the head and killed him. The defendant's age was 11 years. No evidence was offered by the state to prove defendant's capacity to understand the nature of the act charged against him. Was the conviction proper?

A. No; the law conclusively presumes that an infant under the age of 7 years is incapable of committing crime. The capacity of a child over 14 is to be tested in the same manner as that of an adult. As for a child between 7 and 14, the presumption is in favor of the child and against capacity; but this presumption may be rebutted by proof of capacity. Even a plea of guilty by a child between 7 and 14 will not overcome the presumption. The age limits vary slightly from state to state.

People v. Squazza, 81 N. Y. S. 254, 40 Misc. Rep. 71.

People v. Domenico, 92 N. Y. S. 390, 45 Misc. Rep. 309.

For other cases see Decennial Digests, Infants ⚡66.

Q. 28. Defendant, on trial for murder, offered the defense of insanity supported by evidence to the effect that 18 months prior to the commission of the offense he had been committed to an insane asylum. Should he be acquitted on this ground?

A. Certainly not on that evidence alone. In order that insanity should be a good defense, it must appear that the mind of the defendant was so affected at the time of the commission of the act constituting the alleged crime that he was not responsible for his acts, according to the standard of accountability fixed by the law. Insanity, in and of itself, is no defense—an insane person cannot be tried or punished, but the defense of insanity involves only the issue of the accused's accountability at the time of the act. Mental weakness, feeble-mindedness, moral depravity, or even insanity do not exempt from punishment, if there was capacity to know that the act was wrong.

People v. Kirby, 114 P. 794, 15 Cal. App. 264.

For other cases see Decennial Digests, Criminal Law ⚡48.

Q. 29. A was engaged in whipping his son, who had committed some minor offense. B, a stranger to A, passed by, saw what was happening, and killed A. B was charged with murder. On his trial he requested that an instruction be given to the effect that, if the jury should find that at the time of the killing his mind was so affected by disease that he suffered from an uncontrollable impulse to kill any person whom he saw hurting a child, then the jury should also find that he was insane, and acquit him. Was this a proper instruction?

A. No; the general rule, as applied by most of the courts today, is that the proper test of responsibility is the defendant's capacity or lack of capacity to understand the nature and quality of the act done, and his mental power to distinguish between right and wrong with respect to that particular act at the time he committed it. If such capacity is lacking, or if there be an absence of the specified degree of mental power, then the defendant is unaccountable in the eyes of the law and cannot be convicted. The doctrine of irresistible or uncontrollable impulse would add the further qualification that, even if the defendant had the power to distinguish between right and wrong, but was unable to resist his impulse to commit the prohibited act, then he should be held to be not guilty because of insanity. Only a few cases support this doctrine. See 9 Journal Crim. Law & Criminology, 485; 12 Journal Crim. Law & Criminology, 14; State v. Knight, 50 A. 276, 95 Me. 467, 55 L. R. A. 373; Parsons v. State, 2 So. 854, 81 Ala. 577, 60 Am. Rep. 193; Smith v. Mississippi, 49 So. 945, 95 Miss. 786, 27 L. R. A. (N. S.) 461, Ann. Cas. 1912A, 36; People v. Schmidt, 110 N. E. 945, 216 N. Y. 324, L. R. A. 1916D, 519, Ann. Cas. 1916A, 978. The test of criminal responsibility would seem properly to be capacity to discriminate between what is morally right and wrong, rather than legally, because he is not a morally responsible agent if he is incapable of understanding the wickedness of his deed.

For other cases see Decennial Digests, Criminal Law 48, 49, 50, 51; Homicide 27.

Q. 30. Defendant drank some whisky for the purpose of relieving a toothache, not, however, upon instructions of a physician. While intoxicated as a result of drinking the whisky, he shot and wounded a policeman, who tried to arrest him. Is the fact of his intoxication any ground of defense?

A. No; one who becomes intoxicated as a result of his own voluntary acts has no preferred position over a sober man, in the

sense that he is any the less responsible for his acts. If he becomes intoxicated through fraud or the ministrations of a physician, and as a result is in such a condition of mind that he is temporarily insane, that fact may constitute a defense; or if, as a result of continued drinking, he becomes actually and permanently insane, he may defend on that ground, even though the drinking was voluntary. In cases where a specific intent is required, proof of intoxication is permitted, in order to show lack of capacity to form such a specific intent. Except for these limitations, the general rule prevails that intoxication is no defense. *Director of Public Prosecutions v. Beard*, (1920) App. Cas. 479, 12 A. L. R. 846; *Johnson v. Comm.*, 115 S. E. 673, 135 Va. 524, 30 A. L. R. 755; *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556; *State v. Haab*, 29 So. 725, 105 La. 230; *Whitten v. State*, 22 So. 483, 115 Ala. 72; 34 Harv. Law Rev. 78. There is a great difference between insanity and voluntary intoxication as a defense. Such intoxication is no excuse, except where it negatives specific intent. Insanity may not negative the specific intent to kill, to rape, or to steal, and yet may negative the morally accountable mind, the *mens rea*.

For other cases see *Decennial Digests, Criminal Law* ¶53, 56, 57; *Homicide* ¶28, 94.

Q. 31. The defendant was a corporation employing men in public work. Disregarding the United States statute limiting the hours of work of employees so engaged, the corporation required its employees to work for longer periods than the law allowed. On being charged with a violation of the statute, the defendant moved to quash the summons on the ground that the statute did not apply to corporations, because corporations could not commit crimes. Was the contention sound?

A. No; the earlier cases held that corporations were incapable of entertaining criminal intent, and consequently could not be held guilty. The later cases, however, hold that corporations may be guilty of crimes in which the intention of the agents or servants may be imputed to the corporation. It is conceded that a corporation cannot be guilty of certain types of crimes, such as bigamy, perjury, and rape, which cannot be incidental to the servant's employment. *U. S. v. Nearing* (D. C.) 252 F. 223; *U. S. v. John Kelso Co.* (D. C.) 86 F. 304. See *Corporations*, Q. 38, ante, p. 346, 18 Ill. Law Rev. 305. There is no difficulty in holding a corporation criminally liable, where the offense is one punishable by fine, and where an individual employer could be held for the act of his servant, as in case of public nuisances and the violation of police regulations,

like labor laws. The maxim "respondeat superior," which is applicable in tort, does not, in general, apply in crimes involving mens rea.

For other cases see Decennial Digests, Corporations ¶529.

Q. 32. One H was indicted for resisting officers of the United States in the discharge of their official duties. A warrant was issued for his arrest. The officers in whose hands the warrant was placed for service summoned the defendant to assist them in making the arrest. Defendant was stationed at the rear of a house in which H had taken refuge, while the officers went in the front door. H came out the back door with a pistol in his hand, advanced directly toward defendant, and refused to halt when defendant commanded him to do so. Thereupon defendant shot and killed H. Defendant knew that H was a bad character, that he had resisted arrest before, and that he had defied the officers to arrest him, saying that he would never be taken alive. Was defendant justified in killing H?

A. Yes; an officer, in the performance of his duty, is justified in using reasonable force to do so. If it becomes necessary, in the performance of his duty, to serve process upon another or to arrest him, and that person uses force to resist, then the officer may use force to perform his duty, even to the extent of killing, if necessary. Some jurisdictions make a distinction between felonies and misdemeanors, holding that an officer may not kill in preventing a misdemeanor. It is generally held that an officer may not kill to prevent the escape of one charged only with a misdemeanor. A private person, who acts as defendant did here upon the summons of an officer, stands in the same position as the officer.

See 22 Mich. Law Rev. 557, 798, 808.

State v. Laing, 133 F. 887, 66 C. C. A. 617.

U. S. v. Rice, 1 Hughes, 560, Fed. Cas. No. 16,153.

For other cases see Decennial Digests, Homicide ¶105, 111.

Q. 33. B, a schoolmaster, was employed to teach in a district school, where the big boys had made life miserable for several preceding teachers. C, one of the students, committed a breach of discipline by using objectionable language, and was severely punished by B. The punishment included striking C in the face with his fists, and over the head and in the face with a stick. B is prosecuted for assault and battery on C. There was evidence to show that B was greatly excited, and stated, among other things, that he "would conquer him (C) or kill him." Did B's position as teacher justify him in doing what he did in this case?

A. No; a teacher is supposed to stand in the same position as a parent, and, while he is usually conceded to have authority to use some force in disciplining his pupils, in order to preserve the order of the schoolroom, he is, like the parent, or the master, or the guardian, limited to the use of reasonable force under the circumstances of the case. If there be evidence of excessive force used, or of malice in its use, then he exceeds his authority and becomes guilty of crime.

Boyd v. State, 7 So. 268, 88 Ala. 169, 16 Am. St. Rep. 31.

See 37 A. L. R. 704.

For other cases see Decennial Digests, Assault and Battery ¶91.

Q. 34. A and B were neighbors and enemies of long standing. A went to see B about a dispute over some hay, which B had cut, and which A claimed was on his side of the division line. When B saw him coming, he flew into a rage, and started for his gun, which was standing by his house a few feet away. A was then several hundred feet from any shelter, he was a much smaller man, and knew that B was a strong-willed, vindictive man. Before B could reach his gun, A shot him. Can A defend on the ground of self-defense, or was it his duty to retreat to avoid danger?

A. Yes; the defense is good. The old rule regarding self-defense was that a man must "retreat to the wall," or other obstruction beyond which he could not further retreat, before he would be justified in killing his assailant. This doctrine was developed at a time when combats between men were carried on with fists, clubs, knives, etc., and before high-powered guns were invented. It is now generally conceded that the defendant is under no duty to retreat when by so doing he could not reasonably protect himself, and he appears to be in imminent danger of losing his life or of receiving great bodily harm from his assailant. *Brown v. U. S.*, 41 S. Ct. 501, 256 U. S. 335, 65 L. Ed. 961, 18 A. L. R. 1276; *State v. Gardner*, 104 N. W. 971, 96 Minn. 318, 2 L. R. A. (N. S.) 51; *State v. Ballentine*, 125 S. E. 291, 130 S. C. 123. In some states the rule is declared that a person who is attacked elsewhere than in his own dwelling is not excused for killing in self-defense, if a safe way of retreat is open to him. In other jurisdictions, this common-law doctrine of retreat is rejected, and if the person attacked is without fault, and is put in reasonably apparent danger, he may stand his ground, and repel force by force.

For other cases see Decennial Digests, Homicide, ¶117, 118(2), 300(3, 15).

Q. 35. A, a highly nervous, excitable man, was walking in his garden. B, his next door neighbor, had set up a target in his yard,

and just at that moment started firing at it with a small-caliber rifle. A and B had never had any trouble before. A, by reason of his disposition, thought that B was shooting at him, picked up a brick, and threw it at B, striking him on the head and killing him. Is his contention that he was acting in self-defense good?

A. No; the test applied in such cases, in determining whether a killing in self-defense is justified, is whether the defendant has reasonable grounds to believe that he was in actual danger of death or great bodily harm. It is not necessary that there should be actual danger. An apparent danger is sufficient. There is some question as to what constitutes "reasonable grounds." The majority rule is that this is to be determined from the standpoint of a reasonable man, acting under the same or similar circumstances. Some courts hold that the standpoint of the individual himself must be taken as the basis of consideration, and the question is not what a reasonable man would have believed, but whether the defendant, at the time and under the circumstances, acting as a reasonable man, did himself believe that he was in actual danger of death or great bodily harm. In determining whether the defendant, under either of these tests, acted in self-defense, the jury is required to consider the age, size, physical strength, and condition of the parties, the character of the assault, and all the circumstances surrounding the case. In the problem given it seems inconceivable that a reasonable person, or any person acting as a reasonable one under the circumstances, could have supposed that he was in actual danger of death or great bodily harm.

State v. Sterrett, 25 N. W. 936, 68 Iowa, 76.

People v. Duncan, 145 N. E. 810, 315 Ill. 106.

For other cases see Decennial Digests, Homicide ☞116(4).

Q. 36. A and B were engaged in a fight. B was getting the worst of it. C, a friend of B, came along at that moment, and, seeing B in distress, shot A and killed him. He seeks to justify his act on the ground that he was acting in defense of another. Is the defense good?

A. No; if C had been a close relative, such as a father, son, or brother, or if he had occupied the position of one who owed a duty of supervision or care, such as a master toward his servant, or a guardian toward his ward, he might have been justified. One who does not occupy such a relationship is justified only in acting to preserve the peace, prevent crime, or make an arrest, and can use no more force than is necessary for such a purpose. If C had occupied such a relationship as one of those suggested above, then

the better rule as to the test of his right to kill A, in order to protect B, is whether or not B was in such a position as to warrant a killing on his part in self-defense. Some cases qualify this rule in favor of one to whom there appears to be reasonable ground for concluding that the person in whose defense he acts would have been justified in killing in self-defense.

Morrison v. Com., 74 S. W. 277, 24 Ky. Law Rep. 2493.

People v. Forte, 110 N. E. 47, 269 Ill. 505, L. R. A. 1916B, 924.

For other cases see Decennial Digests, Homicide $\S$ 112(2), 122.

Q. 37. Defendant occupied and used a house for the purpose of manufacturing moonshine whisky, and used one of the rooms as a bedroom. One night the house was entered by a burglar, who came into the bedroom, threw a flashlight upon him, and commanded: "Hands up, or I shoot." Defendant shot and killed the intruder. Is his contention that he had a right to kill the deceased in protection of his habitation correct?

A. Yes; provided that the killing was done under necessity, or apparent necessity, for the purpose of preventing the commission therein of a felony, or the loss of life, or great bodily injury of an inmate thereof. The defense of habitation does not justify the killing of one who is lawfully within the house, or of one as to whom there is not even an apparent necessity of using such extreme force. If a building is actually the habitation of the defendant, he is entitled to defend it against an unlawful intruder, even though he may be using the house for an unlawful purpose.

State v. Sorrentino, 224 P. 420, 31 Wyo. 129, 34 A. L. R. 1477.

State v. Touri, 112 N. W. 422, 101 Minn. 370.

Rex v. Hussey, [1924] 8 Cr. App. Cas. 160.

2 Cambridge Law J. 231.

For other cases see Decennial Digests, Homicide $\S$ 123, 300(7).

Q. 38. A, an officer, placed B under arrest for murder, and took him to the police station. When nearly there C, a friend of B, attacked A for the purpose of effecting the escape of B, and was killed by A in order to prevent the escape. Can A defend successfully on the ground that he killed C in order to prevent the commission of a felony?

A. Yes; assisting a felon to escape is generally classed as itself a felony, and, if it becomes necessary to kill one who attacks an officer for the purpose of effecting an escape, the officer is justified in so doing. If the original arrest was wrongful, then the officer would not be excused, and it is sometimes held that he would not be justified in killing to prevent the escape of a misdemeanor.

The right to kill in order to prevent a felony is limited to felonies attempted by force or surprise, and not to secret felonies, such as larceny. Nor does it extend to situations in which the crime has been completed, and the killing is really in revenge or by way of punishment.

State v. Smith, 103 N. W. 944, 127 Iowa, 534, 70 L. R. A. 246, 109 Am. St. Rep. 402, 4 Ann. Cas. 758.

Drew v. State, 71 S. E. 1108, 136 Ga. 658.

Flynn v. Com., 264 S. W. 1111, 204 Ky. 572.

For other cases see Decennial Digests, Homicide ☞ 105, 107, 124.

Q. 39. A discovered B in the bedroom of W, A's wife. Both B and W were in their nightclothes. He immediately shot and killed B. Was the homicide justifiable?

A. If B was about to commit rape upon W, and the killing was done to prevent the commission of that crime, then it was justifiable. If either rape or adultery had already been committed, and W was in no further danger of harm, then the killing would not be justifiable, for there would be no occasion for the use of such a remedy. It would be merely a matter of revenge or punishment in such a case. Of course, according to the statement of facts given, it might be very difficult to tell whether the act had been committed, or was about to be committed. Under such circumstances A should have the benefit of the doubt, on the question of fact. If the act about to be committed, or even in actual course of commission, was adultery, and this fact was known to the husband, A, most jurisdictions hold that the killing would not be justifiable. It is apparent that there is no necessity for protecting W from assault in such a case, because she is a party to the act. It might seem that, in those jurisdictions where adultery is a felony, a homicide would be held to be justifiable, when committed to prevent it, under the general rule that one may properly kill another to prevent the commission of a felony. A few states so hold. A majority seem to reject this proposition, although they concede that there may be sufficient provocation to reduce the killing to manslaughter, whether it be the paramour or the wife who is killed.

State v. Young, 96 P. 1067, 52 Or. 227, 18 L. R. A. (N. S.) 688, 132 Am. St. Rep. 689.

Cloud v. State, 7 S. E. 641, 81 Ga. 444.

For other cases see Decennial Digests, Assault and Battery ☞ 68; Homicide ☞ 122, 241.

SECTION 6.—PRINCIPALS AND ACCESSORIES

Q. 40. Defendant instructed A to go to the warehouse of B with a truck, take a bale of goods therefrom, and return it to defendant's warehouse. A did so. Defendant had no right, title, or interest in the bale of goods, and had no right or authority to remove it from the warehouse. In fact, his intention was to steal it. A was in the regular employ of defendant, engaged in trucking such merchandise as the bale of goods involved in this case. How should defendant and A be described in indictments charging them with larceny?

A. If A was acting honestly and innocently in taking the goods, without any intention of stealing, and supposing that they were the property of defendant, he could not properly be charged with the crime of larceny, but would be regarded as an "innocent agent." If, on the other hand, A knew the real facts of the case, and acted to assist his principal in committing the crime, he would be liable as a "principal in the first degree," as one who willfully and intentionally committed the acts which constituted the crime. If A was an innocent agent, then defendant was a principal in the first degree, for he is held to be constructively present, committing the criminal act, which is actually performed by his agent. If A was a guilty party to the crime, then defendant may have been either (1) a principal in the first degree; (2) a principal in the second degree; or (3) an accessory before the fact.

(1) If defendant was present, assisting in actually taking, loading, and carrying away the bale, he was a principal in the first degree.

(2) If he was present—that is to say, within such a distance that his presence could be called of material assistance in the committing of the act—and aiding, not by committing the constituent acts of the crime itself, but by other acts, such as watching to prevent interruption, signaling against danger, or holding open a gate to the inclosure in which the warehouse was located, so that A could drive through, then he was a principal in the second degree.

(3) If defendant was not present, actually or constructively, and took no part in the act which constituted the crime, except by encouragement and direction, prior to the time of the crime, he was an accessory before the fact.

The lines of distinction between the three classes are necessarily difficult to draw, and border line cases are frequent. In some jurisdictions the distinctions between the three classes have been abolished by statute, and all are grouped together as principals in

the first degree. It is the general rule, also, that all persons concerned in the commission of a misdemeanor or of treason are guilty as principals.

State v. Bailey, 60 S. E. 785, 63 W. Va. 668.

State v. Witt, 200 N. W. 933, 161 Minn. 96.

Brown v. Com., 107 S. E. 809, 130 Va. 733, 16 A. L. R. 1039.

For other cases see *Decennial Digests*, Arson ⚡15; *Criminal Law* ⚡59(4), 62, 65, 67; *Homicide* ⚡100.

Q. 41. Defendant knew that A had committed a felony and was being hunted by a posse. Early one morning, while defendant was standing in the front door of his dwelling house, A rode by on his horse and tossed to defendant incriminating evidence of the crime. This defendant burned, in order to assist A in escaping conviction. Is defendant guilty of any offense?

A. Yes; he is an accessory after the fact to the crime committed by A. An accessory after the fact is one who, knowing that a felony has been committed, renders aid, assistance, or comfort to the felon, for the purpose of aiding in his escape or preventing his capture or conviction. Mere acts of charity or mercy, which are not intended to and do not hinder his apprehension or conviction, do not constitute one an accessory. A wife is not regarded as an accessory after the fact and by statute in some states this has been enlarged to include a number of other close relatives.

Elmendorf v. Com., 188 S. W. 483, 171 Ky. 410.

For other cases see *Decennial Digests*, *Criminal Law* ⚡59(1), 76.

Q. 42. A, being despondent and in ill health, wished to commit suicide. B, sympathizing with A and realizing that she was suffering from a painful and incurable disease, which would soon end her life, procured a loaded revolver, which he left on a table beside her. A discovered the revolver, and with it shot herself through the head, causing a severe wound, but not producing death.

(a) Is A guilty of any crime in attempting to kill herself?

(b) Is B guilty of any crime on account of A's attempt?

(c) After the bullet left A's head, it proceeded across the room, where it struck and killed C, A's nurse. Is A guilty of any crime on account of C's death?

A. (a) This would depend upon the jurisdiction in which the act was committed. At common law, suicide was regarded as a felony, punishable by forfeiture of the lands and goods of the offender, and by ignominious burial of the body in the highway. It is no longer punishable, either in England or the United States, though some courts still regard it as a crime. In most of the

states it is not so regarded, although in some jurisdictions A would be guilty of a crime in attempting to commit suicide. *State v. Carney*, 55 A. 44, 69 N. J. Law, 478.

(b) Where suicide is a crime, one who aids, abets, or encourages it is a criminal also. At common law, it was necessary that he be present at the killing, however; otherwise, he was only an accessory before the fact, and escaped punishment because the principal could not first be convicted. In some jurisdictions, where the distinction between accessories before the fact and principals has been abandoned, B would be held guilty as a principal. In other jurisdictions, it is held that, as suicide is no crime, it is also not criminal to encourage or assist. *People v. Roberts*, 178 N. W. 690, 211 Mich. 187, 13 A. L. R. 1253; *Sanders v. State*, 112 S. W. 68, 54 Tex. Cr. R. 101, 22 L. R. A. (N. S.) 243.

(c) There are but few cases on this point, and they hold A liable on the theory that one who kills another (even though contrary to the killer's own wishes) while engaged in a felonious act is guilty of murder or manslaughter. In jurisdictions which do not regard suicide or attempt to commit suicide as criminal in itself, A would not be liable, unless it could be shown that the act was done in such a negligent, reckless fashion as to bring the case within the definition of manslaughter generally. *Com. v. Mink*, 123 Mass. 422, 25 Am. Rep. 109; *State v. Lindsey*, 5 P. 822, 19 Nev. 47, 3 Am. St. Rep. 776.

For other cases see *Decennial Digests*, Homicide $\Leftrightarrow$ 2, 15, 62, 309(1); Suicide $\Leftrightarrow$ 2, 3.

SECTION 7.—HOMICIDE

Q. 43. A owned a stone quarry and crusher. His next door neighbor, B, was an old man with a young daughter, whom A wished to marry, but he was prevented from doing so by the suggestions and persuasions used by B to influence his daughter against A. In order to accomplish his purpose, he determined to kill B. This he did by trapping B in a pit in his stone quarry, and by throwing him into the crusher, where his body was ground to bits. Of what crime, if any, is A guilty?

A. Murder in the first degree. Murder is usually defined as the unlawful killing of a human being with malice aforethought. Murder in the first degree by statutory definition usually requires upon the part of the defendant express malice aforethought, deliberation, or premeditation, or acts showing a depraved mind, regardless of human life. Murder committed by means of poison, lying in

wait, torture, starving, or otherwise with extreme atrocity or cruelty, is murder in the first degree.

Com. v. Devlin, 126 Mass. 253.

People v. Milton, 78 P. 549, 145 Cal. 169.

People v. Repke, 61 N. W. 861, 103 Mich. 459.

For other cases see *Decennial Digests, Homicide* ¶2, 18(1), 253(4), 308(3).

Q. 44. Quan, a Chinaman, was jointly interested with his cousin, Sing, in a piece of property. Quan came to see Sing, with the intention of intimidating him and forcing him to assign his interest in the property. He found Sing sick in bed, suffering terribly. Sing begged him to kill him and put him out of his misery. Quan had a revolver in his pocket, which he had been shooting that day, but which had become jammed, so that it would not fire. In order to seem to comply with Sing's request, he put his revolver to Sing's head and snapped it several times, knowing that it would not fire. As he did this it occurred to him that, if Sing should die, his interest in the property would descend to Quan. As he aimlessly snapped the trigger, he wished that the gun would fire, so that Sing might be disposed of. At the same instant the revolver fired, and Sing was instantly killed. Of what crime was Quan guilty?

A. Murder at common law; murder in the second degree under some statutes. It cannot be said that there was premeditation, or a specific intention to kill, in this case. Still there was undoubtedly a malicious desire in the mind of Quan, at the instant of killing, that Sing be disposed of. There was also undoubtedly a conscious act on the part of Quan, done in reckless disregard of human life, which actually resulted in Sing's death. There is not enough here to constitute first degree murder, and there is too much for manslaughter.

State v. Quan Sue, 179 N. W. 972, 191 Iowa, 144.

State v. Hardie, 47 Iowa, 647, 26 Am. Rep. 496.

For other cases see *Decennial Digests, Homicide* ¶21, 31, 74.

Q. 45. A and B quarreled over the line between their properties. B undertook to build a fence on a line which A thought encroached on his property. A ordered B to get off his property; B refused, and went ahead with his fence building. A took hold of B and attempted to eject him. B struck A, whereupon the latter became suddenly enraged, picked up a piece of fence railing, struck B over the head, and killed him. There was no evidence of necessity for killing in self-defense; neither was there any evidence of malice on the part of A toward B prior to the killing, nor evidence to indicate

that A had in any way contemplated the killing of B. Of what crime, if any, is A guilty?

A. Manslaughter. There may be manslaughter when the killing results from acts done in a sudden passion or anger, or from acts indicating a careless disregard for human life. In some jurisdictions a distinction is made also between voluntary and involuntary manslaughter. The distinction is based upon some such classification as this: That voluntary manslaughter results from the killing of another intentionally, but under provocation; while involuntary manslaughter results from the killing of another unintentionally, while engaged in the doing of some unlawful act not amounting to felony, or by culpable negligence. The lines of demarcation, too, between the degrees of murder and of manslaughter, vary considerably in the definitions given by the statutes of the different states.

Wallace v. U. S., 16 S. Ct. 859, 162 U. S. 466, 40 L. Ed. 1039.

State v. Palmer, 176 P. 547, 104 Wash. 396.

For other cases see Decennial Digests, Homicide §36, 112(5).

SECTION 8.—OFFENSES AGAINST PROPERTY

Q. 46. A constructed a dwelling house, and had it completed and ready for occupancy, except that it was not painted, and some of the windows had not been put in. It had never been occupied. B, an enemy of A, with intent to injure A, set fire to the house one night, and it was burned to the ground. Was B guilty of arson?

A. Under the common law and in those states which have adopted it, B would not be guilty. The offense of arson at common law was an offense against the security of habitation, the dwelling houses of human beings. It is true that the rule was extended to include outhouses adjoining dwellings, but the burning of a building not yet inhabited, even though intended for habitation, was not regarded as an offense of such enormity as that contemplated by the definition of arson. If the house had ever been occupied, its burning under such circumstances, while temporarily vacant, was arson. The common-law rule has been substantially enlarged by statute in many states to include buildings of all character, as well as other types of property, and in such jurisdictions B would undoubtedly be guilty. State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; State v. Colgate, 3 P. 346, 31 Kan. 511, 47 Am. Rep. 507; Smith v. State, 5 S. W. 219, 23 Tex. App. 357, 59 Am. Rep. 773. Arson was regarded as an offense against the dwelling of another, and burning one's own property to defraud an insurance

company is not arson, unless so declared by statute. *Haas v. State*, 132 N. E. 158, 103 Ohio St. 1, 17 A. L. R. 1164.

For other cases see Decennial Digests, Arson $\Leftrightarrow$ 3, 5, 8, 9, 14.

Q. 47. A and B were friends, but both were enemies of C. Following an altercation between the three, A and B captured C. A wished to kill C, but B insisted that he be turned over to the authorities. In order to accomplish this, he locked C up in his cellar. During the night A decided to kill C, so he went to B's house, unlatched and opened the outside cellar door, went down the stairs into the cellar, and was about to kill C, when B came in through the inside cellar door, intercepted him, and sent him home. Is A guilty of the crime of burglary?

A. Yes; all of the elements of the crime were present. There was, first, a "breaking." Lifting the latch and opening the door were sufficient to satisfy the requirements of the definition of burglary on that point. Walking into the cellar was a sufficient "entry," the second element of the offense. The third element, that the breaking and entry be of a "dwelling house," was satisfied, for the cellar was clearly a part of the house. The house belonged to B, "another" person than the defendant, A, which satisfied the fourth element. The fifth element of the crime is that it take place in the nighttime, and this was present. The sixth and last element of the crime is that the breaking and entry be done with intent to commit a felony therein. A's intention to murder C clearly supplied this element. In some jurisdictions, the definition of burglary has been extended, particularly to include acts committed in the daytime.

State v. Perry, 145 N. W. 56, 165 Iowa, 215.

State v. Crawford, 80 N. W. 193, 8 N. D. 539, 46 L. R. A. 312, 73 Am. St. Rep. 772.

Mitchell v. Com., 11 S. W. 209, 88 Ky. 349, 10 Ky. Law Rep. 910.

For other cases see Decennial Digests, Burglary $\Leftrightarrow$ 3, 4, 9(1), (2).

Q. 48. Defendant stole from the portico of complainant's house a bird cage, containing a mocking bird which had been caught while a young wild bird and tamed. It had been in captivity for about three years and was a fine singer, worth from \$15 to \$25. Defendant was charged with larceny, and defended on the ground that wild birds and animals, according to the common-law rule, could not be the subject of larceny. Is this a good defense?

A. No.; even at common law some kinds of wild birds and animals, when reduced to captivity, could be the subject of larceny, and

under present-day statutes, both in England and in the United States, any wild animal in captivity comes within the classification of personal property, which may be the subject of larceny.

Haywood v. State, 41 Ark. 479.

Rex v. Sherriff, 20 Cox. Cr. Cas. 334.

State v. Johnson, 141 P. 1040, 80 Wash. 522.

People v. Opie, 55 P. 989, 123 Cal. 294.

For other cases see *Decennial Digests*, Larceny ¶5, 28(1).

Q. 49. Defendant was indebted to his landlady for his board. He left his trunk and his bicycle with her as a pledge to secure the payment of his debt. Later he surreptitiously removed the articles from her possession and sold the bicycle. Can he be properly convicted of larceny for taking his own trunk and bicycle?

A. Yes; larceny is sometimes referred to as a crime against the "possession" of goods. It is possible to steal, not only from the owner of goods, but from any one who has possession thereof, such as a bailee, or even from one who has previously stolen them. In the problem case, the landlady had possession of the goods, and a right to keep possession until defendant paid his bill. Under the circumstances, defendant was properly convicted of larceny.

Henry v. State, 36 S. E. 55, 110 Ga. 750, 78 Am. St. Rep. 137.

Com. v. Novick, 142 N. E. 771, 248 Mass. 317.

For other cases see *Decennial Digests*, Larceny ¶7, 9.

Q. 50. Skillful and a number of others persuaded Daley to play a game of poker. Then, by manipulation of the cards in dealing, by looking at his hands and signaling to the others, they all played against him, and won all of his money. None of it was taken by force, or otherwise than by the usual process of playing the game, except for the violation of the rules of the game set out. On being charged with larceny the defendants insist that there was no larceny, because there was no wrongful taking. Are they guilty or not guilty?

A. Guilty. Whether the taking was by force or by trick is immaterial. This is known as larceny by trick, and the element of wrongful taking is supplied by the fraudulent method of persuading the owner to part with his goods. This doctrine has been bitterly criticized, but is followed in most jurisdictions, either under the common law or statutory enactment.

State v. Skilbrick, 66 P. 53, 25 Wash. 555, 87 Am. St. Rep. 784.

People v. Mills Sing, 183 P. 865, 42 Cal. App. 385.

Gardner v. State, 26 A. 30, 55 N. J. Law, 17.

For other cases see *Decennial Digests*, Larceny ¶14(1, 3).

Q. 51. Ford left his automobile on the street, with a chain around the front wheel and axle, and with the gas tank and ignition locked. Defendant cranked the car, climbed into the front seat, and started the car. It ran for about 150 feet, when it climbed the curb and stopped. Defendant had unlocked the ignition, and the chain had broken on the way, but the gas feed remained locked. Defendant was charged with larceny, and defended on the theory that there was no "asportation" or carrying away of the car. Is this contention correct?

A. No; the taking and carrying away, or the caption and asportation of the common law, which are essential elements of larceny, were both clearly present in this case. All that is necessary, in order to satisfy the strictest interpretation of the law, is that the article be moved in its entirety from its previous position, and that it be in the adverse possession of the taker for at least an instant of time.

State v. Maddaus, 163 N. W. 507, 137 Minn. 249.

Walls v. State, 63 S. W. 328, 43 Tex. Cr. R. 70.

For other cases see Decennial Digests, Larceny §3(1), 62(1).

Q. 52. Burton occupied a room in defendant's house. She spilled Colorite, a stain, on the wall of the room. Defendant discovered the damage during Burton's absence, took her bag and its contents, and refused to give them back until Burton should pay \$5 for the damage. Defendant was charged with larceny, and defends on the ground that she had no intent to steal. Is the defense good?

A. Yes, in some jurisdictions; no, in others. The courts are very evenly divided on this point. It is agreed that there must be an intent to steal, or *animus furandi*, in order to have larceny. The difficulty comes in defining that intent. Some jurisdictions say that the intent need be only to deprive the owner of the goods, and that it is immaterial whether the taker convert them to his own use, to the use of another, or even destroy them. Other jurisdictions hold that it is necessary that the intent be to deprive the owner permanently of his property, and to convert it to the taker's own use. This is sometimes called "*lucri causa*."

State v. Sawyer, 110 A. 461, 95 Conn. 34, 13 A. L. R. 139.

Roberts v. State, 104 N. E. 970, 181 Ind. 520.

For other cases see Decennial Digests, Larceny §3(1, 3, 4), 34.

Q. 53. A was walking along the street, when he saw a woman, B, standing in an adjoining building, rapping on the window, and motioning for him to join her. He did so, whereupon she requested

him to give her money with which to purchase brandy. He gave her a \$20 bill to purchase brandy costing \$3. She left, and returned shortly with another woman, C, saying that she was unable to make the purchase, but that her friend knew where it could be purchased. As they left A, C removed from A's pocket, without his knowledge, another \$20 bill, which was projecting therefrom, and immediately thereafter D, an accomplice of B and C, hit A over the head with a piece of gas pipe and took the rest of his roll of bills. A never saw B, C, or D again until they came into court. Of what crimes are B, C, and D guilty?

(a) D is guilty of robbery. A taking of personal property from the person of another, by means of force or of putting him in fear, with an intent to steal, constitutes robbery. *People v. Calvin*, 26 N. W. 851, 60 Mich. 113.

(b) C is guilty of larceny. Here we have all the essentials of the common-law crime of larceny: A trespass, a wrongful taking, and an asportation, or carrying away, of the personal goods of A, without his consent and against his will, accompanied by an intent to steal upon the part of C, but without any element of force or fear, as would be present in a case of robbery. *State v. Parker*, 170 S. W. 1121, 262 Mo. 169, L. R. A. 1915C, 121.

(c) B may be guilty of larceny, embezzlement, obtaining money under false pretenses, or of no crime at all. If A gave the money to B as a gift, with no intention of getting back any part of it, then B would be guilty of no crime. If, on the other hand, B received the money as a bailee, or upon a trust for an express purpose, and upon an understanding that the balance was to be returned to A, and thereafter fraudulently converted it to her own use, then she was guilty of embezzlement. If B obtained possession of the money by fraud and false pretenses, and A intended to part with his title as well as possession, being induced to do so by reason of B's fraud and false pretenses, then B is guilty of obtaining money under false pretenses. If B obtained possession by fraud, with intent at that time to convert the money to her own use, and A intended to part with possession only, and not to part with his title, then B is guilty of larceny by trick. *Com. v. Barry*, 124 Mass. 325; *People v. Miller*, 62 N. E. 418, 169 N. Y. 339, 88 Am. St. Rep. 546.

The distinction just made is generally recognized as being the proper one. However, the history of the law of larceny is one of uncertainty and confusion. Many statutory changes have been made, which result at times in making a defendant guilty, on the same set

of facts, of two or more of the offenses classified under the larceny group. *People v. Mills Sing*, 183 P. 865, 42 Cal. App. 385.

For other cases see *Decennial Digests*, Embezzlement ⌘5; False Pretenses ⌘12; Larceny ⌘8, 12, 13, 14(1); Robbery ⌘2.

SECTION 9.—CRIMINAL PROCEDURE

Q. 54. A, an American citizen, on a ship belonging to the United States at the port of Rio de Janeiro, conspired with others to defraud the United States by obtaining the allowance and payment of a false claim against the United States Shipping Board Fleet Corporation, contrary to the criminal statutes of the United States. Can he be prosecuted in a federal District Court in the United States?

A. Yes; generally the rule is that a crime committed on a vessel upon the high seas is punishable in the country of registry of the vessel; that a crime committed within the territorial waters of one country is punishable in that country, even though it be committed on board a vessel of another country. But, where a criminal statute is enacted for the express purpose of defending a government against obstruction or fraud, wherever perpetrated, the general rule does not apply.

U. S. v. Bowman, 43 S. Ct. 39, 260 U. S. 94, 67 L. Ed. 149.

For other cases *Decennial Digests*, Criminal Law ⌘97(½), 97(3); United States ⌘12.

Q. 55. A, in California, with murderous intent, sent poisoned candy to B, in Delaware. B ate the candy in Delaware, and died as a result. Can A be prosecuted for murder in California?

A. Yes; the general rule is that a state cannot prosecute extra-territorial offenses committed outside of its jurisdiction. A difficult problem is presented where the offense is committed in part in one state and in part in another. Most jurisdictions have adopted the rule that the crime is committed where the criminal act takes effect. During recent years a number of states have passed laws providing that, where crimes are committed in whole or in part within a particular state, the offender shall be punishable therein. The effect is to make the crime punishable in either of two or more states. As a practical matter, in such cases the state which first takes jurisdiction usually prosecutes.

People v. Botkin, 64 P. 286, 132 Cal. 231, 84 Am. St. Rep. 39.

Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89.

Simpson v. State, 17 S. E. 984, 92 Ga. 41, 22 L. R. A. 248, 44 Am. St. Rep. 75.

State v. George, 63 N. W. 100, 60 Minn. 503.

For other cases see *Decennial Digests*, Criminal Law ⌘97(1), (2).

Q. 56. A burglary was committed in New York. The New York authorities telephoned to authorities of other states, including Vermont, to look out for four suspects going toward Rochester, Vt. The constable of Rochester and private citizens acting with him undertook to arrest without warrant a party of four men, the defendants, who were coming along the highway in a livery wagon. The defendants demanded to be shown a warrant. The constable informed them that he was an officer, and that he arrested them by the authority of the state of Vermont. Thereupon the defendants refused to submit to arrest and started shooting. They were tried on a charge of assault with intent to kill, and defended on the ground that they were resisting an unlawful arrest. Was the arrest unlawful?

A. No; all that is required of an officer, in making an arrest without warrant, is that he shall have reasonable cause to believe that a felony has been committed, and that the person whom he arrests has committed it, and that he give notice of his authority and purpose. If the person being subjected to arrest knows that the person making the arrest is an officer, it is not even necessary for the latter to notify him of that fact. According to the best-reasoned cases, it is not necessary for the officer to show his warrant *before* making the arrest, even if he have one; but it is his duty to show the warrant, if it is demanded, after the arrest. It is also generally held, and certainly universally practiced, that an officer may make an arrest of a fugitive from another state without warrant upon telegraphic request, and hold him until a demand for extradition arrives. The right of arrest and detention in advance of requisition is in many states regulated by statute.

State v. Taylor, 39 A. 447, 70 Vt. 1, 42 L. R. A. 673, 67 Am. St. Rep. 648.

Burton v. New York Cent. & H. R. R. Co., 38 S. Ct. 109, 245 U. S. 318, 62 L. Ed. 320.

22 Mich. Law Rev. 694, 698.

23 Mich. Law Rev. 390.

For other cases see Decennial Digests, Arrest ¶63(4), 68; Extradition ¶37.

Q. 57. A killed B in Kentucky. Before he could be apprehended he was arrested by a sheriff from Ohio on a charge of robbery, and removed forcibly and against his will from Kentucky into Ohio. An indictment in proper form was found against A in Kentucky, charging him with murder, and a demand was made by the Governor of Kentucky upon the Governor of Ohio for the return of A. Should the demand be complied with?

A. Yes; section 2 of article 4 of the federal Constitution provides for extradition between states under such circumstances as this. In order that extradition may be had, it must appear first that A has been properly charged with crime in the demanding state. It is not proper for the state of refuge to attempt to determine the guilt or innocence of A, or to inquire into the merits of the charge at all, except to determine whether A is the person wanted. Second, it must appear that A is a fugitive from justice. In order to constitute him a fugitive from justice, it is not necessary that he should have fled from the demanding state to escape punishment, but merely that, having committed within the demanding state "that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." But, although it is the duty of the Governor of the state of refuge to return A, if he refuses to do so, there is no way to compel him to do so, and the process of extradition is carried out as a matter of mutual necessity between the states.

Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717.

Illinois v. Pease, 28 S. Ct. 58, 207 U. S. 100, 52 L. Ed. 121.

Roberts v. Reilly, 6 S. Ct. 300, 116 U. S. 97, 29 L. Ed. 544.

For other cases see Decennial Digests, Extradition ¶24, 30; Habeas Corpus ¶85(2).

Q. 58. Defendant was charged with an offense not capital, and offered to give bail in the form of bonds, with sureties who were his relatives. The court refused to consider such sureties, and refused to admit the defendant to bail under the circumstances. Was the court justified in so doing?

A. No; the court's action amounted to a denial of defendant's constitutional right to be released upon bail not excessive in amount. The Constitution of the United States prohibits excessive bail, and the state Constitutions, generally, contain provisions to the effect that one accused is entitled to bail in all cases except capital offenses, and even then, unless the proof is evident or the presumption great. If too stringent requirements regulating the giving of bail are made, either by legislative action or by rule or order of court, this constitutional right is violated just as effectively as if bail were refused outright.

Ex parte Ruef, 97 P. 89, 8 Cal. App. 468.

Ford v. Dilley, 156 N. W. 513, 174 Iowa, 243.

For other cases see Decennial Digests, Bail ¶42, 43, 60.

Q. 59. Defendant was tried for murder. On the first trial the jury disagreed. On the second trial, two special venires were exhausted without securing a jury. Thereupon the court on its own motion ordered a change of venue to another county, on the ground that "a qualified jury cannot be obtained in this county." Was this error on the part of the court?

A. No; the general rule is that a change of venue may be had upon the motion of the defendant, and some jurisdictions permit a change upon motion of the prosecution. It is also generally held that the question is one to be determined in the discretion of the trial court, when the motion is upon the ground that a fair and impartial or qualified jury cannot be obtained. The right of the defendant to be tried by a jury of the vicinage means a right to be tried by a qualified jury, and it is the duty of the judge to see that such a jury is had. If it cannot be obtained in the home county, then the case should be transferred to an adjacent county.

Hewitt v. State, 30 So. 795, 43 Fla. 194.

For other cases see Decennial Digests, Criminal Law ¶116.

Q. 60. Defendant was charged by information with the crime of robbery. The information was signed by the district attorney, and did not appear to be, nor was it, found by a grand jury. The defendant moved to quash the information, and after conviction he appealed, on the ground that no prosecution had ever been properly initiated or carried on against him, because no indictment had ever been found against him by a grand jury. Is the objection good?

A. The answer must depend upon the particular jurisdiction. In some states, prosecutions in felony cases can be had only upon indictments. In others, all felonies may be prosecuted upon informations signed by the prosecuting attorney. In others, some felonies may be prosecuted upon either indictments or informations, and other felonies only upon indictments. This is a matter which is controlled by the Constitutions and statutes of the various states.

State v. Kyle, 65 S. W. 763, 166 Mo. 287, 56 L. R. A. 115.

State v. Keeney, 189 N. W. 1023, 153 Minn. 153.

Hurtado v. California, 4 S. Ct. 111, 110 U. S. 516, 28 L. Ed. 232.

For other cases see Decennial Digests, Constitutional Law ¶265; Indictment and Information ¶3, 4, 35, 36.

Q. 61. Defendant was under indictment by a grand jury for receiving a stolen automobile. He filed a plea in abatement, prior to trial, challenging the indictment on two grounds: First, that during the

time when the grand jury was considering his case it permitted a numbers of persons not members of the grand jury to be present while the examination was going on; second, that he was required to give testimony before the grand jury. The plea in abatement was found by the trial court to be insufficient; the court finding, further, that as regards the first point the persons who were present were merely other witnesses, and as regards the second point that defendant waived his right not to be required to testify, and gave his statement voluntarily, and also that it did not appear that his testimony related to any material fact. Following his conviction, defendant moved in arrest of judgment that the indictment was insufficient, because certain members of the grand jury were disqualified. Were any of his objections good?

A. The first objection was probably well taken. Although the courts are not in complete accord on the point, the general tendency is to insist on the greatest secrecy of proceedings, and to preserve the old common-law rule, which required the exclusion all unauthorized persons. The second objection should be held to be not well taken. Although the defendant cannot be required to testify against himself, there is no reason why a voluntary statement made by him should thereafter exempt him from prosecution. Some jurisdictions go so far as to hold that, even though the grand jury hears improper evidence, an indictment will not be set aside on that account, if it can be shown that there was enough proper evidence before the grand jury to support the indictment. The third objection is not well taken. A motion in arrest of judgment serves a very limited function, such as testing the jurisdiction of the court over the person or the indictment. The qualification of jurors is a matter which should be tested before trial by a plea in abatement, and, if not so raised, it is held to be waived.

Com. v. Harris, 121 N. E. 409, 231 Mass. 584.

People v. Lauder, 46 N. W. 956, 82 Mich. 109.

Pick v. State, 121 A. 918, 143 Md. 192.

State v. Heffernan, 68 A. 364, 28 R. I. 477.

For other cases see Decennial Digests, Criminal Law ⚡970(4); Grand Jury ⚡41; Indictment and Information ⚡2(1), 137(4); Witnesses ⚡305(1).

Q. 62. Defendant objected to the sufficiency of the indictment upon which he was being tried, because it did not conform to the common-law form of indictments, in that the name of the court was not correctly set out; that the court was referred to as being "of" a certain county, instead of "in" the county; that it did not show that it had been found by a properly formed grand jury; that the

caption failed to contain the name of the defendant; that in naming the grand jury it failed to set out the name of the state in which the county referred to was located; and that the conclusion was defective, because it used the words "against the peace and dignity of the people of the state," instead of "against the peace and dignity of the 'same' people of the state." Were any of the objections valid?

A. No; each one of the defects is one merely of form, which does not in itself vitiate the indictment. While it is quite probable that, if an indictment contained as many defects as the one referred to in the problem case, the court would feel impelled to sustain an objection to it, still each one of the objections suggested is one which, appearing alone in an otherwise sufficient indictment, would not be given much weight by a present-day court. Some jurisdictions still pay rigorous homage to formal requirements, as is indicated by the Missouri case cited.

State v. Campbell, 109 S. W. 706, 210 Mo. 202, 14 Ann. Cas. 403.

Mitchell v. Com., 51 S. W. 17, 106 Ky. 602, 21 Ky. Law Rep. 222.

People v. Haren, 72 N. Y. S. 205, 35 Misc. Rep. 590.

Stone v. State, 30 Ind. 115.

State v. Parks, 39 A. 1023, 61 N. J. Law, 438.

Howell v. State, 31 N. E. 88, 4 Ind. App. 483.

Kirkham v. People, 48 N. E. 465, 170 Ill. 9.

For other cases see Decennial Digests, Indictment and Information ➞
22, 23, 25, 26, 29, 32(3), 34(2).

Q. 63. The indictment upon which defendant was brought to trial charged him with murder. The indictment, after setting out the nature of the attack made by defendant upon the deceased with a club, and the wounds produced thereby, continued: "Of which said mortal wounds he * * * did languish and die." Following his conviction, the defendant moved in arrest of judgment, assigning, among other things, in support thereof, the insufficiency of the indictment, because of its failure to use the words "did suffer and languish, and languishing did live." Was the indictment insufficient?

A. No; under the practice of the common law very elaborate and prolix indictments were used, and many requirements as to the caption, the body, and the conclusion were insisted upon. The tendency of recent years has been to depart from what now seem to have been absurd requirements. Of course, some courts still cling to some of the old archaisms. The test of a good indictment is now generally expressed in such terms as this: "* * * The sufficiency of the indictment, especially after conviction, is no longer tested

by the nicety of expression once required. If, by fair and reasonable construction, it alleges every essential element to make out the crime, it is sufficient."

State v. Conley, 39 Me. 78.

Cohen v. U. S. (C. C. A.) 294 F. 488.

State v. Lovelace, 83 P. 330, 29 Nev. 43.

For other cases see Decennial Digests, Burglary ⚡24; Homicide ⚡137; Indictment and Information ⚡17, 75(1).

Q. 64. Defendant was indicted for violation of the Blue Sky Law in selling securities without a license to a number of persons named in the indictment "and others." Objection was made that the indictment was bad on account of duplicity. Is the objection good?

A. No; the defect of duplicity arises whenever, in a single count in an indictment, there are set out two distinct offenses. In order that duplicity may be shown, it must appear that there are actually two good accusations. If there is only one in fact, although there is other matter set out in the count which is an incomplete statement of an accusation, the latter may be regarded as surplusage, and stricken out. In the problem case, however, the offense charged was the sale of "securities," and it was proper to charge and prove the sale of a number of securities, or a number of sales of securities. Where the offense consists of a series of acts, or several distinct acts, which are properly construed as one continuous act or transaction, then they may all be charged in a single count.

State v. Gopher Fire & Rubber Co., 177 N. W. 937, 146 Minn. 52.

For other cases see Decennial Digests, Indictment and Information ⚡125(4, 43).

Q. 65. Defendant was charged with violations of the liquor laws by five separate indictments. The prosecuting attorney decided to enter a nolle prosequi as to four of the indictments, upon defendant pleading guilty to the fifth. Then one Peter moved for leave to appear and prosecute, and objected to the indictments being thus disposed of, because he was the complainant and entitled to one-half the fines. Should Peter's motion be granted?

A. No; in those jurisdictions where the prosecuting attorney has power to enter nolle prosequi, final decision to dismiss rests with him, and his power cannot be interfered with, even by the court. In a number of jurisdictions the law has been changed on this point, and it is now necessary for the prosecuting attorney to move for a dismissal, and for the court to grant the motion or deny

it. As a general rule, the court never inquires further, but grants the motion as a matter of course.

See 23 Col. Law Rev. 683.

State v. Smith, 49 N. H. 155, 6 Am. Rep. 480.

Atty. Gen. v. Tufts, 131 N. E. 573, 132 N. E. 322, 239 Mass. 458, 17 A. L. R. 274.

People ex rel. Hoyne v. Newcomer, 120 N. E. 244, 284 Ill. 315.

For other cases see Decennial Digests, Criminal Law Ⓒ302(1, 2); District and Prosecuting Attorneys Ⓒ2(5).

Q. 66. The grand jury found an indictment which contained on its face a statement which the court knew to be an error. The defendant was charged with perjury. The indictment charged that the perjury was committed during the hearing of a petition for letters testamentary, whereas in fact it was during the hearing of a petition for letters of administration. The court resubmitted the indictment to the grand jury, and it was by that body corrected and again returned into court. Does the law prohibit the amendment of indictments in this manner?

A. No; the defendant cannot be in any way harmed, because he is not yet on trial. A more serious question is presented when an effort is made to amend after the trial has commenced, and especially after the grand jury has been discharged. Statutes have been passed in a number of states, permitting amendments during the trial; some limited to matters of form exclusively; some permitting amendments to conform to the proof.

People v. Rodley, 63 P. 351, 131 Cal. 240.

For other cases see Decennial Digests, Indictment and Information Ⓒ159(1).

Q. 67. The defendant, through oversight, was never formally arraigned, and never pleaded to the indictment. The trial was held, however, defendant being present at all times, and no objection was made by him until after the verdict had been entered. It is conceded that defendant knew the charge which was made against him, and that he was permitted to put in his defense just as fully and effectively as if he had been arraigned, informed of his rights, and his plea entered. Was this a fatal error?

A. No; although arraignment and plea are essential to due process of law, and a right of which defendant cannot be deprived by law, still it is a right which may be waived, and under the facts as stated it is generally held that, except in capital cases, a waiver has taken place. The right cannot be waived by counsel in the absence

of defendant; but if defendant himself "comes into court with his attorney, fully advised of all his rights, and furnished with every means of making his defense," he is held to waive the right if he does not ask for it.

Hack v. State, 124 N. W. 492, 141 Wis. 346, 45 L. R. A. (N. S.) 664.

State v. McMichael, 23 So. 992, 50 La. Ann. 428.

For other cases see *Decennial Digests, Constitutional Law* ¶43(1), 257; *Criminal Law* ¶262.

Q. 68. Defendant was brought into court for arraignment; the indictment was read to him; a true copy was handed to him; he was informed of his various rights; he stated, in reply to questions of the court, that he had no attorney and did not care to have one appointed. When he was asked whether he pleaded guilty or not guilty to the charge contained in the indictment, defendant refused to make any reply, and the court instructed the clerk to enter a plea of "not guilty." Thereafter the case was set for trial, and at the appointed time the defendant, being brought into court for trial, stated that he did not wish to be tried, but preferred to enter a plea of "guilty." He was permitted to do so, and the court appointed a time for passing sentence upon him. When that time came, the court imposed a severer penalty than defendant expected, and he then stated that he wished to withdraw his plea of "guilty," and plead "not guilty." The court refused to comply with this request. Was this error?

A. No; the plea of "not guilty" was properly entered in the first place, as it is the universal rule, both of the common law and of the statutes, that if the defendant stands mute the court shall order that a plea of "not guilty" be entered. The court should first inquire whether the defendant stands mute because he cannot speak, or because he does not understand, and in such cases a means of interpretation and expression should be provided. It was also a proper exercise of the court's discretion to permit one plea to be withdrawn and another substituted; but, where it appears that the defendant is fully advised as to his rights, the court is under no obligation to allow the defendant to change his mind every time he comes into court, especially where it appears that he deliberately waited to find out what punishment the court would inflict before making his last request.

State v. Savage, 76 A. 1079, 79 N. J. Law, 583.

Ernst v. State, 192 N. W. 65, 179 Wis. 646, 30 A. L. R. 681.

People v. Dabner, 95 P. 880, 153 Cal. 398.

For other cases see *Decennial Digests, Criminal Law* ¶266, 273, 274.

Q. 69. Defendant, while a soldier, was stationed at a point on the boundary line between two states. He made an assault upon a private citizen with apparent intent to commit murder. The evidence showed that the assault was committed directly upon the boundary line. Defendant was tried and acquitted by court-martial. He was thereafter put upon trial in X state, and entered a plea of former jeopardy on account of his acquittal at the court-martial. The court denied his plea; he was convicted and served a short term. Thereafter he was put on trial in Y state, and again entered a plea of former jeopardy, because of his former acquittal and his former conviction. Was the plea good on either ground?

A. No; as a practical matter, defendant would probably never be tried more than once. However, so far as the law is concerned, his defense was not good. Each of the three tribunals before which he was tried was independent of the other, represented a jurisdiction distinct from the others, and defendant's act constituted an offense against each of the three jurisdictions. Consequently the fact that he had actually been in jeopardy was of no avail as a defense in the second and third courts.

In re Fair (C. C.) 100 F. 149.

State v. Norman, 52 P. 986, 16 Utah, 457.

For other cases see *Decennial Digests, Criminal Law* § 186, 201.

Q. 70. Defendant was indicted, tried, and convicted for permitting a person named in the indictment to remain in his saloon during certain hours, when it was required by law to be closed. He was then again indicted for permitting another person to remain in the saloon during prohibited hours. It appeared that the two persons named in the successive indictments had been present together in the saloon at the same time. It appeared, further, that the statute under which he was prosecuted prohibited "any person or persons, other than himself and family," from being in the saloon during certain hours. Defendant pleads former jeopardy because of his prior conviction. Is his plea good?

A. Yes; several tests have been suggested for the determination of a case of this kind. One of them is: "Would the same evidence be necessary to secure a conviction in the pending as in the former prosecution?" Another is: Do the facts constitute but a single offense or separate injury to the state, though it is susceptible of being divided into more than one, as in the case of larceny of a number of articles at the same time? In the problem case it would

seem that there is in fact but one single, separate offense against the state, that exactly the same evidence would be necessary in each case, and that it would be practically impossible for the facts involved in one charge to be given in evidence, without giving the facts involved in the other. If, on the other hand, evidence were necessary to sustain one charge which was unnecessary or improper to be shown in evidence on the trial of the other, or if no one criminal element is a necessary ingredient of both offenses, then the defendant would be required to stand trial a second time.

State v. Rosenbaum, 55 N. E. 110, 23 Ind. App. 236, 77 Am. St. Rep. 432.

Morey v. Com., 108 Mass. 433.

U. S. v. MacAndrews & Forbes Co. (C. C.) 149 F. 836.

For other cases see *Decennial Digests*, Criminal Law §29, 200(1), 200(4).

Q.71. Before defendant had been brought to trial, the prosecuting attorney discovered an error in the indictment, and entered a *nolle prosequi*, in order that a new indictment might be prepared. Thereafter the trial commenced upon a new indictment, the evidence was taken, arguments made, instructions given, and the jury retired to deliberate upon its verdict. While the jurors were out, the defendant procured a large quantity of whisky, plied the bailiff with whisky until he was drunk, and then distributed whisky to each member of the jury. Before the jurors had agreed upon a verdict, the judge discovered what the defendant had done, and discharged the jury. When the case came on for trial again, the defendant objected on the ground that he had been once in jeopardy, and assigned in support thereof: (1) The entry of a *nolle prosequi*; (2) the court's action in discharging the jury without his consent, before the jurors had declared themselves unable to agree. Is defendant's objection good?

A. No; the first reason assigned is of no weight, as it is generally conceded that a defendant is not put in jeopardy at least until the trial begins, and in some jurisdictions it is held that there is no jeopardy until the case is tried upon its merits and submitted upon a valid indictment to a properly constituted jury. The second point might under proper circumstances be taken advantage of by defendant, for jeopardy would no doubt have attached at the time when the jury was discharged, and the defendant is entitled to their verdict if there is any reasonable chance of getting one. However, in the case stated, the defendant had acted in such a manner that he had himself made it impossible for a valid verdict to be rendered, and it became the duty of the court to discharge the jury. Under

such circumstances it is held that there is no jeopardy, any more than there would be in a case where, following a conviction, the defendant should appeal and secure an order for a new trial.

U. S. v. Percansky (D. C.) 298 F. 991.

People v. Warden of City Prison of City of New York, 95 N. E. 729, 202 N. Y. 138.

Simmons v. U. S., 12 S. Ct. 171, 142 U. S. 148, 35 L. Ed. 968.

For other cases see Decennial Digests, Criminal Law ☞ 165, 167, 178, 182, 184.

Q. 72. Defendant was on trial for a felony, and was present during the trial until the case was submitted to the jury. He was free from custody, however, having been released on bail. After the case had been submitted to the jury, defendant absented himself and could not be found. The jury agreed upon a verdict and expressed their readiness to come into court. The court held the jury for 18 hours thereafter, while every effort was made to find the defendant. At the end of that time the defendant still remained in hiding, willfully absenting himself, and the court permitted the jury to come in and received the verdict, not in defendant's presence. Defendant assigns error on the ground that he was deprived of his right to be present at the trial. Is his objection good?

A. No; the general rule is firmly established that the defendant has a right to be present at all stages of the trial down to and including the reception of the verdict. However, this is a right which can be waived, and by willfully absenting himself from court, under the circumstances stated, his conduct clearly indicated a waiver.

State v. Gorman, 129 N. W. 589, 113 Minn. 401, 32 L. R. A. (N. S.) 306.

Hopt v. Utah, 4 S. Ct. 202, 110 U. S. 574, 28 L. Ed. 262.

Com. v. McCarthy, 40 N. E. 766, 163 Mass. 458.

For other cases see Decennial Digests, Criminal Law ☞ 636(3, 8).

Q. 73. Defendant objects to the sufficiency of the verdict found against him. It was as follows: "Wee the joury, agree and find the defendant guilty as charged in the indite and sess his find at \$100 dollars. Isaa Clouse." Was the verdict sufficient?

A. Yes; It was held to satisfy the requirements of the law, in the Kentucky case cited below. It is generally held that, if the verdict clearly expresses the intention of the jury, so that the court can understand it, that is enough. Inaccuracy in language, irregularity, or surplusage are immaterial, if intent to convict of the crime charged in the indictment is unmistakably expressed.

Mitchell v. Com. 51 S. W. 17, 106 Ky. 602, 21 Ky. Law Rep. 222.

For other cases see Decennial Digests, Criminal Law ☞ 875(4).

Q. 74. Defendant was convicted on fifty counts for violating the prohibition law. He was sentenced by the court for a term of 30 days and to pay a fine of \$100 on each count, and committed to the county jail to serve out his sentence, which totalled 52 months, and until his fines, amounting to \$5,200, and costs, amounting to \$1,300, should have been paid. He served about one year, and the balance of his term was commuted by the Governor, but the authorities threatened to keep him in the county jail for life, if necessary, until he paid his fines and costs. He applied for a writ of habeas corpus, on the ground that he was being subjected to cruel and unusual punishment and that the jail was a dark, filthy, disease-breeding dungeon. Should the writ be granted?

A. No; so long as the defendant is held on a proper commitment by a competent court, within the authority of that court to inflict punishment, the court to which application is made for a writ of habeas corpus has no right to interfere. Neither will the conditions in the jail authorize his release on habeas corpus. Other means must be found to effect changes of that character. The writ of habeas corpus serves a definite, limited purpose, which is to test the regularity of process and the jurisdiction of the court or person under whose orders the petitioner is held.

Ex parte Harlan (O. C.) 180 F. 119.

Harlan v. McGourin, 31 S. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

Ex parte Steiner, 202 F. 419, 124 O. C. A. 89.

Ex parte Ellis, 91 P. 81, 76 Kan. 368.

For other cases see Decennial Digests, Habeas Corpus $\S$ 25(1), 27, 28, 29, 30(1).

DAMAGES

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Section

1. Nominal Damages.
2. Causation.
3. Entire and Prospective Damages.
4. Mitigation of Damages.
5. Expenses of Cure or Repair.
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12. Conversion.
13. Personal Injuries.
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SECTION 1.—NOMINAL DAMAGES

Q. 1. Defendant entered into a contract with plaintiff, giving it exclusive representation for the sale of defendant's make of automobiles in a designated territory, and attached to the contract was a schedule of the cars to be furnished by defendant to plaintiff for sale during the year covered by the contract, 125 cars to be sold at retail and 21 at wholesale. Plaintiff performed the terms and conditions of the contract up to January 20, 1923, but on that date defendant, without plaintiff's consent, broke the contract and entered into a new and similar contract with another company to sell defendant's automobiles in the territory covered by the plaintiff's contract, which contract operated to deprive plaintiff of its representation. Thereafter defendant ceased to do business with plaintiff. The contract provided that either party thereto might cancel the same by five days' written notice. On January 22, 1923, defendant had given plaintiff such notice. Can plaintiff be awarded more than nominal damages?

A. On principle, it would seem that plaintiff should be able to recover substantial damages, if more than trifling actual damage can be shown. The fact that defendant had power to terminate the contract by notice does not make the contract of no substantial effect. Substantial damage may have occurred between the time of the breach and the time when notice was to take effect. On construction of a contract terminable at any time, see Wilson

v. Studebaker Corporation of America (D. C.) 240 F. 801. But see Chevrolet Motor Co. v. McCullough Motor Co. (C. C. A.) 6 F.(2d) 212, holding that only nominal damages may be assessed in such a case. See note, criticizing the Chevrolet Case, in 26 Col. Law Rev. 360.

For other cases see Decennial Digests, Damages ⚡11; Sales ⚡405.

Q. 1a. A carrier negligently delays the carriage of a passenger one hour. The passenger sues the carrier, alleging inconvenience as an element of damage, and proves that, as a result of the delay, he was compelled to wait on a station platform for one hour, and arrived at home an hour later than the scheduled time. Is plaintiff's inconvenience a proper element of compensable damage?

A. If so, it cannot be considered as a proper basis of more than very small damages, on the showing of no more facts than these. "Mere inconvenience may be ground for damage, if it is such as is capable of being stated in a tangible form, and assessed at a money value." Baltimore & O. R. Co. v. Carr, 17 A. 1052, 71 Md. 135, Mechem & Gilbert's Cases on Damages, p. 67 (1889). In the case of a delay of two hours, the plaintiffs being healthy young women and showing no unusual results of the delay, the court said: "All the facts, taken together, show that the inconvenience suffered by them, of which the law can take notice, was very slight, and may be fully compensated with a very small sum." Dalton et al. v. Kansas City, Ft. S. & M. R. Co., 96 P. 475, 78 Kan. 232, 17 L. R. A. (N. S.) 1226, 16 Ann. Cas. 185, Bauer's Cases on Damages, p. 444 (1908); 68 Univ. Pa. Law Rev. 367.

For other cases see Decennial Digests, Carriers ⚡277(1), 278(1); Damages ⚡212.

SECTION 2.—CAUSATION

Q. 2. Defendant contracted to purchase a quantity of journal bearings of plaintiff, the bearings to be manufactured according to specifications furnished by defendant. After partial performance by plaintiff, defendant repudiated the contract. Plaintiff placed the manufacture of the bearings in the hands of a subcontractor. As soon as plaintiff learned of the repudiation of the principal contract, plaintiff canceled its contract with the subcontractor. May plaintiff, in this action for breach of the contract, recover special damages to the amount of its liability to the subcontractor?

A. "Where the making of the subcontract was a natural mode of performance under the circumstances, or was actually contem-

plated by the parties, the terms of the subcontract should be admissible. The facts of the instant case seem to bring it within this rule. A further objection was urged by the instant case to permitting the plaintiff's claim, on the ground that he could not show satisfaction to the subcontractor of the subcontractor's claim. The weight of authority, however, does not make this a condition to recovery." Note in 24 Col. Law Rev. 542, 543, on *Quaker Metal Co. v. Standard Tank Car Co.* (Del. Super.) 123 A. 131. In the *Quaker Metal Co. Case*, recovery of such special damages is denied.

For other cases see *Decennial Digests*, Sales ⇨384(6).

Q. 3. Defendant contracted to lend plaintiff \$1,000 on January 1, 1926, at 5 per cent. interest, for one year. At the time of making the agreement to lend the money, defendant knew that, if he did not advance the money on the date stated, a mortgage for \$1,000 was likely to be foreclosed on property of plaintiff. When the date, January 1, 1926, arrives, defendant refuses to lend plaintiff the \$1,000. As a result, plaintiff being unable to get the money, the mortgage is foreclosed, greatly to the loss of plaintiff. May plaintiff be awarded more than nominal damages?

A. Yes; the damage brought about by the foreclosure was in the contemplation of the parties at the time of the making of the contract to lend the money. "To entitle any one to recover more than nominal damages for a breach of contract to loan money to pay incumbrances, it is necessary, not only to allege and prove the contract to loan the money, and its breach, and that the person who agreed to make the loan knew the purpose for which it was to be used, and the necessity therefor, but also that the land was lost to the owner by reason of such liens or incumbrances, and without his knowledge, and solely through the fault of the person who was to loan the money, or, if the landowner had notice of the neglect or refusal to loan the money, that it was at such a time as to deprive him of the opportunity to procure the money elsewhere, and pay said liens or incumbrances, or redeem the land, if sold." *Lowe v. Turpie et al.*, 44 N. E. 25, 47 N. E. 150, 147 Ind. 652, 37 L. R. A. 233, *Mechem & Gilbert's Cases on Damages*, p. 594 (1896). See, also, *Murphy v. Hanna et al.*, 164 N. W. 32, 37 N. D. 156, L. R. A. 1918B, 135, *Bauer's Cases on Damages*, p. 499 (1917), and cases therein cited. See note, 5 Minn. Law Rev. 311, "Lost Profits as an Item of Damages for Failure to Loan Money."

For other cases see *Decennial Digests*, Damages ⇨11, 22, 120(1), 125.

Q. 4. Plaintiff, a city, employed defendants, representing themselves to be expert accountants, to audit the books of the city clerk of defendant, for the year 1908, for the fee of \$150. In this audit, defendants negligently failed to reveal a shortage of \$1,984.26. Later, for the fee of \$500, defendants made an audit of the clerk's books for the years 1908 and 1909, and negligently failed to uncover a shortage of \$5,339 for the year 1909. These shortages, caused by embezzlement by the clerk, were discovered later by the state examiner. If defendants had found and reported the first defalcation, at the time of the first audit, the defalcation for the year 1909 probably would have been prevented. The surety company on the bond of the clerk became insolvent before the discovery by the state examiner, and the city wholly lost the amount of the defalcations. Plaintiff sues for the following items: (1) The \$5,339 embezzled by the clerk between the first and second audits; (2) the \$1,984.26 embezzled by the clerk prior to the first audit; (3) the compensation paid defendants for first audit; (4) the compensation paid defendants for second audit. Each item was set out as a separate cause of action. Defendants demur to each cause of action. Result?

A. It is held that the demurrers to the first and second causes of action should be sustained, and that the demurrers to the third and fourth causes of action should be overruled. The defalcations are neither the natural nor the proximate consequences of the poor audits. The city is entitled to recover back the fees paid defendants, inasmuch as the city has the right to reports showing fully and accurately the condition of the city's accounts, and the reports here were negligently misleading and false.

City of East Grand Forks v. Steele et al., 141 N. W. 181, 121 Minn. 296
45 L. R. A. (N. S.) 205, Ann. Cas. 1914C, 720, *Bauer's Cases on Damages*,
p. 62 (1913).

For other cases see *Decennial Digests, Master and Servant* ¶65.

Q. 5. Plaintiff was struck by a mop handled by one of defendant's deck hands, fell to the floor, striking a seat in the fall, and was injured. Before the injury, plaintiff had a predisposition to ulcer of the stomach. Because of the injury, a stomach ulcer developed. Is the predisposition an intervening cause, such as to relieve defendant of liability for the ulcer?

A. No. "Where, as here, the latent disease or weakness itself did not cause pain, suffering, etc., to the plaintiff, but such condition, plus the fall, caused such pain, the fall, and not the latent

condition is the proximate cause, and the plaintiff is entitled to recover the entire damage shown to have resulted from such fall, without proving how much she would have suffered from such latent disease, if she had not received the injury." *Hahn v. Delaware, L. & W. R. Co.*, 105 A. 459, 92 N. J. Law, 277. See note on this case, 17 Mich. Law Rev. 604. See, also, *McNamara v. Village of Clintonville*, 22 N. W. 472, 62 Wis. 207, 51 Am. Rep. 722, *Mechem & Gilbert's Cases on Damages*, p. 175, *Bauer's Cases on Damages*, p. 177 (1885).

For other cases see *Decennial Digests*, Damages ⇨ 33, 34.

SECTION 3.—ENTIRE AND PROSPECTIVE DAMAGES

Q. 6. Defendant, in 1887, placed piling in the Mississippi river opposite plaintiff's farm, which turned the current from its natural course and upon plaintiff's land, washing away the shores thereof. Plaintiff brought action in 1895, and recovered a judgment, which was satisfied. In that action, prospective damages were not claimed nor assessed. Four more acres since that time have been washed away, and this action is brought to recover damages therefor. Is judgment in the prior action a bar to this action?

A. No. "The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury; but, where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting. * * * The acts of the defendant, in placing and maintaining the piling in the river, whereby the water, logs, and ice were driven upon the shore of the plaintiff's land, were in the nature of a continuing trespass or nuisance, and * * * successive actions may be brought for the damages as they accrue." *Bowers v. Mississippi & R. R. Boom Co.*, 81 N. W. 208, 78 Minn. 398, 79 Am. St. Rep. 395, *Mechem & Gilbert's Cases on Damages*, p. 302, *Bauer's Cases on Damages*, p. 250 (1899). From this it logically follows that the measure of damages, in such an action as this, cannot include prospective damages. See "Damages from Anticipated Injury to Land," *McCormick*, 37 Harv. Law Rev. 574. See, also, 21 Col. Law Rev. 825.

For other cases see *Decennial Digests*, Judgment ⇨ 606.

SECTION 4.—MITIGATION OF DAMAGES

Q. 7. Defendant fails to supply to plaintiff certain silk, required by a contract between plaintiff and defendant. After thus breaking the contract, defendant offers to supply the silk. Plaintiff refuses the offer, and sues for breach of contract. Can plaintiff recover for damage that he could have avoided by accepting defendant's offer?

A. Not if an acceptance of defendant's offer would not have amounted to an accord and satisfaction of the previous breach. Plaintiff should have accepted the offer, and thus mitigated damages. *Payzu, Ltd., v. Saunders*, [1910] 2 K. B. 581, commented upon in note, 33 Harv. Law Rev. 856, 863. Accord: *N. B. Borden & Co. v. Vinegar Bend Lumber Co.*, 62 So. 245, 7 Ala. App. 335, *Bauer's Cases on Damages*, p. 207 (1913). As indicated by the case just cited, a contrary rule "would enable the injured party to adopt a course, possibly dictated by a desire to injure another, rather than to save himself." Contra: *Frohlich v. Independent Glass Co.*, 107 N. W. 889, 144 Mich. 278.

For other cases see *Decennial Digests*, Damages ☞62(4); Sales ☞418(7).

SECTION 5.—EXPENSES OF CURE OR REPAIR

Q. 8. B's horse, of the value of \$100, is negligently damaged by A. B calls V, a veterinary surgeon, of reasonable learning and skill, who tells B that he believes that the horse can be cured by a few treatments, and estimates that the cure will not cost more than \$20. After treatment amounting to \$20, the horse has not recovered, but seems likely to recover after just a little more treatment. The horse always seeming to be nearly cured, but never quite cured, B continues to call V, until B has finally paid V \$110 for veterinary treatment. Then the horse suddenly dies. It is conceded that B has acted as any prudent man would have acted under the circumstances of the case, and that the outcome of the treatment has merely happened to be unsuccessful, without any fault of B. How much can B recover of A?

A. According to considerable case authority, B. may recover \$200, if he may, on the evidence, be taken to have expended as much as \$100, the value of the horse, prudently in an attempt, in good faith, to save the horse. But, according to the weight of authority, "if the expense exceeded the value of the animal, or is for treating one whose condition was such as to make it apparent

that a recovery was hopeless, then it would not be reasonable, and would not be sanctioned." *Southern Hardware & Supply Co. v. Standard Equipment Co.*, 48 So. 357, 158 Ala. 596. See, also, *Ellis v. Hilton*, 43 N. W. 1048, 78 Mich. 150, 6 L. R. A. 454, 18 Am. St. Rep. 438. It is well said in *Douglass v. Seattle Electric Co.*, 132 P. 229, 73 Wash. 561: "The ordinary rule relative to an injured animal is that, if the animal is not lost, but its value is depreciated, the measure of damages will be the difference in value before and after the injury, and expenses incurred, provided the total damages awarded do not exceed the original value. In cases, however, where an injury finally results in death, after a prospect that expense of treatment prudently incurred might save the animal's life, there is no sound reason why expenses thus incurred, in addition to the value of the animal, should not be awarded as damages; for, had the animal recovered, the party at fault would have received the benefit of the recovery and the expenses incurred."

On principle, it would seem that, in the instant case, the plaintiff might recover \$210, for he has, in making the expenditures, acted as a prudent man. It seems rather arbitrary to hold his recovery of veterinary fees down to the value of the horse, in such a case, though clearly he could not have spent \$110 for veterinary fees at once upon the happening of the injury and recovered the amount as damages, for this would have been imprudent. On the other hand, would the result be reasonable, if the defendant could be held for \$1,000 expenditures, prudently made, in order to save a \$100 horse?

For other cases see *Decennial Digests, Damages* ¶44.

Q. 9. A sues B for damages to his automobile, caused by B's negligent collision therewith. What is the proper measure of damages?

A. The usual measure is the difference in value just before and just after the injury, subject, however, to the proviso that, if the property can be repaired at a less expense than the diminution in value, the measure of damages is the reasonable cost of repairs. If defendant can show that the diminution in value would be less than the cost of repairs, he can limit the damages to such diminution. *Rhodes v. Firestone Tire & Rubber Co.*, 197 P. 392, 51 Cal. App. 569. The plaintiff may also recover for the temporary loss of use while being repaired. *Dettmar v. Burns Bros.*, 181 N. Y. S. 146, 111 Misc. Rep. 189; 34 Harv. Law Rev. 330; Maryland Re-

fining Co. v. Duffy, 220 P. 846, 94 Okl. 16, 35 A. L. R. 52; 32 A. L. R. 711.

For other cases see Decennial Digests, Damages $\S$ 39, 113, 174(1), 163(2).

SECTION 6.—PENALTIES AND ALTERNATIVE AGREEMENTS

Q. 10. A promises to build for B a house of certain specifications, in consideration of which B promises to pay A \$20,000 if the house is completed by October 1, 1926, or \$15,000 if it is completed between October 1 and the close of November 1, 1926, or \$10,000 if it is completed between November 1 and the close of December 1, 1926. Is this agreement valid as to the amounts so stated?

A. In order to determine whether the agreement is valid, it must first be determined whether this is a mere alternative agreement, or an agreement for liquidated damages, or an agreement for a penalty. It is argued by some lawyers that this is a valid alternative agreement, permitting A to perform in any one of three different ways, and giving B a corresponding right to pay in different respective sums, according to the time of performance by A. In support of this contention, it is asserted that A legally fulfills his obligation by completing the house within any one of the three periods stated, and that, by paying A for such completion under the contract, B discharges his only duty.

It is difficult to sustain such an agreement as being one for liquidated damages, if we consider \$20,000 as the principal sum intended to be paid by B to A, and the reductions for later dates of completion as being sums of \$5,000 liquidated damages for each period of delay, for usually no such amount of damage is likely to occur to B from such delay. Therefore, if the question were brought up squarely whether this provision was for liquidated damages or for a penalty, it would probably be held to be a penalty, and therefore unenforceable as to the reductions.

As between an alternative agreement and a penalty, there is very good reason for calling this an agreement for a penalty. Having been effectually barred from enforcing penalties cloaked as liquidated damages, many business concerns have adopted this scheme of concealing an agreement for a penalty as one for an alternative agreement. The same undesirable and oppressive remedy is shown as was present in the stipulation for a penalty, veiled as liquidated damages. In support of this, it seems necessary to analyze the agreement and to learn its true import. May it not be said that, if the contract and surrounding circumstances show

that the real intent of the parties is that the house be finished on the earliest of the stated dates and compensated for in the largest amount, the deductions to be made for delay, if unreasonable, are in the nature of penalties? See *Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.*, 41 N. E. 625, 157 Ill. 186; 2 Williston Contracts, § 781.

SECTION 7.—CONTRACTS TO CONVEY LAND

Q. 11. Defendant contracted to convey to plaintiff good title to a certain lot of land, but, finding that he could not make out good title, offered plaintiff his election, either to take the title with its faults or to rescind. Plaintiff brings action for damages for breach of contract. May plaintiff recover for the loss of his bargain?

A. Yes; according to the weight of American authority. *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261, *Bauer's Cases on Damages*, p. 460 (1875). Contra: *Flureau v. Thornhill*, 2 Wm. Bl. 1078, 96 Eng. Repr. 634, *Mechem & Gilbert's Cases on Damages*, p. 562, *Bauer's Cases on Damages*, p. 459 (1776); *Allen v. Anderson*, 2 Bibb. (Ky.) 415.

Under the English rule no compensation is allowed for loss of the bargain, where the vendor, acting in good faith, is unable to convey a good title. This exceptional rule is due to the difficulties of showing good title. 21 Law Notes, 237; Civ. Code Cal. § 3306.

For other cases see *Decennial Digests*, Covenants ⇨124; Exchange of Properties ⇨8(5); Vendor and Purchaser ⇨351(3).

SECTION 8.—CONTRACTS TO SELL PERSONALTY

Q. 12. A contracted to buy an engine from B, to be shipped from Chicago to A in North Dakota. A notified B not to ship the engine and to cancel the order. B nevertheless shipped the engine to A.

(1) Can the price be recovered by B?

(2) If not, can B include in the damages the cost of shipment and tender to A?

A. Ordinarily the price cannot be recovered as the measure of damages, unless the title to the goods has passed to the purchaser. But under the Uniform Sales Act, if the goods cannot readily be resold at a reasonable price, the seller may tender and recover the price. According to the better view, upon repudiation by the buyer, the seller should desist from further performance, which would enhance the damages. But some courts hold that the seller may ship the goods, even after notice of repudiation, and hold the buyer li-

able for loss suffered by the fall in price and additional transportation charges. Compare *Hart-Parr Co. v. Finley*, 153 N. W. 137, 31 N. D. 130, L. R. A. 1915E, 851, Ann. Cas. 1917E, 706, *Bauer's Cases on Damages*, p. 223, with *Barber Milling Co. v. Leichthammer Baking Co.*, 116 A. 677, 273 Pa. 90, 27 A. L. R. 1227.

For other cases see *Decennial Digests, Sales* Ⓒ177, 342, 384(1, 4).

SECTION 9.—CONTRACTS FOR SERVICES

Q. 13. Plaintiff, an attorney, contracts to represent defendant throughout a certain proceeding for \$500. When approximately half of the work of plaintiff is completed, defendant discharges plaintiff without proper cause. Plaintiff brings action for \$500. What is the measure of damages for the breach?

A. According to the weight of authority, plaintiff may recover \$500. "If he is discharged from the employment before the service is completed, he may recover the whole sum, * * * because of the manifest impossibility of making an apportionment of the services and compensation, when the parties themselves by their contract expressly abstained from making any, and may in fact be said to have agreed that none should be made." *City of Detroit v. Whittemore*, 27 Mich. 281; *Dorshimer v. Herndon*, 153 N. W. 496, 98 Neb. 421; *White v. American Law Book Co.*, 233 P. 426, 106 Okl. 166.

Some courts hold that, inasmuch as the client always has the power to discharge the attorney and even the right to do so, the attorney cannot recover on the contract of employment at all, but that he can recover on a quantum meruit. *Lawler v. Dunn*, 176 N. W. 989, 145 Minn. 281. See notes, 20 Col. Law Rev. 792, and 14 Col. Law Rev. 597.

For other cases see *Decennial Digests, Attorney and Client* Ⓒ134(1, 2), 144.

SECTION 10.—CARRIERS—LOSS OF PROSPECTIVE PROFITS

Q. 14. H & Co. were millers, and ran their mill by a steam engine. The crank shaft of their engine broke, and the mill suddenly came to a standstill. They sent the broken shaft by D, an express company, to J & Co., to serve as a pattern for a new one. By the fault of D the shaft was not delivered promptly, and the mill was kept standing idle. Can H & Co. recover from D for the loss of profits which they would have made if the new shaft had been procured on time?

A. No; but, if the carrier had been properly notified that a loss of profits would result from the delay, he would have been answerable.

It did not appear that D knew that the mill was dependent on the shaft. The extent of liability for consequences cannot be more than the parties can be presumed to have had in contemplation at the time of making the contract.

Hadley v. Baxendale, 9 Exch. 341.

Champion Ice Mfg. & Cold Storage Co. v. Pennsylvania Iron Works Co., 67 N. E. 486, 68 Ohio St. 229.

For other cases see *Decennial Digests*, Damages ¶122.

SECTION 11.—FOREIGN EXCHANGE—WHAT RATE SHOULD BE APPLIED

Q. 15. In 1914, defendant, an American corporation, borrowed of plaintiff, a Russian corporation, 750,000 rubles, then worth about \$390,000 in American money. Later in the same year, when the money fell due, the 750,000 rubles were worth \$375,000. Early in 1919, when action is brought in a court in the United States, for the nonpayment of the rubles, the exchange rate has so greatly changed that the 750,000 rubles would be worth only \$105. At the time when judgment is rendered, late in 1919, the exchange value of the 750,000 rubles is only \$95. How much may plaintiff recover?

A. According to the rule applied in some English and a majority of American cases, plaintiff could recover \$375,000, the amount being calculated according to the exchange rate on the day of the breach. *Owners of S. S. Celia v. Owner of S. S. Volturmo* [1921] L. R. 2 App. Cas. 544, 37 Law Q. 38; *Simonoff v. Granite City National Bank*, 116 N. E. 636, 279 Ill. 248; *Page v. Levenson et al.* (D. C.) 281 F. 555; *Hicks v. Guinness*, 46 S. Ct. 46, 269 U. S. 71, 70 L. Ed. 71 (suit to recover a debt owed by a German firm on a stated account payable in marks). The principle is that the loss of the plaintiff happens at the date the contract is broken, just as it does when a tort is committed, and plaintiff's claim is for the amount of the loss valued in money at that time.

According to the rule laid down in some other English and earlier American cases, plaintiff could recover only \$95; the court applying the exchange rate on the date of judgment. *Kirsch & Co. v. Allen, Harding & Co., Ltd.*, 122 L. T. 159, *Bauer's Cases on Damages*, p. 368 (1919); *Lee v. Wilcocks*, 5 Serg. & R. (Pa.) 48. See notes, 22 Col. Law Rev. 217; 21 Mich. Law Rev. 597; 68 Univ. Pa. Law Rev. 395; 36 Harv. Law Rev. 422; 33 Yale Law J. 564; 11 A. L. R. 363.

For other cases see *Decennial Digests*, Bills and Notes ¶529, 531; Payment ¶12(5); Sales ¶384(1).

SECTION 12.—CONVERSION

Q. 16. Plaintiff placed cotton in warehouse of G., to be there stored and kept by him till he was directed to sell it. Without further notice from plaintiff, G shipped it to L, who sold it, believing it had a right to do so as cotton factor of G, to defendant, who purchased it on the faith that L had the right to sell it. What is the measure of damages in an action against defendant for the conversion?

A. The general rule of the common law is that the measure of damages for conversion is the value of the article at the time of the conversion. *Hurd v. Hubbell*, 26 Conn. 389. As to stocks and sometimes to other property of fluctuating value, a number of courts place the measure of damages at the highest market value between the time of the conversion and the time of the trial. *Potts v. Paxton*, 153 P. 957, 171 Cal. 493; 4 Cal. Law Rev. 246.

Inasmuch as, under the "highest intermediate value" rule, the plaintiff might delay the trial over a long period and thus speculate on the condition of the market, the rule has, in New York and some other jurisdictions, been changed to substantially the following rule: "The proper measure of damages for the conversion of cotton, which is subject to depression and inflation of price in the market, is the highest price for which the same grade of cotton has been sold between the time of the conversion and a reasonable time after notice to the owner of such conversion; in other words, the price at which the owner might have replaced the cotton within a reasonable time." *Newburger Cotton Co. v. Stevens et al.*, 267 S. W. 777, 167 Ark. 257, 40 A. L. R. 1279, on which see note, 39 Harv. Law Rev. 124, which very properly says: "The present case, however, is one of a very small group of decisions extending the more satisfactory New York rule to other than stock cases." See 19 Col. Law Rev. 379.

For other cases see Decennial Digests, *Trover and Conversion* ¶46, 49.

Q. 17. Defendants converted a guitar, four pictures, and a trunk containing manuscripts of prose and poetry composed by plaintiff's husband, now deceased. May the plaintiff show a special value of the articles to her, because they were gifts from her husband, and because of the associations connected with them?

A. Yes. "One criterion of damages is the actual value to him who owns it, and this is the rule when the property is chiefly or exclusively valuable to him; such articles, for instance, as family pictures, plate, and heirlooms. These should be valued with reason-

able consideration of, and sympathy with, the feelings of the owner."

Bateman v. Ryder, 64 S. W. 48, 106 Tenn. 712, 82 Am. St. Rep. 910, *Mechem & Gilbert's Cases on Damages*, p. 348, *Bauer's Cases on Damages*, p. 625 (1901), quoting 3 *Sutherland on Damages*, p. 476.

For other cases see *Decennial Digests, Trover and Conversion* ¶47.

Q. 18. Defendant converted a savings bank book belonging to plaintiff. The jury, by direction of the court, found a verdict for the plaintiff in the sum of 15 cents, the value of the book as pieces of paper. Should plaintiff have had a verdict for \$1,662.97, the amount of the deposit?

A. Yes. "The plaintiff was entitled to the possession of the book and to receive the amount represented thereby. The defendant's conversion, not only deprived him of the book, but made it impossible for him to withdraw his deposit in the usual manner." *Stebbins v. North Adams Trust Co.*, 136 N. E. 880, 243 Mass. 69. See note thereto, 21 Mich. Law Rev. 803, 804; 29 Yale Law J. 689. Contra: *Newman v. Munk*, 74 N. Y. S. 467, 36 Misc. Rep. 639.

There is a scarcity of decisions on this point. Might it not well be said that the measure of damages in such a case would not ordinarily be either the value of the book as mere stationery or the value of the deposit? Ordinarily the plaintiff would be able, by putting up a bond against the assertion of any claim against the bank by a bona fide purchaser, to get payment from the bank. Might not the damages be, in the ordinary case, the cost of collecting the deposit, plus compensation for any delay proximately resulting in damage to plaintiff?

For other cases see *Decennial Digests, Trover and Conversion* ¶50.

SECTION 13.—PERSONAL INJURIES

Q. 19. During the Great War, one of the defendants, the agent of the other defendant, a private detective, came to the residence of the plaintiff, a French woman, who was in correspondence with a German interned in the Isle of Man, to whom plaintiff was engaged to be married. Defendant's agent falsely stated: "I am a detective inspector from Scotland Yard, and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy." Plaintiff was thereby extremely frightened, and suffered an extreme nervous shock. Plaintiff introduced evidence tending to prove that a long period of nervous illness was the proximate result of the shock. May a judgment for plaintiff, allowing a recovery for such nervous illness, be affirmed?

A. Yes. *Janvier v. Sweeney et al.*, [1919] 2 K. B. 316, *Bauer's Cases on Damages*, p. 415. Here is an intentional wrongful act of defendants, directly followed by fright or emotional disturbance, which in turn is followed in normal sequence by nervous illness of the plaintiff, which is a physical damage resulting from the wrong of the defendants, without any independent, efficient, intervening cause. Accord: *Sloane v. Southern Cal. Ry. Co.*, 44 P. 320, 111 Cal. 668, 32 L. R. A. 193. Contra: *Mitchell v. Rochester Ry. Co.*, 45 N. E. 354, 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604. See article, "Damages for Fright," by Archibald H. Throckmorton, 34 *Harv. Law Rev.* 260 (1921); "Emotional Disturbance as Legal Damage," by Herbert F. Goodrich, 20 *Mich. Law Rev.* 497.

A wrongdoer, who commits an intentional, willful, or malicious wrong, may be held responsible for nervous shock resulting even in jurisdictions where he would not be liable for such consequences of a negligent shock without impact. See *Garrison v. Sun Printing & Publishing Ass'n*, 100 N. E. 430, 207 N. Y. 1, 45 L. R. A. (N. S.) 766, *Ann. Cas.* 1914C, 288; *Boyce v. Greeley Square Hotel Co.*, 126 N. E. 647, 228 N. Y. 106, 113.

For other cases see *Decennial Digests*, *Carriers* ⇨382(4); *Damages* ⇨48, 52, 56, 57.

SECTION 14.—FRAUD AND DECEIT

Q. 20. Ames made a contract with Brown for the purchase of a tract of land in California of ten acres area. Brown falsely represented that the land was good raw orange land, and also suitable for raising walnuts, and was worth \$1,000 per acre. The contract price was \$500 per acre, but, if as represented, the land would have been worth \$800 per acre. The land was underlaid with rock, and was worth only \$100 per acre. Ames paid \$1,000 down and agreed to pay the balance in annual installments. Ames discovered the fraud a few days after the contract was made, and declared that he would make no more payments to Brown. Brown declared the contract terminated on account of Ames' anticipatory breach. Ames brings suit for deceit against Brown, claiming \$10,000, the difference between what Brown said the land was worth at \$1,000 an acre and what it was actually worth, plus the \$1,000 already paid down.

A. It would seem that Brown's assertion that the land was worth \$1,000 an acre was either mere "puffing," or a statement of opinion, for which he could not be held liable. His representation as to the character of the land was definite, and was more than "puffing" or

statement of opinion. Such a representation was a fraud and actionable, which leads us to the first conclusion, viz. that Brown has made an actionable false representation to the effect that the land is of a certain character, which would make it worth \$800 an acre. If Ames had elected to stand on the contract, and had paid all of the consideration, he could have recovered, on each acre, the difference between \$800, the value if as represented, and \$100, the actual value of each acre, or a total of \$7,000 on the contract. *Hines v. Brode*, 143 P. 729, 168 Cal. 507.

The measure of damages generally applied is the difference between the actual value of the property and the value it would have had, if as represented, even though greater than the consideration paid. According to the minority view, Ames could recover the amount that he had lost by the deal, the amount that he had diminished his assets by reason of the contract, which would be the difference between the \$5,000 paid and the \$1,000 that the land was actually worth. As he is not suing on the contract, but in tort, much is to be said, on principle, for this minority view. 14 Harv. Law Rev. 454.

If Ames had brought an action to rescind, he could have been placed in statu quo, which would here mean that he could recover the \$1,000 already paid and compel Brown to take back title, if title had passed. In urging his own power to terminate the contract for nonperformance by the defrauded party, and thus to defeat Ames' action, Brown is not within his rights, according to the weight of authority. *Contra*: *Olson v. Northern Pac. Ry. Co.*, 148 N. W. 67, 126 Minn. 229, L. R. A. 1915F, 962, criticized in note, 9 Minn. Law Rev. 143.

But Ames cannot rescind the contract and stand upon its representations at the same time. Thus he cannot recover both the \$1,000 already paid and the \$7,000 or \$4,000 damages for loss resulting from the deceit, under one of the two rules, followed in such actions. Either he rescinds and recovers only the \$1,000 paid, or he affirms the contract and sues for \$7,000, which is the amount recoverable according to the weight of authority. In the latter event, as already indicated, he would get only \$4,000, according to the minority view that he is merely entitled to recover the amount he has lost by the deceit, rather than the value of the bargain which he supposed he was getting. 3 Williston, Contracts, §§ 1392, 1514, 1524; 38 Harv. Law Rev. 523.

For other cases see Decennial Digests, Fraud §59(2), 60.

SECTION 15.—DEATH BY WRONGFUL ACT

Q. 21. In an action for death by wrongful act, the plaintiff, widow of the decedent, claims as an element of damage loss of support. May damages be allowed for such loss?

A. This depends upon the wrongful death statute of the state. If the statute provides only a survival of the action of the deceased for the personal injury to him, only such damages can be allowed as the deceased suffered in his lifetime. *Ramsdell v. Grady*, 54 A. 763, 97 Me. 319. If the statute creates an entirely new cause of action, allowing loss of support as an element of damages, the plaintiff may recover for such loss. *Hegerich v. Keddle*, 1 N. E. 787, 99 N. Y. 258, 52 Am. Rep. 25. The basis of estimating damages under the usual wrongful death statute is the probable pecuniary value of the life to the dependents, which includes protection, support, and companionship, but not solace for mental anguish, grief, and bereavement. *Redfield v. Oakland Consol. St. Ry. Co.*, 42 P. 822, 1063, 110 Cal. 277; *In re Ricommi's Estate*, 197 P. 97, 185 Cal. 458, 14 A. L. R. 509.

For other cases see *Decennial Digests*, Death §18(1), 30, 86(1).

Recovery of damages for loss of support

EQUITY

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Section

1. The Maxims of Equity.
2. Powers of Courts of Equity.
3. What Contracts are Specifically Enforceable.
4. Specific Performance for and against Third Parties.
5. Equitable Conversion.
6. Partial Performance with Compensation.
7. Consideration in Equity.
8. Marketable Titles.
9. Part Performance and the Statute of Frauds.
10. Effect of Default.
11. Fraud as a Defense.
12. Mistake and Hardship.
13. Mutuality of Remedy.
14. Injunction against Torts.
15. Interpleader.
16. Bills of Peace.
17. Bills Quia Timet.
18. Reformation and Rescission for Mistake.

SECTION 1.—THE MAXIMS OF EQUITY

Q. 1. A loaned \$5,000 to B, to enable B to erect a building. B agreed to give A a mortgage on the lot and building to secure the repayment of the loan. B failed to execute the mortgage, and conveyed the property to C, who knew of the agreement between A and B. B has no other property subject to execution. What relief can a court of equity give A?

A. The maxim, "Equity regards and treats that as done which in good conscience ought to be done," will be applied, and a court of equity will charge the property in C's hands with a lien to secure the repayment of the loan. *Beckwith v. Sheldon*, 145 P. 97, 168 Cal. 742, Ann. Cas. 1916A, 963; 24 Col. Law Rev. 550.

If a party agrees to give a mortgage, or imperfectly attempts to execute a mortgage, upon a valuable consideration, equity will create a lien on the property, and enforce it against the would-be mortgagor, or his assigns, who are not innocent purchasers. The application of maxims as solving phrases usually fails to show the real reason and ground of the decision, but they are frequently used and to those who know the law they serve as convenient catch phrases to point out certain policies or refer to certain doctrines. As in the case of the compass, they do nothing but point; "there

is much deviation and many things may serve to deflect." See Pound, *The Maxims of Equity*, 34 Harv. Law Rev. 809, 823. The following nine questions will illustrate some of the familiar equitable maxims.

For other cases see *Decennial Digests, Equity* ¶57.

Q. 2. To enable M, a mortgagor, to redeem after the title could be quieted, so he could borrow the necessary money, P, the purchaser at foreclosure, gave a contract to sell the property to M, on M's paying to P within the next year a sum equal to the amount necessary to redeem. It required 14 months to secure a decree quieting the title, and P then refused to convey, on the ground that M had not complied with the condition. Can M maintain a bill to redeem the property?

A. Yes. "Equity looks to the intent rather than to the form." The intent was to extend the time for redemption until the title could be quieted, and that intent will be enforced, though the contract on its face was for sale on condition.

Ogden v. Stevens, 89 N. E. 741, 241 Ill. 556, 132 Am. St. Rep. 237.

For other cases see *Decennial Digests, Equity* ¶56.

Q. 3. O sues to cancel, as a cloud on his title, a deed executed by him to P, and recorded by P, claiming that the deed was intended as a mortgage, and was invalid, because it did not comply with the statutory requirements for a mortgage. What decree should be rendered?

A. A decree canceling the deed should be conditioned on the repayment by O of the loan secured thereby, under the maxim, "He who seeks equity must do equity."

Mason v. Fichner, 139 N. W. 485, 120 Minn. 185.

For other cases see *Decennial Digests, Equity* ¶66.

Q. 4. A, a baseball player of exceptional ability, had contracted to play for D club during the current season, and to play only for that club during the following season, unless released at a salary to be determined by the parties. The provision for the following season was legally unenforceable for want of mutuality. P club, knowing the terms of A's contract, induced him to agree to play ball for it during the second season, but before the season opened A repudiated his contract with P club, and agreed to play again for D club. Can P club enjoin A from playing for D club?

A. No; the conduct of P club in inducing A to violate a provision of his contract with D club was contrary to good conscience,

though that provision was legally unenforceable, and deprives P club of its right to affirmative relief in equity concerning that transaction, under the maxim, "He who comes into equity must come with clean hands."

Weeghman v. Killifer, 215 F. 289, 131 C. C. A. 558, L. R. A. 1915A, 820.
See 36 Harv. Law Rev. 221, and 35 Harv. Law Rev. 754.

For other cases see Decennial Digests, Equity Ⓒ65(2).

Q. 5. A stockbroker, to secure a loan to himself, wrongfully pledged certificates of stock he had purchased for A, B and C, which had been paid for, but not delivered. After the bankruptcy of the broker, the pledgee sold the stock represented by the certificates of B and C, which produced sufficient funds to discharge the debt. Have B and C any claims against the stock of A?

A. Yes; applying the maxim, "Equality is equity," the three owners will be treated alike, and A will not be entitled to recovery of his stock, unless he pays to B and C a proportionate share of the debt for which his stock was pledged, and which was satisfied by a sale of their stock.

In re J. C. Wilson & Co. (D. C.) 252 F. 631.

For other cases see Decennial Digests, Equity Ⓒ59.

Q. 6. A beneficiary assigned his interest in the trust fund to X. X gave no notice to the trustee, and the beneficiary thereafter assigned the same interest to Y, who notified the trustee of the assignment. Is X or Y entitled to the fund?

A. The claim of X to the fund is based on the maxim, "Where there are equal equities, the first in order of time shall prevail." This maxim should not be applied, if there is any equitable ground for giving one claim a preference over the other. Courts are divided on the question whether an assignee of a trust fund is equitably bound to give notice to the trustee, in order to protect his claim against subsequent assignments. If such notice is required, the maxim would not apply, and Y would be entitled to the fund. If neither assignee had given notice, the maxim would apply, and X would receive the fund.

Jenkinson v. New York Finance Co., 82 A. 36, 79 N. J. Eq. 247.

For other cases see Decennial Digests, Assignments Ⓒ85; Trusts Ⓒ147(1); Vendor and Purchaser Ⓒ212.

Q. 7. V, by a valid contract, agreed to sell Blackacre to P. Later he made a similar contract with D, who had no notice of the contract with P, and, in conformity with the later contract, V conveyed the land to D. Can P enforce his prior equity against D?

A. No; here the equities of the two purchasers are equal, but D, in addition to his equity, has the legal title and the maxim, "Where there is equal equity, the law must prevail," applies. This maxim, and not the maxim favoring the prior equity, controls, if one of the holders of two equal equities has also the legal title.

Dedeaux v. Cuevas, 64 So. 844, 107 Miss. 7.

South Side Bank v. Center Wheeling Sav. Bank, 81 S. E. 571, 74 W. Va. 61.
For other cases see Decennial Digests, Equity ⌘61; Vendor and Purchaser ⌘239(6).

Q. 8. Five of the six owners of an oil lease assigned their interests to the sixth, to enable him to sell the lease. The assignee sold the lease, but did not account to the assignors for their shares. A, one of the assignors, sued the assignee, and enjoined him from disposing of the proceeds of the sale of the lease pending the suit. A obtained a decree for his share of the proceeds, but none of the other assignors made any claim. Should the injunction be continued, in so far as it affects the interests of the other assignors?

A. No; under the maxim, "Equity aids the vigilant, not those who slumber on their rights," the court will not exercise its powers to protect the interests of those who have not asserted their claims.

West v. Madansky, 194 P. 439, 80 Okl. 161.

For other cases see Decennial Digests, Equity ⌘64.

Q. 9. T by will gave to X a fund with which X was to buy land to hold in trust for T's heirs. With the money X bought Blackacre, taking the title in his own name. X subsequently died without making any declaration that he held Blackacre in trust. Have T's heirs any rights in Blackacre?

A. Yes. "Equity imputes an intention to fulfill an obligation," and therefore presumes that X purchased as trustee, and not in breach of his trust. The failure to make a declaration of trust will not be permitted to prejudice the beneficiaries.

Gale v. Harby, 20 Fla. 171.

For other cases see Decennial Digests, Trusts ⌘84.

Q. 10. A father left to his minor heirs several tracts of land, all incumbered by mortgages for less than their value. The minors were without funds to discharge the mortgages, and some of the mortgagees had started foreclosure proceedings. In the absence of statutory authority, can a court of equity authorize a sale of part of the lands to raise funds to discharge the mortgages against the rest?

A. Yes; it is a maxim of equity that "Equity will not suffer a wrong without a remedy," though it must be construed with qualifications. But in this case equity can act to prevent the entire dissipation of the estate of the minors, even though not expressly authorized by statute so to act.

Fienhold v. Babcock, 113 N. E. 962, 275 Ill. 282.

For other cases see *Decennial Digests*, Equity ⇨55.

SECTION 2.—POWERS OF COURTS OF EQUITY

Q. 11. A brings suit in X state to enjoin prosecution of action at law begun against him in Y state by B, and obtains a temporary injunction. Relying on this, A does not appear in the action in Y state, and B obtains judgment there by default. Thereafter the court in X state dissolves the temporary injunction as having been improvidently granted, and B brings an action in X on his judgment. A defends on the ground that the judgment was invalid. Is the defense good?

A. No; the temporary injunction merely rendered B subject to punishment for contempt, if he disobeyed the injunction. It did not affect the jurisdiction of the court in Y state, since "Equity acts in personam and not in rem." If the temporary injunction had been made permanent, the court of equity in X state could have enjoined the action at law on the judgment obtained in Y state, and, if there were a statute in X permitting equitable defenses in actions at law, the defendant in the action in X state could have pleaded the injunction as a defense, so long as it remained in force. After it had been dissolved, because there was no equity against recovery in the action at law, there could be no defense to the action on the judgment obtained in Y state, based on the injunction in X. B might be punished for contempt for obtaining the judgment while the temporary injunction was in force, but the punishment would be inflicted merely to vindicate the court's authority.

Platt v. Woodruff, 61 N. Y. 378.

Reekman Lumber Co. v. Acme Harvester Co., 114 S. W. 1087, 215 Mo. 221, affirmed 32 S. Ct. 96, 222 U. S. 300, 56 L. Ed. 208.

For other cases see *Decennial Digests*, Injunction ⇨205.

Q. 12. A, while mentally competent, contracts to sell to B Blackacre, which is situated in a state other than the domicile of A; conveyance to be made in three months. In a suit against A for specific performance of that contract, brought in the state of A's domicile, it is proved that since the execution of the contract A

has become insane. What relief can a court of equity of that state grant to B?

A. A suit by B against A for specific performance of the contract is within the jurisdiction of the court of equity in the state where A is domiciled, although the land is situated elsewhere. Equity, in granting specific performance, generally acts in personam, and not in rem; i. e., by directly decreeing transfer of the legal title. Even if there were a statute in the state of A's domicile, authorizing a court of equity to transfer title to land by its decree, it could not make a decree in that state effective to pass the title to land located out of the state. The insanity of A deprives him of capacity to execute a valid conveyance, and therefore equity will not order him to do it, so that the court cannot give to B any effective relief in that suit.

Milkman v. Ordway, 106 Mass. 232.

Morgan v. Bell, 28 P. 925, 3 Wash. 554, 16 L. R. A. 614.

O. W. Kerr Co. v. Nygren, 130 N. W. 1112, 114 Minn. 268, Ann. Cas. 1912C, 538.

For other cases see Decennial Digests, Specific Performance §13, 103, 128(2).

Q. 13. D owns a large tract of semiarid land in the state of Y. For the purpose of cultivating this land, D constructs an irrigation canal, drawing the water from the Colorado river at a point in the state of X. At the time of a heavy flood the canal breaks through its banks, and in consequence a large quantity of water continually flows through the opening and across the state boundary, flooding the land of P in the state of Y. D makes no effort to restore the stream to its original channel, with the result that P's land is under water. P and D are both residents of the state of Y. Can P obtain an injunction against D in the United States District Court in Y state?

A. Yes; a court of equity can order a person subject to its jurisdiction to do acts with reference to a res situated outside of the jurisdiction. Ordinarily it will not exercise this power, where the acts must necessarily be performed by the party outside of the jurisdiction, because of the difficulties in enforcing such a decree. Under facts similar to those stated the federal Circuit Court of Appeals sustained an injunction restraining D from permitting water to flow onto P's land because actions at law for damages to the land were local actions, and that relief could only be obtained where the injured land was located, and the remedy at law would

not have been as practical and efficient as the remedy by injunction.

Salton Sea Cases, 172 F. 792, 97 C. C. A. 214.
For other cases see Decennial Digests, Equity Ⓒ36.

SECTION 3.—WHAT CONTRACTS ARE SPECIFICALLY ENFORCEABLE

Q. 14. V and P enter into a written contract for the sale to P of the timber standing on V's land, P agreeing to cut and remove the timber during the six months next following the conveyance of the timber. P intends to sell the logs on the open market. Before he has begun the cutting, V notifies him that he will not convey the timber, and P brings a suit for specific performance. V demurs to the bill. What should be the ruling of the court?

A. The demurrer should be sustained. Here there is no reason why the remedy at law is not adequate; the logs were to be re-sold within a limited time, and recovery of the difference between the market value during that time and the cost of the standing timber, plus the expense of marketing it, would make P whole. The fact that the sale of the standing timber was a sale of an interest in realty should not affect the ruling. The test should be whether the remedy at law is adequate, without regard to the technical nature of the subject-matter of the contract as realty or personalty. If the time within which the timber was to be removed was so long that the damages were conjectural, and therefore inadequate, the contract should be specifically enforced. It is on this ground that cases allowing specific performance of sales of standing timber can be supported, although some of them are also based on the ground that they involve an interest in realty.

Stuart v. Pennis, 22 S. E. 509, 91 Va. 688.

Paddock v. Davenport, 12 S. E. 464, 107 N. C. 710.

Omaha Lumber Co. v. Co-operative Investment Co., 133 P. 1112, 55 Colo. 271.

For other cases see Decennial Digests, Specific Performance Ⓒ64, 68, 69.

Q. 15. A believes that a new industry will be located in a certain section of the city, which will enhance the value of building lots in that section. As a speculation he contracts to buy from B three vacant lots. Later B refuses to perform, and A sues for specific performance. B defends on the ground that the X Realty Company owns a large number of lots in that immediate vicinity, any of which can be bought at a price already fixed by that company, and that therefore A has an adequate remedy at law. Is the defense good?

A. Theoretically the defense is well taken, but as a result of historical development it is generally stated that any tract of land is unique, so that the recovery of damages for breach of a contract to convey it is not an adequate remedy. In a few cases specific performance of a contract for the sale of land has been refused, on the ground that the purchaser intended to resell at a profit.

Hazelton v. Miller, 25 App. D. C. 337.

Schmid v. Whitten, 103 S. E. 553, 114 S. C. 245.

For other cases see Decennial Digests, Specific Performance ⇨55, 65.

Q. 16. S, a wholesale dealer, agrees to sell to B, a retailer, a car-load of sugar, to be delivered at the end of three months. When the time for delivery arrives, the market price of sugar has doubled, and S has become insolvent, but has enough sugar in his warehouse to fill the order. B sues S for specific performance, alleging that his remedy at law is inadequate, since a judgment against S could not be collected. Should the relief be granted?

A. It has sometimes been said by courts that the insolvency of the defendant establishes the inadequacy of the remedy at law, since a judgment for damages is worthless as a matter of fact, if it cannot be collected. Other courts have said that the remedy at law, to be adequate, need not be collectible; that all remedies, equitable as well as legal, are apt to prove unenforceable in the particular case. All recognize that the insolvency of the defendant is a circumstance to be considered in determining whether a court of equity will exercise its discretion in favor of granting the relief. In this case there is no ground for specific performance, except the insolvency of the defendant. Until the right to such relief arises, the buyer has no equitable right in the specific sugar in S's warehouse. After the insolvency, it is the policy of equity to treat equally all creditors who have no specific equities or liens. So that in this case specific performance ought to be refused as giving an undue preference to B, even if the insolvency were a ground for specific performance.

Chafee v. Sprague, 13 A. 121, 16 R. I. 189.

Hogg v. McGuffin, 68 S. E. 41, 67 W. Va. 456, 31 L. R. A. (N. S.) 491.

McNamara v. Home Land & Cattle Co. (C. C.) 105 F. 202.

Geo. E. Warren Coal Co. v. Black Coal Co., 102 S. E. 672, 85 W. Va. 684, 15 A. L. R. 1083.

Horack, Insolvency and Specific Performance, 31 Harv. Law Rev. 702.

For other cases see Decennial Digests, Specific Performance ⇨5, 68.

Q. 17. By a written contract, a mining company agreed to sell to a smelting company 100,000 tons of ore at a fixed percentage of the current market price of the metal produced therefrom, deliv-

eries to be made at fixed periods during the year. After the mining company had refused to make further deliveries under the contract, the smelting company sues for specific performance, and shows that the mining company is the only producer of ore of that kind, and that certain elements therein are necessary to enable the smelting company to continue the operation of its smelter. Shall the relief be granted?

A. Yes; a contract for the sale of chattels may be specifically enforced, if, under the circumstances, the recovery at law of damages for its breach would be an inadequate remedy. Under the facts shown here, the damages recoverable would not be an adequate remedy. Even if the loss suffered from closing the smelter could be recovered as special damages, the amount of that loss could not be accurately ascertained.

Texas Co. v. Central Fuel Oil Co., 194 F. 1, 114 O. C. A. 21.

Curtice Bros. v. Catts, 66 A. 935, 72 N. J. Eq. 831.

For other cases see Decennial Digests, Specific Performance ⇨68.

Q. 18. A conveys to B a tract of land lying between A's factory and a navigable river, and as part of the consideration therefor B agreed to construct a wall along the river bank to protect A's factory from floods. After receiving possession of the land B refuses to construct the wall. Is A entitled to specific performance?

A. Yes; there has been some tendency for courts to adopt a rule that building contracts either will or will not be enforced, but on principle the right to specific performance of such contracts should be determined by the application of the ordinary principles of equity governing the remedy of specific performance. If the plaintiff can have the work done by another, his remedy at law is adequate. In the case stated here, A could not go on the land of B to construct the wall, no money he can recover from B will enable him to get the protection he contracted for, and equity should require specific performance by B. The difficulty of the court's supervision of the performance by B is not great enough to require the denial of the relief, in view of the injustice to A if it is not granted.

Gloe v. Chicago, R. I. & P. R. Co., 91 N. W. 547, 65 Neb. 680.

For other cases see Decennial Digests, Specific Performance ⇨74.

Q. 19. In the city of X there were two street railroad systems, operated respectively by A Company and B Company. As a condition to the renewal of their franchises for a term of 20 years, the city council required them to grant transfers from one system to

the other, and to operate through cars over certain routes comprised in part by the lines of both companies. To carry out the condition the companies entered into a contract whereby the A Company agreed to construct certain additional lines to connect with the lines of B Company and to operate its cars on other lines on specified schedules, which would enable them to connect with those operated by B Company. Thereafter A Company refused to perform the contract, and B Company sues for specific performance of both the agreements relating to construction and those relating to operation. Should the relief be granted?

A. Yes; ordinarily specific performance of a contract calling for continuous affirmative action will not be decreed, because the court cannot undertake the supervision of the acts required by the decree. But there is no lack of jurisdiction to compel the performance of such contracts, and where the public has an interest in the performance of the contract sufficient to justify the court in devoting the necessary time to the supervision of the enforcement of the decree, specific performance should be granted.

Union Pac. Co. v. Chicago, R. I. & P. R. Co., 16 S. Ct. 1173, 163 U. S. 564, 41 L. Ed. 265.

Joy v. St. Louis, 11 S. Ct. 243, 138 U. S. 1, 34 L. Ed. 843.

For other cases see Decennial Digests, Specific Performance §75.

Q. 20. A enters into a contract with a baseball club whereby he agrees that during the next three years he will play only for that club. The club manager made the contract with A believing that the latter would later become a great ball player, but during the first month of the first season A is not used in any of the games, and thereupon he begins to play baseball for another club. The first club brings suit to enjoin him from playing baseball for any club except itself. Should the injunction be granted?

A. No; the rule of Lumley v. Wagner, allowing injunction to restrain the breach of a negative clause in a contract, though the affirmative clauses cannot be enforced, because they are for the performance of personal services, is generally followed in this country, regardless of whether the negative is expressed or implied in fact. The relief will not be granted, however, unless the services of the defendant are of a unique character, so that plaintiff will be damaged by their rendition for a competitor. The fact that the defendant in this case was not used regularly in the games is a circumstance strongly tending to show that his services were not of a unique character, so that the injunction should be denied, unless there were other circumstances showing plaintiff would

be damaged by defendant's playing for another. The expectation that he would become valuable in the future ought not to be sufficient.

Carter v. Ferguson, 12 N. Y. S. 580, 58 Hun, 569.

Philadelphia Ball Club v. Lajoie, 51 A. 973, 202 Pa. 210, 58 L. R. A. 227, 90 Am. St. Rep. 627.

Clark, Implications of Lumley v. Wagner, 17 Col. Law Rev. 687.

For other cases see Decennial Digests, Injunction ¶60.

Q. 21. By a written contract, which is valid under the co-operative marketing laws, a farmer agrees to sell all his wheat to a co-operative marketing corporation, which has secured a similar contract from all the farmers who sell their wheat in the same market. After the wheat is harvested, the farmer starts delivering it to a private dealer for sale on commission. Will equity require specific performance of the contract? If so, what form of relief will be granted?

A. Though this contract relates to a sale of personalty, it may be specifically enforced if, under the circumstances, the recovery at law of damages for its breach would be an inadequate remedy. Here the purpose of the organization of the corporation can only be realized if it can enforce these contracts, the amount by which it would be injured by the breach of any one of them could not be ascertained, even if such a recovery would be permitted as special damages. Equity will not attempt to compel a farmer to raise wheat, but, after he has done that, it can restrain him from selling to any one else in violation of his contract.

Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.

Tobacco Growers' Co-op. Ass'n v. Battle, 121 S. E. 629, 187 N. C. 260.

Minn. Wheat Growers' Ass'n v. Huggins, 203 N. W. 420, 162 Minn. 471.

37 Harv. Law Rev. 162.

12 Col. Law Rev. 146.

For other cases see Decennial Digests, Injunction ¶59(1, 3), 61(1); Specific Performance ¶68.

SECTION 4.—SPECIFIC PERFORMANCE FOR AND AGAINST THIRD PARTIES

Q. 22. L leased Blackacre to T for 10 years, by a lease which gave T the option to purchase the property for \$5,000. T recorded his lease and went into possession. Before the expiration of the term, L conveyed Blackacre to P for \$7,500. Thereupon T tendered the purchase money to P and demanded a deed. When P refused to convey, T sued for specific performance. Can he obtain that relief?

A. Yes; equity regards T as having an equitable right to Blackacre, not merely a contract right against L. Since P had notice of the option in the lease, he purchased subject to that equitable right, and can be compelled to convey the property to T in accordance with the terms of the contract.

Forney v. City of Birmingham, 55 So. 618, 173 Ala. 1.

24 Col. Law Rev. 550.

For other cases see Decennial Digests, Specific Performance ¶22.

Q. 23. V had acquired title to a city block by a deed restricting the use of the west half to residences only. On that side of the block was a fashionable residence street. On the other side was a street along which ran a railroad track. V subsequently conveyed the lots in the east half of the block to different purchasers, by deeds containing restrictions on the use differing from the restrictions imposed on the other half, and containing no agreement by himself to impose similar restrictions. A subsequent grantee of one of the east lots now sues to enjoin a subsequent grantee of the adjoining lot from erecting a building, in violation of the restriction in both the deeds by which V parted with title to those two lots. Will the injunction be granted?

A A common plan of restrictions, imposed on all of the lots of a tract sold by a common owner, is a strong indication that he intended the restrictions for the benefit of the land, and not for his personal benefit. Here there was no such common plan, but the restrictions varied with the location of the several lots. Unless there is some other circumstance tending to show an intent of V to benefit the lots in the east half of the block by the restrictions imposed on the several lots, the restriction will be construed as intended for his personal benefit, and cannot be enforced by the grantee of another lot.

Equitable Life Assur. Soc. of United States v. Brennan, 43 N. E. 173, 148 N. Y. 661.

Sprague v. Kimball, 100 N. E. 622, 213 Mass. 380, 45 L. R. A. (N. S.) 962, Ann. Cas. 1914A, 431.

Stone, 18 Col. Law Rev. 291.

For other cases see Decennial Digests, Covenants ¶69(1); Deeds ¶173.

Q. 24. X Coal Company sold a tract of land to P, the deed containing a covenant, which it expressly stated should "run with the land," that P should not conduct thereon a coal and ice business. P conveyed the tract to A by a deed which did not contain the restriction, but A knew of P's covenant. X Coal Company now sues to prevent A from using the tract for the prohibited business. A demurs to the bill. What ruling?

Res. restrict
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A. The demurrer should be sustained. Not even the parties to a covenant can make it one running with the land, if it is not of such a nature. The test is whether it "touches and concerns"—i. e., directly affects—the land, or is a collateral and personal covenant. It is not always easy to apply the test to the particular facts, but in this case it is apparently clear that the purpose is merely to restrict competition with the grantor's business rather than to exclude a noxious trade from a residential district.

Rubel Bros. Inc. v. Dumont Coal & Ice Co. Inc., 182 N. Y. S. 204, 111 Misc. Rep. 658.

Natural Products Co. v. Dolese & Shepard Co., 140 N. E. 840, 309 Ill. 230. 33 Yale Law J. 447.

2 Wis. Law Rev. 40.

16 Mich. Law Rev. 90.

For other cases see Decennial Digests, Covenants ⇨53, 69(1).

Q. 25. S sold his grocery business to B, and agreed not to engage in that business in the same city during the next five years. Two years later, B sold the business to P, and shortly thereafter S opened a grocery store in the same city. Can P have S restrained from violating his agreement with B?

A. Yes; even though the agreement was not expressly made with the assigns of B, it was clearly intended to protect the good will of the business sold by S, and passes to a subsequent purchaser of that business.

Francisco v. Smith, 38 N. E. 980, 143 N. Y. 488.

Johnston v. Blanchard, 116 P. 973, 16 Cal. App. 321.

For other cases see Decennial Digests, Assignments ⇨77; Specific Performance ⇨17.

Q. 26. R Co. platted an addition to a city, consisting of eighteen blocks, and by the plat and deeds to purchasers provided that each lot should be used only for a single residence. A purchased a lot on the west side of the addition, at a time when the property across the street, outside of the addition, was vacant. Before A had erected any building on his lot, a large automobile factory was erected on the unrestricted land across the street, a double-track street car line was laid in the street, and business buildings erected both north and south of the factory, so that A's lot was of no value as a residence site. He then started to erect a business building on his lot, but B, who owned the lot immediately back of A's lot and had erected a residence thereon, sought to enjoin A from proceeding. Should the injunction be granted?

A. Courts are generally agreed that building restrictions will not be enforced, when the character of the restricted district has so changed, that the purpose of the restriction can no longer be attained. Here the change affects only the lots fronting on one of the streets forming the boundary of the district. Apparently the courts are divided as to whether such a change defeats the right of those not affected to enforce the restrictions against those whose property can no longer be used for the intended purpose. *change*

Windemere-Grand Improvement & Protective Ass'n v. American State Bank, 172 N. W. 29, 205 Mich. 539.

Bohm v. Silberstein, 189 N. W. 899, 220 Mich. 278.

Kneip v. Schroeder, 99 N. E. 617, 255 Ill. 621, Ann. Cas. 1913D, 426.

For other cases see Decennial Digests, Covenants Ⓒ72; Deeds Ⓒ176.

SECTION 5.—EQUITABLE CONVERSION

Q. 27. L gave T a lease for 10 years, with option to buy at a stated price at any time during the term. Subsequently L made a will, giving his real estate to C, and his personal property to W. After L's death, T exercised his option to purchase. Before the transaction was closed, C died. The purchase money is now claimed by W, C's heir, and C's executor. Who is entitled to it? *optioned to, be, W & C*

A. C's executor. When a binding contract for the sale of land is entered into, an equitable conversion takes place; the right of the purchaser is treated as real property and that of the vendor as personalty. In England the rule is that, when a contract arises from the exercise of an option to sell, the conversion of the vendor's right relates back to the giving of the option, and under that rule W would be entitled to the purchase money. The general rule in this country is that the conversion does not take place until the option is exercised, so that the vendor's right passed to C as realty, was converted into personalty by the exercise of the option, and therefore passed to C's executor. *Wt. in U.S. in*

Rockland-Rockport Lime Co. v. Leary, 97 N. E. 43, 203 N. Y. 469, L. R. A. 1916F, 352, Ann. Cas. 1913B, 62.

Adams v. Peabody Coal Co., 82 N. E. 645, 230 Ill. 469.

Ingraham v. Chandler, 161 N. W. 434, 179 Iowa. 304, L. R. A. 1917D, 713.

Stone, Equitable Conversion by Contract, 13 Col. Law Rev. 369.

For other cases see Decennial Digests, Conversion Ⓒ11, 13, 21(1,2).

Q. 28. A contract for the sale of Blackacre by V to P for \$10,000 provided that P should pay one-half of the purchase price in 10 days and then be entitled to possession, but that no conveyance was to

be made until the full purchase price was paid, at the expiration of one year. Before surrendering possession, V cut timber worth \$500. After he took possession, P began cutting the remaining timber, which was worth \$1,000, and also began to move a building onto adjoining land owned by him. What are the rights of the parties?

A. According to the general rule, V had only a legal title as security for the payment of the purchase money after the contract was executed, and therefore P can recover for the timber cut by V. P has the beneficial ownership, subject to the vendor's lien, and can use the property in any way which does not impair the security of the lien. In the circumstances of this case the cutting of the timber would probably be held not to impair the security, but the removal of the building would, and that can be enjoined at the suit of V.

Van Dyke v. Cole, 70 A. 593, 1103, 81 Vt. 379.

Newman v. Mountain Park Land Co., 107 S. W. 391, 85 Ark. 208, 122 Am. St. Rep. 27.

Thienes v. Francis, 138 P. 845, 69 Or. 171.

Laughlin v. North Wisconsin Lumber Co., 193 F. 367, 113 C. C. A. 291.

McCarroll v. Newsham (C. C. A.) 278 F. 4.

For other cases see Decennial Digests, Specific Performance §94; Vendor and Purchaser §193, 203.

Q. 29. V contracts to sell a house and lot to P, payment and conveyance to be made the next day. During that night the house, which comprised 80 per cent. of the total value of the property, was destroyed by a tornado. Can V, on establishing that he tendered a deed and abstract showing good title to P at the time fixed, require P to perform?

A. According to the weight of authority, he can. Equity regards P as the owner of the property, and the usual rule is that the risk of loss is on the owner. Some courts, regarding more the contract obligation, deny the right to specific performance in such a case, because the vendor cannot convey what he agreed to convey. They argue that there is an implied condition that the subject-matter be in existence when the time for performance arrives, and that the situation is analogous to that in which the vendor has not good title to convey and that there is a partial failure of consideration.

It has been suggested that the loss ought to fall on the party in possession, and some courts have stressed the fact that the pur-

chaser was in possession as a ground for requiring performance, or that the vendor was in possession as a ground for refusing specific performance. Other courts say possession is immaterial.

Sewell v. Underhill, 90 N. E. 430, 197 N. Y. 168, 27 L. R. A. (N. S.) 233, 134 Am. St. Rep. 863, 18 Ann. Cas. 795.

Woodward v. McCollum, 111 N. W. 623, 16 N. D. 42.

Good v. Jarrard, 76 S. E. 698, 93 S. C. 229, 43 L. R. A. (N. S.) 383.

Farmers' Tobacco Warehouse Co. v. Eastern Carolina Warehouse Co., 117 S. E. 625, 185 N. C. 518.

O'Brien v. Paulson, 186 N. W. 440, 192 Iowa, 1351.

Libman v. Levenson, 128 N. E. 13, 236 Mass. 221, 22 A. L. R. 560.

Langdell, Brief Survey of Equity Jurisdiction, 1 Harv. Law Rev. at pages 373-380.

Williston, Risk of Loss, 9 Harv. Law Rev. 106.

8 Minn. Law Rev. 127.

For other cases see Decennial Digests, Vendor and Purchaser ¶203.

Q. 30. V contracted to sell Blackacre to P "free and clear of all incumbrances." At the time the contract was made there was a mortgage upon the premises, which could not be paid and discharged until after the time fixed for conveyance. Before that time, however, the house on Blackacre burned, and the mortgagee accepted the insurance money and released the mortgage. Can V compel P to complete the contract?

A. No; the equitable ownership of property does not pass, where the vendor has not the title he agreed to convey, and therefore the risk of loss remains on him.

Eppstein v. Kuhn, 80 N. E. 80, 225 Ill. 115, 10 L. R. A. (N. S.) 117.

For other cases see Decennial Digests, Vendor and Purchaser ¶203.

Q. 31. After V had agreed to sell land to P for \$10,000, payment and conveyance to be made concurrently in six months, and the contract had been recorded, C recovered a judgment against V for \$12,000, and D recovered a judgment against P for \$15,000. The land was worth \$16,000. What are the rights of C and D?

A. In equity, V when C recovered his judgment, held the legal title only to secure his vendor's lien, and that is all that C can have applied to the payment of the judgment. D can have applied to his judgment P's equitable right to have the property conveyed to him on paying the purchase price. Whether C and D can enforce their claims, by levying execution on the interests of their debtors, depends on the scope of execution under the statutes of the state; but, if they cannot, they can by proceedings in equity have those in-

terests sold. The purchaser of P's interest can get the land by paying the \$10,000 to the purchaser of V's interest.

Kinsey v. Drury, 126 A. 125, 146 Md. 227.

Schmidt v. Steinbach, 160 N. W. 448, 193 Mich. 640.

Evins v. Sandefur Julian Co., 98 S. W. 677, 81 Ark. 70.

W. F. Miller Co. v. Grussi, 98 A. 90, 90 Conn. 555.

For other cases see Decennial Digests, Vendor and Purchaser 213 (1,3), 216.

SECTION 6.—PARTIAL PERFORMANCE WITH COMPENSATION.

Q. 32. V agreed to sell to P a tract used as a market garden, containing 12 acres, for \$1,200. A survey showed that the tract contained only 11½ acres, and P refused to perform. Can V have specific performance of the contract, if he is willing to abate \$50 from the purchase price?

A. Yes; under these facts. Equity will not grant specific performance, with compensation, to the party unable to perform in full, as freely as it will to the party not at fault. The rule is that plaintiff must be able to perform substantially, but slight deficiencies, not affecting the substantial value of the premises, and which can be fully compensated for, will not defeat the right to relief.

Heltzel v. Baird, 175 P. 851, 90 Or. 156.

Doherty v. Egan Waste Co., 111 A. 499, 91 N. J. Eq. 400.

Louisville & N. R. Co. v. Fuson, 262 S. W. 1086, 203 Ky. 708.

For other cases see Decennial Digests, Specific Performance 94.

Q. 33. V agreed to convey real property to P free and clear of all liens or incumbrances. At the time for performance there was an outstanding mortgage on the property, which was not yet due. P refused to perform, and V brought suit for specific performance, alleging that the mortgagee was willing to accept payment and release the mortgage, and offering to have the payment made from the purchase money. P demurs to the bill. What ruling?

A. The demurrer should be overruled. Since the mortgage can be discharged out of the purchase money, the purchaser will get what he contracted for. It is not necessary that he be able to perform when the bill is filed, for equity determines the rights of the parties as of the time of the decree. However, some courts have denied relief, unless plaintiff is able to tender the agreed title at the time of bringing suit.

Keepers v. Yocum, 114 P. 1063, 84 Kan. 554, Ann. Cas. 1912A, 748.

Rothwell v. Schmidt, 94 N. E. 82, 248 Ill. 586.

For other cases see Decennial Digests, Specific Performance 95.

Q. 34. A contract for the sale of land to P was not signed by the wife of the vendor, V, and she refused to sign the deed when the time came for conveyance. P asks that V be required to perform, and that the purchase price be reduced by the value of the wife's dower interest, which cannot be obtained. Should the relief be granted?

A. Courts disagree as to the right to specific performance, with compensation, in a case like this. They are agreed that the relief can be granted to the purchaser, when there is no reason for refusal except the vendor's inability to convey all he agreed to convey, and the value of that which cannot be conveyed can be accurately ascertained. Some courts apply this rule when there is a dower right outstanding; others hold that the value of such right cannot be ascertained, and to compel the vendor to accept an abatement of the purchase price would induce him to coerce the wife into releasing her dower, which is against the policy of the law. Abatement will be denied if the vendee had notice of the defect.

Minge v. Green, 58 So. 381, 176 Ala. 343.

9 Cornell Law Quart. 470.

34 Yale Law J. 333.

Long v. Chandler, 92 A. 256, 10 Del. Ch. 339.

For other cases see Decennial Digests, Specific Performance ⇨ 127(1).

SECTION 7.—CONSIDERATION IN EQUITY

Q. 35. O contracted to sell to M all the coal under O's land for \$20,000. O was an able business man, and consulted his attorney and a mining engineer before he made the contract. M's explorations had disclosed a quantity of coal under the land, which, at a fair valuation, was worth \$70,000 in place. O refused to convey. Can M compel him to do so?

A. Yes; equity follows the law in requiring consideration for a contract before it will enforce it, and also in refusing to consider the adequacy of the consideration. A grossly inadequate consideration is strong evidence of fraud or mistake; but where, as here, the inadequacy is not so great as to be conclusive evidence of fraud or mistake, and the circumstances indicate that the transaction was a fair one, equity will grant specific performance, though the bargain was a bad one for defendant.

Heyward v. Bradley, 179 F. 329, 102 C. C. A. 509.

Pound, Consideration in Equity, 13 Ill. Law Rev. 667.

For other cases see Decennial Digests, Specific Performance ⇨ 49(2).

SECTION 8.—MARKETABLE TITLE

Q. 36. V sues P for specific performance of P's agreement to buy land from V. P defends, on the ground that there is a restriction upon the use of the premises which renders the title unmarketable. There is no decision by the highest court of the state as to whether such a restriction follows the land into the hands of a purchaser with notice, and the decisions in other jurisdictions are in conflict. What should be the decision?

A. Specific performance should not be decreed, even if the court thinks the restriction is not an incumbrance on the land, since its decision to that effect would not bind the parties entitled to the benefit of the restriction, and a purchaser cannot be compelled to take a title which is doubtful, and therefore unmarketable. The bill should be dismissed, or the proceedings stayed, until the effect of the restriction can be conclusively determined between the parties thereto.

Smith v. Dugger, 142 N. E. 243, 310 Ill. 624.

Schulz v. Garibaldi, 112 A. 854, 92 N. J. Eq. 320.

For other cases see Decennial Digests, Specific Performance ¶95.

SECTION 9.—PART PERFORMANCE AND THE STATUTE OF FRAUDS

Q. 37. V orally contracted to sell a house and lot to P, and gave P permission to take possession immediately. P moved into the house the next day, but, after he had lived there only one day, V repudiated the contract. Can P have specific performance?

A. In some jurisdictions, but not in all. The statute of frauds requires land contracts to be in writing to be enforceable, but courts of equity in all but four of the states will sometimes enforce oral contracts for the sale of land, if they have been partly performed. There is disagreement as to whether merely taking possession under the contract is sufficient part performance to take the case out of the statute. The English rule, followed in many of our states, holds that it is. Other states hold that there must be, in addition to possession, either payment of purchase price or expenditures for improvements. Still other states hold that the question is whether the performance has been such that it would be inequitable not to enforce the contract.

Franklin v. Matoa G. M. Co., 158 F. 941, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302.

Collins v. Leary, 77 A. 518, 77 N. J. Eq. 529.

Baldrige v. Centgraf, 108 P. 83, '82 Kan. 240.

Williams v. Carty, 91 N. E. 392, 205 Mass. 396.

Ballard v. Boyette, 86 S. E. 175, 171 N. C. 24.
32 Yale Law J. 846.

For other cases see Decennial Digests, Specific Performance ¶41, 42, 46, 47.

Q. 38. While T was in possession of premises under a lease having several years yet to run, L, the owner, orally agreed to sell the property to T. When T tendered the purchase money, several weeks later, L refused to convey, and T sues for specific performance. What decree?

A. Specific performance refused. T cannot claim his possession was sufficient part performance to take the case out of the statute of frauds, since, to have that effect, the acts relied on must be referable only to the contract. Here the possession was explainable by the lease, and does not meet the policy of the statute to require evidence of the contract other than oral testimony.

Tonseth v. Larsen, 138 P. 1080, 69 Or. 387.

For other cases see Decennial Digests, Specific Performance ¶42.

Q. 39. P took possession of land under an oral contract to purchase it from V, and made valuable improvements thereon, but repudiated the contract after the price of land in that vicinity had fallen. Can V have the contract specifically enforced?

A. It is generally said that only the party who has partly performed the oral contract may have it specifically enforced, since the other party has not been prejudiced by action under the contract. But surrender of possession by the vendor, especially if accompanied by circumstances showing prejudice to him if the contract is not enforced, ought to be sufficient. It has been held that, where the purchaser has performed sufficiently to be entitled to enforce the contract, the vendor may, since the remedy of specific performance ought to be mutual.

Alexander v. Alexander, 124 A. 523, 96 N. J. Eq. 10.

Andrew v. Babcock, 26 A. 715, 63 Conn. 109.

Cooper v. Thomason, 45 P. 296, 30 Or. 161.

For other cases see Decennial Digests, Frauds, Statute of ¶129(4); Specific Performance ¶41, 43.

Q. 40. F told his son, S, that he gave Blackacre to S. In reliance on the statement, S took possession of the land and made improvements thereon, costing one-fourth of the land's value. F. died without conveying the land, and S sues F's heirs for specific performance. Will the relief be granted?

A. Yes; in jurisdictions recognizing possession and substantial improvements under an oral contract to sell as sufficient part per-

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formance to prevent the vendor from relying on the statute. Though, as a rule, equity does not enforce a promise not supported by a consideration, it considers that it would amount to a fraud on a donee, who had taken possession and made substantial improvements on the faith of a parol gift, to permit the donor to rely on the statute of frauds to defeat the gift.

Bevington v. Bevington, 110 N. W. 840, 133 Iowa, 351, 9 L. R. A. (N. S.) 508, 12 Ann. Cas. 490.

Pound, 13 Ill. Law Rev. 667.

For other cases see Decennial Digests, Gifts ⇨25.

SECTION 10.—EFFECT OF DEFAULT

Q. 41. A vendor agreed to convey a farm on February 1, and to deliver an abstract showing clear title, except for a lease which would expire March 1. He failed to obtain the abstract by the time specified, though he could have done so, if he had acted more promptly. When he tendered the deed and abstract on February 5, the purchaser refused to perform. Is the vendor entitled to specific performance?

A. Yes; equity does not regard the time fixed for the doing of an act as of the essence of the contract, unless the contract expressly so provides, or the circumstances show that performance at that time is essential. Here there was no express provision time should be of the essence, and the purchaser was apparently not prejudiced by the delay, since he could not have obtained possession before March 1 anyway.

Gerba v. Mitruske, 94 A. 34, 84 N. Eq. 79.

Lese v. Lamprecht, 89 N. E. 365, 196 N. Y. 32.

For other cases see Decennial Digests, Specific Performance ⇨93.

Q. 42. V contracted to sell to P a city lot, payment to be made in five annual installments on June 1 of each year. The contract provided that time should be of the essence of the contract, and that, if any payment was not made promptly when due, the rights of the purchaser under the contract should cease, and all payments previously made should be forfeited to the vendor. P went into possession, and erected on the lot a building which cost five times the value of the lot. He paid the first four installments promptly, but, just before the fifth became due, his agent, who collected the rents, became sick, and P was not able to tender that payment until June 4. V refused to accept the payment, and declared the contract at an end. May P compel specific performance?

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A. Yes; though the contract authorized V to refuse performance and retain the improved property and four-fifths of the purchase price, equity regards P as having an equitable estate in the property, subject to a lien for the balance of the purchase price, and will protect that estate against forfeiture, where P was not responsible for the delay, and V has not suffered thereby. It would also seem that, as to the last installment, the tender of a deed would be necessary to put the purchaser in default.

Mound Mines Co. v. Hawthorne, 173 F. 882, 97 C. C. A. 394.

Haas v. Coburn, 124 P. 476, 22 Idaho, 47.

Reese v. Westfield, 105 P. 837, 56 Wash. 415, 28 L. R. A. (N. S.) 956.

But cf. *Heckard v. Sayre*, 34 Ill. 142.

Collins v. Eksoozian, 214 P. 670, 61 Cal. App. 184.

See *Ballantine, Forfeiture for Breach of Contract*, 5 Minn. Law Rev. 329, 345.

For other cases see *Decennial Digests, Contracts* ¶318; *Specific Performance* ¶93, 99; *Vendor and Purchaser* ¶93.

SECTION 11.—FRAUD AS A DEFENSE

Q. 43. P made to V an offer to buy V's property, which he knew was substantially less than the property was worth. Knowing that V was aged and infirm, and was prejudiced against foreigners, P stated that there were foreigners on both sides of V's property, which was a fact, and that their presence had depreciated the value of the property, which was not true. P succeeded in inducing V to sign the contract at once, with the purpose of preventing her from consulting with others. Is P entitled to specific performance of the contract?

A. No; though P's conduct may not amount to such fraud as would make the contract invalid at law, he was guilty of such sharp practice that equity will refuse to give its extraordinary remedies to aid him in reaping the benefits of it. The showing of fraud which will defeat the right to specific performance need not be so strong as that which will entitle a party to cancellation of the contract, which would destroy the right to recover at law.

Banaghan v. Malaney, 85 N. E. 839, 200 Mass. 46, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378.

Wagner v. Allen, 169 N. W. 143, 185 Iowa, 894.

For other cases see *Decennial Digests, Specific Performance* ¶51, 53.

Q. 44. P, having received information, not yet generally known, that a large factory was to be erected on a certain site, offered to buy from V his lot, across the street from the site, at a price which was its fair value in the present condition of the neighborhood, but was much less than its value would be after the erection of the fac-

tory. V accepted the offer, but refused to convey after he learned of the proposed factory. Can P have specific performance?

A. Yes; in the absence of any confidential relationship between the parties. A purchaser who is dealing at arm's length with his vendor is under no obligation to disclose all that he knows about the value of the property. If he makes no misrepresentations, and does not actively conceal facts, he is entitled to the benefit of the bargain he obtained.

Lucas v. Long, 94 A. 12, 125 Md. 420.

Compare Byars v. Stubbs, 85 Ala. 256.

For other cases see Decennial Digests, Specific Performance ⇨ 53, 88.

Q. 45. After a contract for the sale of a farm had been entered into, and the purchaser had gone into possession, the purchaser wrote the vendor, who lived in another state, that the day before the contract was executed a tornado had destroyed the buildings on the farm, and that the purchaser would not complete the purchase unless the vendor would reduce the contract price by half the value of the buildings. The vendor assented to the modification, but later, on learning that the representation by the purchaser was absolutely false, he rescinded the entire contract. Can the purchaser have specific performance of the original contract?

A. No; specific performance is granted in the discretion of the court, and that discretion will not be exercised in favor of one who has been guilty of fraud in the transaction, though the contract he now seeks to enforce was not tainted by the fraud. He cannot seek to profit by a fraud and repudiation, and hope to retain the benefit of his original bargain after the fraud is discovered. He does not come with clean hands.

Blondel v. Bolander, 114 N. W. 574, 80 Neb. 531.

See 33 Yale Law J. 665.

For other cases see Decennial Digests, Specific Performance ⇨ 89.

SECTION 12.—MISTAKE AND HARDSHIP

Q. 46. R Company owned a tract of land adjoining on the east a tract owned by A. It recorded a plat of the tract as a city addition, but did not show on the plat a narrow strip, next to A's tract, which was not surveyed into lots. A, desiring to enlarge his tract, so as to erect a factory thereon, contracted to buy the two westerly lots shown on the recorded plat, not knowing that there was other land between those lots and his tract. Can R Company have specific performance of the contract?

A. No. A was mistaken as to the description of the land he desired to buy, and did not intend to purchase the lots described. Though the mistake was not mutual, equity will not compel him to perform a contract he did not intend to make. R Company's act contributed to cause A's mistake.

Rudisill v. Whitener, 146 N. C. 116, 59 S. E. 995, 15 L. R. A. (N. S.) 81.
Louisville Ry. Co. v. Kellner-Dehler Realty Co., 147 S. W. 424, 148 Ky. 765.
For other cases see Decennial Digests, Specific Performance ⇨52, 53.

Q. 47. V's agent, in quoting to P the price of lot 5 in a designated block, consulted a list of the prices of the lots in that block given him by V. By mistake he quoted the price of \$500, which was that at which lot 4 was listed. Lot 5 was on a knoll, which made it very desirable as a residence site. It was listed at \$1,200, and was worth that sum. P and the agent executed a written contract for the sale of lot 5 to P at \$500. Can V be compelled to perform the contract?

A. No; here there was a unilateral mistake, due, perhaps to the negligence of V's agent; but it would be a hardship on V to compel him, because of a mistake, to sell his property for less than half of its value, and less than half of the selling price he had fixed. In such a case the court will exercise its discretion against granting the extraordinary remedy of specific performance, and will leave the parties to their remedies at law.

Samuel v. Cityco Realty Co., 118 A. 124, 141 Md. 27.

For other cases see Decennial Digests, Specific Performance ⇨52.

Q. 48. V offered to sell his farm to P for \$30,000. P was unacquainted with land values, and he consulted R, who told him the land was worth that amount, so P contracted to buy at that price. Unknown to P, R was interested in the sale, but V did not know P had consulted R. In fact, the land was worth only \$20,000. Will P be compelled to perform his contract?

A. No; equity will not decree specific performance of a contract entered into by mistake, where to do so will impose hardship on the defendant, and there is no equitable reason why he should suffer that hardship. } *Not*

Caldwell v. Depew, 42 N. W. 479, 40 Minn. 528.

Gabrielson v. Hogan (C. C. A.) 298 F. 722.

For other cases see Decennial Digests, Specific Performance ⇨51, 52.

Q. 49. In 1919, P agreed to buy Blackacre from V for \$50,000, payments to be completed and conveyance made in 1920. At the date of the contract, the price was fair to both parties, but before

the time for performance all land values had fallen rapidly, and Blackacre was not worth more than \$20,000. V sues P for specific performance. What decree?

A. Specific performance ordered. The contract, when made, was fair, and V has done nothing since to make it inequitable to enforce the contract. The mere fact that subsequent events beyond the control of either party have made the bargain a hard one for P is no ground for relieving him from it, and thereby letting the loss fall on V.

Allen v. Hayes, 141 N. E. 188, 309 Ill. 374.

Ross v. Carroll, 194 N. W. 315, 156 Minn. 132.

For other cases see Decennial Digests, Specific Performance ¶51.

SECTION 13.—MUTUALITY OF REMEDY

Q. 50. V contracted to sell Blackacre to P. P assigned his contract to A, who did not assume the obligation to pay. Can A compel V to perform the contract?

A. Most courts say that specific performance of a contract will not be decreed in favor of one party, if it could not be decreed in favor of the other party; that the remedy must be mutual. Some say the mutuality must exist at the time the contract is entered into; others, that it must exist at the time of the decree. All courts that adopt the rule admit exceptions to it. In this case, there is no mutuality of remedy at any time, and there could be no relief in most jurisdictions, unless this case came under an exception to the rule. The rule has been much criticized by writers, and has been rejected in some jurisdictions, which allow the remedy of specific performance, unless the court cannot reasonably assure to defendant, after he has been compelled to perform, that he will get what he contracted for.

Epstein v. Gluckin, 135 N. E. 861, 233 N. Y. 490.

First Nat. Bank of Hastings v. Corporation Securities Co., 150 N. W. 1084, 128 Minn. 341.

Lewis, Present Status of the Defense of Want of Mutuality, 51 Am. Law Reg. 591.

Ames, Mutuality in Specific Performance, 3 Col. Law Rev. 1.

Durfee, Mutuality in Specific Performance, 20 Mich. Law Rev. 289.

See, also, 8 Cornell Law Quart. 374; 32 Yale Law J. 831; 23 Col. Law Rev. 667, 22 Col. Law Rev. 682; 37 Harv. Law Rev. 162; 36 Harv. Law Rev. 229; 71 U. Pa. Law Rev. 371; 6 Minn. Law Rev. 604.

For other cases see Decennial Digests, Specific Performance ¶6, 17.

Q. 51. P contracted to buy Blackacre from V, conveyance to be made March 1, and payment to be by the rendition of personal

services by P to V during the next two years. Can P have specific performance of the contract before he has rendered the services? Could he, after the services have been rendered?

A. In jurisdictions where mutuality of remedy when the contract is entered into is essential to the right to specific performance, there could be no decree for P, even after he had completely performed. Where the rule is that there must be mutuality at the time of suit, or that all that is necessary is reasonable assurance defendant will get what he contracted for, the decree could be granted after performance by P, but not before. The best solution would be to require V to perform at the time agreed, but make the conveyance conditional on the subsequent rendition of the services by P.

Pantages v. Grauman, 191 F. 317, 112 C. C. A. 61.

Oswald v. Nehls, 84 N. E. 619, 233 Ill. 438.

Elk Refining Co. v. Falling Rock Cannel Coal Com., 115 S. E. 431, 92 W. Va. 479.

For other cases see Decennial Digests, Specific Performance ¶6.

SECTION 14.—INJUNCTION AGAINST TORT

Q. 52. P sued for an injunction to restrain D from obstructing P's easement across D's land. D claimed that P had abandoned the easement. What decree should be rendered?

A. Where law and equity are administered as separate systems, and especially where they are administered by separate courts, and the right for which protection by injunction is sought is a legal right, and is disputed by the defendant, the court of equity ought to require the right to be settled by an action at law. If irreparable injury is threatened, it may be enjoined pending the determination of the action at law. Under the Codes and Practice Acts, fusing law and equity, the right at law and the right to an injunction can both be determined in a single action.

Mason v. Ross, 77 A. 44, 77 N. J. Eq. 527.

Baldwin v. Fisher, 124 N. W. 1094, 110 Minn. 186.

Lewis, 56 Univ. Pa. Law Rev. 289; 22 Harv. Law Rev. 65.

For other cases see Decennial Digests, Easements ¶61(1); Injunction ¶36(2), (3).

Q. 53. P sued to enjoin the removal by D of gravel from land claimed both by P and D. D's claim rested on a deed to him on a form which had previously been construed not to convey an estate which gave the right to remove gravel. Should the injunction be granted?

Equity won't decide

A. Yes; equity will not require the right to be first tried at law, where it depends on no disputed fact, and the right at law is clear.

Espenscheid v. Bauer, 85 N. E. 230, 235 Ill. 172.

For other cases see *Decennial Digests*, Injunction ⇨37.

Q. 54. D was operating a livery stable near P's residence in such a manner as to cause serious discomfort, and P sought to enjoin the continued operation of the stable. D alleged that P's damage was small, because the neighborhood was not desirable for residences, and that he, D, was solvent and willing to pay the amount by which P was damaged. Is the defense good?

A. No; the injury in this case was continuing, and of such nature that the damages caused thereby could not be accurately ascertained. In such cases, equity regards the injury as irreparable, and grants the relief, though the defendant is financially able to respond in damages.

Lead v. Inch, 134 N. W. 218, 116 Minn. 467, 39 L. R. A. (N. S.) 234, Ann. Cas. 1913B, 891.

Charles C. Wilson & Son v. Harrisburg, 77 A. 787, 107 Md. 207.

For other cases see *Decennial Digests*, Injunction ⇨14.

Q. 55. P sued to restrain D from converting to his own use a team of horses belonging to P, alleging that D was insolvent. D demurs to the bill, on the ground that the remedy at law was adequate. What should be the ruling on the demurrer?

A. The demurrer should be sustained. Insolvency of the defendant is not alone sufficient to make the remedy at law inadequate, though equity considers such insolvency, with other facts, in determining whether it will, in its discretion, grant an injunction.

Smith v. Howell, 176 P. 805, 91 Or. 279.

Amoskeag Mfg. Co. v. Shirley, 39 A. 976, 69 N. H. 269.

Woodstock Operating Co. v. Quinn, 79 So. 253, 201 Ala. 681.

See *Horack*, 31 Harv. Law Rev. 711.

For other cases see *Decennial Digests*, Injunction ⇨18.

Q. 56. D was constructing a dam at the lower end of a gorge. P owned land along the stream above the gorge, and above the level of the top of the dam; but he claimed, in order to get fall enough to give the water the velocity required to carry the volume of the stream in flood times, the water would back up above the gorge and flood his lands. Expert witnesses differed as to whether there was such a danger. Can P have the construction of the dam enjoined?

A. No; before equity will grant an injunction to prevent injury, it must appear that injury is reasonably probable or imminent. In this case the construction of the dam will be permitted; but, if it actually floods plaintiff's lands, an injunction against its maintenance at such a height can be granted.

Columbia Ave. Saving Fund, etc., Co. v. Prison Commission of Georgia (C. C.) 92 F. 801, 804.

Warren Manufacturing Co. of Baltimore County v. City of Baltimore, 86 A. 502, 119 Md. 188.

For other cases see Decennial Digests, Injunction ¶12; Waters and Water-Courses ¶75, 196.

Q. 57. D was operating a smelter in such a manner as to be a nuisance, and P, who owned a farm near the smelter, sought an injunction against its further operation in that manner. D showed that its smelter was a very large one, employing several thousand men, and that it could not be operated in a way to avoid the nuisance without incurring an expense several times greater than the entire value of P's farm. Will the court refuse the injunction?

A. A court of equity has discretion to consider comparative injuries, with reference to the issuance or denial of an injunction, and will not issue one where it would cause great loss to defendant, with only slight benefit to plaintiff. But where, as here, the right of plaintiff is clear, and his damage is substantial, the injunction ought not to be denied merely because it will cost defendant more to avoid the injury than the damages plaintiff will suffer by permitting it to continue.

American Smelting & Refining Co. v. Godfrey, 158 F. 225, 89 C. C. A. 139, 14 Ann. Cas. 8.

Penn Gas-Coal Co. v. Greensboro Gas Co., 85 A. 1093, 238 Pa. 97.

36 Harv. Law Rev. 211.

33 Yale Law J. 205.

59 Univ. Pa. Law Rev. 431, 444.

8 Cal. Law Rev. 130.

For other cases see Decennial Digests, Injunction ¶23.

Q. 58. A city had constructed a dam to create a reservoir for the storage of its water supply. The dam caused the flooding of some of plaintiff's lands above the dam. Can plaintiff have the city enjoined from maintaining the dam?

A. No; in determining whether to issue an injunction, equity can consider the damage which might thereby be caused to the public. To avoid impairing the water supply of a city, the in-

junction will be refused, and plaintiff remitted to his remedy at law for damages.

York Haven Water & Power Co. v. York Haven Paper Co., 201 F. 270, 119 C. C. A. 508.

Booth-Kelly Lumber Co. v. City of Eugene, 136 P. 29, 67 Or. 381.

34 Harv. Law Rev. 398.

8 Col. Law Rev. 127.

For other cases see Decennial Digests, Injunction ¶24.

Q. 59. D had constructed a foundation for a wall of his building 9 inches over the line on P's land, after P had warned him as to the location of the land. P had brought ejectment to recover possession of the strip of his land occupied by the wall, and had obtained a judgment in his favor. He now asks a mandatory injunction to compel D to remove the encroaching foundation. Should it be granted?

A. Yes; the only means of enforcing the judgment at law is by execution, which would subject the sheriff to liability for any damage done to D's wall while removing the encroaching foundation. Since D erected the encroaching structure with notice of the facts, he cannot complain that he is required to bear the expense and risk of removing it.

Hirschberg v. Flusser, 101 A. 191, 87 N. J. 588.

See 10 Col. Law Rev. 169, and 27 Yale Law J. 268.

For other cases see Decennial Digests, Injunction ¶50.

Q. 60. P sought an injunction to restrain D from buying from P's employees ore which D knew they had stolen from P's mine. Should the injunction be issued?

A. No; equity has no jurisdiction to enjoin the commission of a crime as such. If there are equitable grounds for enjoining the doing of certain acts, the fact that those acts may also be crimes does not defeat the power to grant the injunction. In the present case there appears no ground for equitable intervention.

Heber v. Portland Gold Min. Co., 172 P. 12, 64 Colo. 352, L. R. A. 1918D, 681.

Contra: Goldfield Consol. Mines Co. v. Richardson (C. C.) 194 F. 198.

For other cases see Decennial Digests, Injunction ¶103.

Q. 61. P sued to enjoin D from disinterring the body of P's father. D demurred to the bill, on the ground that equity protected only rights of property. What should be the ruling on the demurrer?

A. Demurrer overruled. Formerly it was commonly said that equity protected only property rights. But recently it has under-

taken to protect personal rights as well, and an injunction has been issued to prevent the removal of a dead body, on the ground that there was no property right in a body, and therefore there was no adequate remedy at law to protect the right of the next of kin to have the body left undisturbed.

Sherrard v. Henry, 106 S. E. 705, 88 W. Va. 315, 21 A. L. R. 645.

Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harv. Law Rev. 640.

For other cases see Decennial Digests, Dead Bodies ¶5.

SECTION 15.—INTERPLEADER *Know*

Q. 62. A received from P for sale a certificate of corporate stock. After he made the sale, C notified him that P had sold the certificate to him, C. P denied making the sale, and both P and C demanded the proceeds from A. How can A protect himself against the conflicting claims?

A. By filing in equity a bill of interpleader. To maintain the bill it must appear: (1) That two or more parties claim the same thing, debt, or duty from plaintiff; (2) the adverse claims must be dependent "in privity," or derived from the same source; (3) the plaintiff must claim no interest in the subject-matter; (4) the plaintiff must have incurred no independent liability to either claimant. On filing the bill, A will pay the money into court, and be discharged from any further liability in the matter. P. and C will then come in and try their respective claims to the fund, and A can escape double vexation for a single liability.

Hayward & Clark v. McDonald, 192 F. 890, 113 C. C. A. 368.

Smith v. Horton, 87 S. E. 655, 144 Ga. 496.

Chafee, Modernizing Interpleader, 30 Yale Law J. 814.

24 Col. Law Rev. 432.

33 Yale Law J. 685, 879.

For other cases see Decennial Digests, Interpleader ¶1.

Q. 63. A left a bond with a bank for safe-keeping, and the bank gave A its receipt, in which it agreed to return the bond to A on demand. B claimed that the bond had been stolen from him, and demanded that the bank deliver it to him. Can the bank have interpleader against A and B?

A. No; unless the strict rules governing interpleader in the English Court of Chancery have been relaxed. There is no privity of title between A and B, and that was a prerequisite to the right to have interpleader; also there might be a liability on the part of the bank to restore the bond to A, regardless of the ownership thereof, because of the language of the receipt. The existence of

reasonable doubt as to that liability precludes interpleader, because the bank is not entitled to be discharged from further liability merely on bringing the bond into court. The whole matter must be settled by the success of one in order to interplead.

Atlantic City National Bank v. Thompson, 87 A. 636, 82 N. J. Law 111.
National Security Bank of Boston v. Batt, 102 N. E. 691, 215 Mass. 489.
See 30 Yale Law J. 833.

For other cases see Decennial Digests, Interpleader ¶9, 10.

Q. 64. B owed C \$10,000, the balance due on a building contract. D and E each claimed that C had assigned to him one-half of the amount due from B. C denied the validity of the assignments. Can B have interpleader against C, D, and E?

Note
A. Yes; the fact that some of the adverse claimants claim only a part of the fund or debt does not destroy the identity of the subject-matter of the claim, which is essential to interpleader.

Enterprise Lumber Co. v. First National Bank, 61 So. 930, 181 Ala. 388.
Chicago, R. I. & P. Ry. Co. v. Moore, 123 S. W. 233, 92 Ark. 446.

For other cases see Decennial Digests, Interpleader ¶7.

SECTION 16.—BILLS OF PEACE

Q. 65. The officers of an irrigation district issued 1,000 bonds of the district, which were held by over 500 different individuals. The district claimed that the bonds were void, because a majority of the voters at an election did not authorize their issuance, as required by law, though the election judges certified to the contrary. Several bondholders had already brought action for the first interest due on the bonds, and others were threatening to do so. Can the district protect itself against the necessity of defending all of these actions?

A. Yes; by a bill of peace the district may have the prosecution of the numerous actions at law enjoined until the single question of the validity of the bonds has been adjudicated, either in equity, or in one of the common-law actions, which may be permitted to proceed as the representative of all. The object of a bill of peace is to avoid the vexation of useless litigation and multiplicity of suits.

Paxton Irr. District v. Conway, 142 N. W. 797, 94 Neb. 205.

For other cases see Decennial Digests, Equity ¶51(1).

Q. 66. M Company files a bill, alleging that more than 100 actions at law had been brought against it by representatives of employees who had been killed by an explosion in its mine, and that the company's defense to each of the actions was the same, that

the explosion was not due to its negligence, but resulted from the negligence of an independent contractor, who was installing new machinery in the mine, and praying that the prosecution of the actions at law be enjoined and the liability of the company determined in one suit in equity, to avoid a multiplicity of suits. The defendants demurred to the bill. What ruling?

A. Demurrer sustained. In *Pomeroy's Eq. Jur.* par. 268, it is stated that a community of interest merely in the question of fact or law to be determined is sufficient to sustain a bill of peace; but the courts have not been willing to accept that statement, so as to permit a bill of peace to determine the liability in tort for numerous injuries growing out of the same accident. Not for to

Tribette v. Illinois Central R. Co., 12 So. 32, 70 Miss. 182, 19 L. R. A. 660, 35 Am. St. Rep. 642.

Southern Steel Co. v. Hopkins, 57 So. 11, 174 Ala. 465, 40 L. R. A. (N. S.) 464, Ann. Cas. 1914B, 692.

Davis v. Forrestal, 144 N. W. 423, 124 Minn. 10, L. R. A. 1915F, 1012, Ann. Cas. 1915D, 448.

25 Harv. Law Rev. 559; 24 Yale Law J. 642; 68 Univ. Pa. Law Rev. 167.

For other cases see *Decennial Digests*, Injunction $\S$ 26(4), (5).

Q. 67. P's property, which was injured by a fire, was insured with ten different companies, each policy providing that the company issuing it should be liable only for the proportion of the loss sustained which the face of that policy bore to the total amount of insurance carried. Can the insurance companies maintain a bill of peace to have the share of the loss to be borne by each determined in a single suit?

A. No; there is no common interest to be determined; each company is liable only under the terms of its own contract. The clause apportioning the loss does not create a common interest, for the liability of one company does not depend upon the liability of the others, but upon its own policy, referring to the others only to determine the proportion of the loss, determined in accordance with its own policy, that it must bear. Ans. Bill

Equitable Life Assurance Soc. v. Brown, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

Mechanics' Insurance Co. of Philadelphia v. O. A. Hoover Distilling Co., 173 F. 888, 97 C. C. A. 400, 32 L. R. A. (N. S.) 940.

For other cases see *Decennial Digests*, Equity $\S$ 51(1), (2); Injunction $\S$ 26(4).

SECTION 17.—BILLS QUIA TIMET

Q. 68. The officers of R Company issued negotiable bonds of the company in collusion with D to defraud the company. The

bonds are still held by D, but if they are transferred to bona fide purchasers the company will be obliged to pay them. How can it protect itself?

A. By a bill quia timet the company can have D required to surrender the bonds for cancellation, and in the meantime can have him enjoined from transferring them. Such a bill will always lie, where the plaintiff has a good defense to an action on an outstanding instrument, which defense may be lost before the holder brings his action, and the plaintiff cannot himself bring an action at law in which the question can be determined.

Pere Marquette R. Co. v. Bradford (C. C.) 149 F. 492.

For other cases see Decennial Digests, Cancellation of Instruments ¶13.

Q. 69. A sues B for the cancellation of a release of liability for A's personal injuries, which A alleged he signed without reading, relying on B's representation that it was only a receipt for \$50, then advanced by B to pay A's hospital expenses. No offer was made to return the \$50, and B demurs to the bill. What ruling?

A. Demurrer overruled. If the fraud charged had been misrepresentation as to the facts affecting B's liability, or if the ground for cancellation had been incapacity or undue influence, the weight of authority is that A would not be entitled to relief without returning the consideration for the release. But in this case, if B's representations had been true, A could have kept the money, and still sought to recover for his injuries, and therefore he will not be compelled to refund it as a condition precedent to cancellation of the release. *St. Louis, I. M. & St. R. Co. v. Hambright*, 113 S. W. 803, 87 Ark. 614. On necessity of tender before instituting suit for rescission, see 24 Col. Law Rev. 544.

For other cases see Decennial Digests, Release ¶24(2).

Q. 70. H entered into a written contract to sell to P a tract of land, and P recorded the contract. The land was H's homestead, and the contract was void under the statute, because it was not signed by H's wife, W. H and W are in possession of the land, and P refuses to release or surrender his contract. Can H and W have any relief in equity?

A. Yes; where plaintiff is in possession of land, the title to which is clouded by an instrument apparently valid on its face, but in fact void under the circumstances, plaintiff can maintain a bill to have the instrument canceled as a cloud on his title.

Rakow v. Tate, 140 N. W. 162, 93 Neb. 198.

For other cases see Decennial Digests, Quieting Title ¶7(2, 3).

Q. 71. P files a bill in equity, alleging that D is in possession of P's land, claiming to own the land by virtue of a tax deed, which is regular on its face, but is in fact void. He prays that D may be ordered to surrender the tax deed for cancellation, and that his own title to the premises be quieted in him. D demurs to the bill. What ruling?

A. Demurrer sustained. Since D is in possession of the land, P may bring an action of ejectment against him, and in that action the validity of D's tax deed can be determined. Therefore P's remedy at law is adequate, and equity will not undertake to determine the question.

Stuart v. Union Pac. R. Co., 178 F. 753, 103 C. C. A. 89.

Miscotten v. Hellenthal, 127 N. W. 324, 162 Mich. 402.

33 Yale Law J. 556.

37 Harv. Law Rev. 622.

72 Univ. Pa. Law Rev. 326.

For other cases see Decennial Digests, Quietling Title ⇐4.

Q. 72. P had been in adverse possession of a tract of land for the statutory period of limitations. D had obtained a deed from the owner of the record title, and was asserting publicly that he owned the land, but had brought no action against P. Can P have his title quieted against D?

A. The plaintiff in a suit to quiet title must rely on the strength of his own title, not on the weakness of defendant's. P's right, therefore, depends on the construction of the statute of limitations. If that is construed merely to bar the remedy of the true owner, P has no title, and cannot maintain a suit to quiet title. But if, as is generally the case, the statute is construed as giving title to the adverse possessor, that title can be quieted against the holder of the record title.

Work v. United Globe Mines, 100 P. 813, 12 Ariz. 339.

Parker v. Miller-Brent Lumber Co., 47 So. 580, 157 Ala. 282.

For other cases see Decennial Digests, Quietling Title ⇐10(4).

SECTION 18.—REFORMATION AND RESCISSION FOR MISTAKE

Q. 73. A contract for the sale of land provided that a described strip along one side of the designated lot should be excepted from the conveyance. The contract was given to a scrivener to prepare the deed, and by his mistake the exception was omitted. What remedy has the grantor, who executed the deed without noticing the omission?

A. He may bring suit in equity for reformation of the contract, which is always maintainable where the minds of the parties have

met on the terms of the agreement, but there has been a mistake in drafting the instrument, so that it does not contain the actual agreement of the parties.

Los Angeles & R. R. Co. v. New Liverpool Salt Co., 87 P. 1029, 150 Cal. 21. Day v. Dyer, 152 N. W. 53, 171 Iowa, 437.

For other cases see Decennial Digests, Reformation of Instruments 17(2).

Q. 74. V sued P for reformation of a warranty deed, so as to include therein an assumption by P of a mortgage upon the land. At the hearing, V offered evidence of a parol agreement between the parties that P was to assume the payment of the mortgage as part of the consideration. V objected to the evidence. What ruling?

A. Objection overruled. In a suit to reform an instrument, to make it conform to the agreement of the parties, the agreement, in performance of which the instrument was executed, may be established by parol evidence.

Tossini v. Donahue, 117 N. W. 148, 22 S. D. 277.

For other cases see Decennial Digests, Reformation of Instruments 44.

Q. 75. V gave P a deed conveying a tract of land described by metes and bounds. V did not intend to convey his building site, and did not know it was included in the description. P knew the site was included, and intended to acquire it. V filed a bill for reformation of the deed to exclude the site from the description of the land conveyed, alleging the above facts, and P demurred to the bill. What ruling?

A. Demurrer sustained. An instrument can be reformed only when there is an agreement between the parties to which the instrument can be made to conform. Here the parties did not agree as to the subject-matter of the contract, and, in the absence of fraud or some other equitable ground, P cannot be required to take less than he agreed to take. V's remedy, if any, is for rescission and cancellation of the deed because of the mistake.

McFarland v. Mead, 34 App. D. C. 268.

Forrester v. Moon, 84 S. E. 532, 100 S. C. 157.

Bivins v. Kerr, 108 N. E. 996, 268 Ill. 164.

See 23 Col. Law Rev. 785.

For other cases see Decennial Digests, Reformation of Instruments 17(1), 19(1), (2).

Q. 76. The government plat showed a fractional subdivision as bordering on a lake. V contracted to sell that subdivision to P, both parties believing that it extended to the lake, whereas, in

fact, there was a strip of government land between it and the lake. Has P a right to relief in equity?

A. Here there can be no reformation, since the mistake was not in expressing an actual agreement of the parties, but as to the subject matter of the contract. The mistake was mutual, so that P can have the contract canceled, if the mistake was of a fundamental character. If the contract be construed as one for a lake shore lot, then the actual premises described did not, by reason of the mistake, constitute the property with reference to which the contract was made, and the contract can be canceled. But, if the main intent of the parties was to transfer the tract described, the mistake was only as to the attributes or characteristics of the subject-matter of the contract, and such a mistake is generally not regarded as invalidating the contract, though some courts hold that, if it is as to a material matter, the contract may be canceled. *Coolin v. Anderson*, 140 P. 969, 26 Idaho, 47. When is mistake of fact ground for rescission? See 13 Cal. Law Rev. 246, commenting on (1) the basic fact test, (2) the identity test, and (3) the "realm of bargain" test; see, also, 35 Harv. Law Rev. 757.

For other cases see Decennial Digests, Vendor and Purchaser ¶31.

Q. 77. D gave to C a warranty deed conveying Blackacre, and took from C a contract to reconvey on payment of a debt D owed to C. A state statute, of which neither party had actual knowledge, provided that no instrument relating to realty should be valid as security for any debt, unless so expressed therein. Can C have the deed reformed, so as to show it was intended as security?

A. It is generally stated that a mistake of law does not entitle a party to reformation of an instrument, but the rule has little reason to support it, and many courts find many exceptions to it, while others deny it. In the present case it would be a great hardship for C to lose his security because of his ignorance of a statute, and equity can reform the instrument. mistake in law

Ingram Day Lumber Co. v. Robertson, 92 So. 289, 129 Miss. 365.

Forest Lake State Bank v. Ekstrand, 128 N. W. 455, 112 Minn. 412.

7 Iowa Law Bul. 264.

9 Va. Law Rev. 9.

For other cases see Decennial Digests, Equity ¶8; Reformation of Instruments ¶18.

Q. 78. V and P had entered into a contract for the sale of V's farm. In the deed as prepared, the description did not include one 10-acre tract, which formed part of the farm. V noticed the omis-

sion, and knew that P did not. After P had accepted the deed and paid the purchase money, he discovered the omission, and brought suit to reform the deed. Is he entitled to the relief?

A. Yes; the mistake was not mutual, but V's attempt to take advantage of P's mistake amounted to fraud, which is sufficient to entitle P to a reformation of the deed.

Hand v. Cox, 51 So. 519, 164 Ala. 348.

Bell v. McJones, 65 S. E. 646, 151 N. C. 85.

For other cases see Decennial Digests, Reformation of Instruments ◊ 19(1), 20.

Q. 79. P offered to buy Blackacre from V at \$90 per acre. V refused to sell at that price, but said he would take \$100 an acre. P accepted V's offer, and a contract was executed whereby V agreed to convey to P, "Blackacre, containing 160 acres, more or less," and P agreed to pay therefor \$16,000. Both parties thought Blackacre contained 160 acres, but in fact it contained only 120. P sought reformation of the contract, so as to require the payment of \$12,000 only. Is he entitled to the relief?

A. Yes; the agreement between the parties was for a sale and purchase by the acre, not at a lump sum for the entire tract. The contract was executed in the latter form only because both parties thought it expressed the agreement, because of their mutual mistake as to the acreage.

Mills v. Kampfe, 94 N. E. 1072, 202 N. Y. 46.

For other cases see Decennial Digests, Vendor and Purchaser ◊ 176.

Q. 80. V sold lot 1 to P, and later lots 2 and 3 to D. All parties thought that the fence between two houses on those lots was on the dividing line between lots 1 and 2, whereas in fact it was in the middle of lot 2. P conveyed lot 1 to R; both parties intending the conveyance to include all the property up to the fence. Can R, after discovering the mistake, have the original deed from V to P reformed, so as to include the half of lot 2 on his side of the fence?

A. Yes; unless the rights of a bona fide purchaser are involved, those deriving title through a grantee in an instrument may have it reformed as against those deriving title from the grantor. Theoretically, it is not reformation of the instrument, but is the enforcement against D of a constructive trust, impressed on the land by the equity in favor of P. If the court of equity cannot directly affect the title by its decree, it can only give R the relief to which he

is entitled by requiring P, in whom the legal title to the half of lot 2 in controversy is vested, to convey to R.

Hill v. Clark (Ky.) 106 S. W. 805.

Mattox v. Davis (Tex. Civ. App.) 106 S. W. 169.

For other cases see Decennial Digests, Reformation of Instruments 26, 28.

Q. 81. A made a bid for the erection of a church for \$2,500 less than he intended. B accepted the bid without knowledge of the mistake. The next day, before B had altered his position in any respect, he was notified of the mistake, which was due to the omission of the item of structural steel through some accidental oversight. A sues in equity for rescission of the contract on the ground of mistake. What decision?

A. In most jurisdictions, rescission would not be granted for purely unilateral mistake, except where the defendant is in the position of a donee or volunteer. Specific performance will be denied, even though the mistake is only unilateral, if hardship or unfairness would result. *Rudisill v. Whitener*, 59 S. E. 995, 146 N. C. 403, 15 L. R. A. (N. S.) 81. But for rescission the mistake must generally be mutual and fundamental. A few courts, however, have recognized a defense or granted rescission for a unilateral error, resulting in an unfair advantage, where there has been no part performance or change of position by the other party. *St. Nicholas Church v. Kropp*, 160 N. W. 500, 135 Minn. 115, L. R. A. 1917D, 741; *Moffett, H. & C. Co. v. Rochester*, 20 S. Ct. 957, 178 U. S. 373, 44 L. Ed. 1108; *Werner v. Rawson*, 15 S. E. 813, 89 Ga. 619; *Harper v. City of Newburgh*, 145 N. Y. S. 59, 159 App. Div. 695; *Steinmeyer v. Schroepfel*, 80 N. E. 564, 226 Ill. 9, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224; 30 Harv. Law Rev. 637; 2 Ill. Law Rev. 267. It is suggested that B cannot complain of A's carelessness, unless he has been prejudiced by it, and that it would be unjust for him to take advantage of A's mistake, and enrich himself at A's expense.

For other cases see Decennial Digests, Contracts 19, 93(1); Reformation of Instruments 20; Sales 114; Specific Performance 53.

EVIDENCE

By A. M. KIDD, Professor, Columbia University Law School

Section

1. Discovery and Depositions.
2. Authentication of Documents.
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SECTION 1.—DISCOVERY AND DEPOSITIONS

Q. 1. P sues D in ejectment. P has in his possession a deed which is evidence in D's favor. Can D ascertain the contents of the deed before trial, and, if so, how?

A. Yes; under the old chancery system, a bill of discovery could be brought in equity in aid of an action in law. Modern statutes usually provide for the taking of depositions of opponents and the obtaining of the evidence of an opponent without resort to a bill of discovery.

Wigmore (2d Ed.) § 1846; Jones (3d Ed.) §§ 702, 703, 705.

Q. 2. In the above case P has deeds evidencing his own title, and on which he relies to make out his case. Can D inspect them before trial, and, if so, how?

A. Under the old chancery procedure, a bill of discovery would lie to get documentary or oral evidence by the plaintiff to prove his own case, or by the defendant to prove his defense, but not to ascertain the case of the other side. Wigmore (2d Ed.) § 1846; Jones (3d Ed.) § 702; *Kettlewell v. Barstow*, L. R. 7 Ch. 689.

Modern statutes usually allow full discovery as to the merits of the case. Jones, § 706; Wigmore, § 1856a, note. This is not true in the federal courts. The deposition of an opponent may not be taken there as a matter of right (*Patapsco v. Southgate*, 5 Pet. 616, 8 L. Ed. 243; *Texas & P. R. Co. v. Wilder*, 92 F. 953, 35 C. C. A. 105; Wigmore, § 1416 [2]), and the statutes for the production of documents are held not to apply to production before trial. Evidence can be obtained in the federal courts from an opponent in actions at law only by the bill of discovery. Rev. St. 724 (U. S. Comp. St. § 1469 [U. S. C. tit. 28, § 636]); *Carpenter v. Winn*, 31 S. Ct. 683, 221 U. S. 533, 55 L. Ed. 842. Contra: *Exchange Nat. Bank v. Washita Cattle Co.* (C. C.) 61 F. 190. In proceedings in equity there is a more flexible procedure by interrogatories. Hughes on Equity Procedure, a hornbook, has a good brief account of interrogatories.

For other cases see Decennial Digests, Depositions ⌘89, 98; Discovery ⌘83, 97(2).

Q. 3. In the above case X has a deed and certain facts of importance in his knowledge. Can D obtain an inspection of them before trial?

A. Ordinarily not. Discovery does not lie against a third party (*American Security & Trust Co. v. Brooks*, 114 N. E. 732, 225 Mass. 500; *Burchard v. MacFarland*, [1891] 2 K. B. 241), unless he has an interest in the action at law (*Griesa v. Mut. Life Ins. Co. of New York*, 169 F. 509, 94 C. C. A. 635; *Post v. Toledo, C. & St. L. R. Co.*, 11 N. E. 540, 144 Mass. 341, 59 Am. Rep. 86). But this testimony may be obtained before trial, if some probable unavailability at trial can be shown. This was necessary under the old chancery practice. *International Coal Min. Co. v. Pennsylvania R. Co.*, 63 A. 880, 214 Pa. 469; Jones, § 835. Statutes usually enumerate the requirements, such as residence at a distance, probable absence when the action is to be tried, probable illness at the time of trial, etc. Wigmore, §§ 1402-1411; Jones, § 638.

For other cases see Decennial Digests, Depositions ⌘11; Discovery ⌘8, 15, 17.

SECTION 2.—AUTHENTICATION OF DOCUMENTS

Q. 4. In the above action P produces a deed from A to B, which is relevant to D's case. How may the deed be put in evidence?

A. D must authenticate the deed. He must prove that A executed it. This may be done in several ways. Jones, § 526. One

way is by proving the handwriting of A. The witness proving the handwriting must have seen the writing executed, or must in some other way have become familiar with A's signature. Other means would be a comparison of the deed with other writings proved or admitted to be A's. This method is now permitted in the federal courts, where it was formerly not allowed. *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470. Failing with these methods of authentication, circumstantial evidence may be resorted to. *Throckmorton v. Holt*, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

For other cases see *Decennial Digests*, Evidence ⇨561; Wills ⇨297 (2), 322.

Q. 5. X produces a deed to B, signed by A and witnessed by C. What must D do to get it in evidence?

A. At common law the attesting witness must be produced. If he cannot be obtained, his handwriting must be proved. *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140; *Jones*, § 527. The document cannot be authenticated by proving the handwriting of the maker, or even by the maker himself on the stand. *McPherson v. Rathbone*, 11 Wend. (N. Y.) 96. The rule was a foolish one, and has generally been abolished, except for documents like wills, required by law to be attested. Under modern statutes, attestation simply affords an additional means of proving the document.

For other cases see *Decennial Digests*, Evidence ⇨374 (6, 8, 9), 375.

Q. 6. P sued D for breach of D's promise to buy certain securities, which later P sold at a loss. To show that P sold below what he might have obtained for them, D offered a newspaper showing the prices asked on the market. Objection that it was incompetent, irrelevant, and immaterial, and that no proper foundation had been laid. What ruling?

A. Objection should be sustained. Though printed reports may be admitted in evidence to show market prices, even when the compiler did not have personal knowledge, nevertheless a foundation must first be laid by showing that the reports are relied upon by those dealing in the commodity, that commercial operations are transacted on faith of them, and that they are generally accepted as accurate.

Atlantic National Bank v. Moore (Ariz.) 241 P. 601.
39 Harv. Law Rev. 885.

For other cases see *Decennial Digests*, Evidence ⇨323(4).

Q. 7. Defendant, to maintain his defense, wishes to introduce a deed from F to G, witnessed by H, acknowledged before a no-

tary public, and recorded. What must he do to get the document in evidence?

A. At common law the execution of the document would have to be proved as in question 4. Under statutes, when acknowledged before an officer authorized to administer oaths, like a notary public, the instrument can be recorded, and can also be offered in evidence. The document may also generally be proved by the record, or by a certified copy thereof. The court will presume, from the notary's seal, that he took the acknowledgment, and will take the notary's hearsay certificate that the party actually did acknowledge execution of the instrument. The recorder's certificate is accepted as hearsay evidence of the fact of recording and of the contents of the document recorded.

Jones, §§ 519-525, 537.

Note, 19 L. R. A. (N. S.) 438.

Smith v. Worley, 73 S. E. 428, 10 Ga. App. 280.

For other cases see Decennial Digests, Evidence ☞370(8).

Q. 8. D has a contract between M and N, witnessed by O, dated February 7, 1895. X, who is an old man living more than 175 miles away from the place of trial, had had considerable correspondence with M and N during the closing years of the last century, and would recognize their signatures. Put the contract in evidence.

A. Ordinarily at common law the attesting witness would have to be called, and, if unavailable, his signature proved, before any other authentication would be offered. *Wilson v. Betts*, 4 Denio (N. Y.) 203. This, however, is a document over 30 years old. Such a document is considered an ancient document. In ancient matters, most rules of evidence necessarily break down, and this contract could be offered in evidence without further authentication, on showing proper custody and unsuspicious circumstances. It is therefore unnecessary to call X to prove the handwriting. *Wilson v. Snow*, 33 S. Ct. 487, 228 U. S. 217, 57 L. Ed. 807, 50 L. R. A. (N. S.) 604.

For other cases see Decennial Digests, Evidence ☞372(4, 8).

SECTION 3.—BEST EVIDENCE RULE

Q. 9. D puts a witness on the stand who testifies that P showed him a letter, which P said was written by X and is material to D's case. Thereupon the witness is asked as to the contents of the letter. Objection, not the best evidence.

A. Objection overruled. The admission of the party as to the contents of a document dispenses with the necessity of producing the document itself. This is generally conceded as to unattested documents, and is perhaps true as to attested.

Smith v. Palmer, 6 Cush. (Mass.) 513.

Contra: Prussing v. Jackson, 69 N. E. 771, 208 Ill. 85.

For other cases see Decennial Digests, Evidence ¶172.

Q. 10. D had written letters to X, material to the issue between P and D. D testifies he dictated the letters to his stenographer; that the stenographer takes all letters down in short hand, and transcribes them on the typewriter; that he signs the original; and that the stenographer takes the original, puts it in an envelope, seals and stamps same, and leaves it in a box. The office boy collects letters so left, and places them in a United States mail box. The stenographer files the carbon copy. D produces the carbon copy and offers the same in evidence. Is it admissible?

A. Probably. The best evidence rule requires the production of the original writing, or accounting for its absence. If the rule applied here, D would have to show efforts to get the letter sent to X, and that it was lost or destroyed, out of the jurisdiction, or from some other good reason unavailable; then the secondary evidence might be introduced. A carbon, however, unlike a letter-press copy, is usually regarded as a duplicate original, and can be admitted without accounting for the nonproduction of the copy sent. Engles v. Blocker, 192 S. W. 193, 127 Ark. 385; International Harvester Co. of America v. Elfstrom, 112 N. W. 252, 101 Minn. 263, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107. The custom of D's office and the presumption of regularity in the mails would be sufficient to prove the mailing and receipt of the letter. Hughes v. Pacific Wharf & Storage Co., 205 P. 105, 188 Cal. 210.

For other cases see Decennial Digests, Evidence ¶174(1, 4), 378(1).

Q. 11. Plaintiff v. Defendant. In this action A testifies he is the partner of B. In response to further questions, he states there are written articles of partnership. Motion to strike out the answer, on ground that the articles are the best evidence.

A. The best evidence rule applies only to written documents. When the thing to be proved is the existence of a fact, such as partnership, tenancy, etc., it may be proved by any competent evidence, although the fact may also be evidenced by a writing. If

the terms of the partnership were in issue or important, then the articles must be produced.

Paterson v. Mobile Steel Co., 80 So. 855, 202 Ala. 471.

For other cases see *Decennial Digests*, Evidence ¶171.

Q. 12. Prosecution against D for seditious libel. Witness for prosecution testifies D carried a banner, with the inscription, "We are for the Soviets." Objection, not the best evidence.

A. The objection would probably be overruled. The so-called best evidence rule is a misnomer. It is not necessary to produce the best evidence, except in the case of a written document. In all other cases any competent and relevant evidence is admissible, whether better evidence exists or not. In the case of the banner or a ring, the question is whether the inscription is a written document, or merely a part of the description of the banner, or ring. The cases have usually held the latter, although it would seem, if the exact words on the banner were sufficiently important, the banner itself should be required in evidence. *Commonwealth v. Morrell*, 99 Mass. 542. As in the case of a written instrument, if the thing to be proved by it is not very important, the court may allow secondary evidence, without accounting for the nonproduction of the writing. This is usually phrased by saying that, if the evidence is on a collateral matter, the writing need not be produced. *People v. Goldsworthy*, 62 P. 1074, 130 Cal. 600.

For other cases see *Decennial Digests*, Criminal Law ¶400(7); Evidence ¶158(28).

SECTION 4.—REAL EVIDENCE

Q. 13. P sues D for personal injury, by which P's hand was cut off. P offers the hand, pickled in salt, as evidence. What objection, if any, should be made to this offer?

A. Objection might perhaps be made on the ground that the hand is irrelevant, immaterial, and unduly prejudicial. While it is true that the plaintiff need not produce the hand (the best evidence rule not applying to things), still there is no rule that the thing itself cannot be offered in evidence. It constitutes what is known as real evidence. The only question involved in the case is whether the production of the hand proves anything that has not already been fully proved. If it does, as, for example, where there were marks on the hand, which show how the accident occurred, the evidence must come in, no matter how prejudicial it may be. If, however, the evidence is not sufficiently probative, the court may exclude it, on the ground that it is irrelevant, immaterial, and

unduly prejudicial. *Anderson v. Seropian*, 81 P. 521, 147 Cal. 201; 8 Va. Law Rev. 543. The same rule applies to cases where the evidence offered is indecent. *Dunkin v. City of Hoquiam*, 105 P. 149, 56 Wash. 47.

For other cases see *Decennial Digests, Evidence* ⇨188, 192.

Q. 14. Prosecution for murder. Prosecution requests that the jury be taken to the scene of the homicide. The defendant objects. What ruling?

A. Any ruling made by the court will be sustained on appeal. The granting or refusal of a view is in the discretion of the court.

People v. Milner, 51 P. 833, 122 Cal. 171.

For other cases see *Decennial Digests, Homicide* ⇨260.

Q. 15. The judge instructs the sheriff to take the jury to the scene of the crime. Neither the judge nor the defendant accompanies the jury. After the verdict, the defendant alleges error. What ruling?

A. There is a conflict on this proposition. Some courts hold that a view is not the receiving of evidence, and therefore not part of the trial, and that therefore neither the judge nor the defendant need be present. *People v. Thorn*, 50 N. E. 947, 156 N. Y. 286, 42 L. R. A. 368. The best rule, however, would seem to be that it is the receiving of evidence and part of the trial, and that the judge and defendant should both be present. *People v. Lowrey*, 11 P. 605, 70 Cal. 193. It is not, however, part of the trial in court, and if the defendant, by failing to object, waives his presence and the judge's presence, it should not constitute reversible error.

For other cases see *Decennial Digests, Criminal Law* ⇨636(5).

SECTION 5.—WITNESSES

(a) Competency

Q. 16. D on trial for murder; witness offered by prosecution. Objection on the ground that the witness is an inmate of an insane asylum. The court admits the witness to testify. Exception. What ruling?

A. Testimonial capacity depends on a certain minimum ability to observe, recollect, and narrate. If it is worth while for the jury to hear the testimony, then the objection may be overruled. There is no technical rule that disqualifies insane persons automatically, nor is there any technical age limit below which a child cannot be

a witness. It is a question of fact for the judge to decide, in every case, whether the witness can contribute something worth while for the jury to hear.

Coleman v. Commonwealth, 25 Grat. (Va.) 865, 18 Am. Rep. 711.

For other cases see *Decennial Digests, Witnesses* ¶41, 79(3).

Q. 17. Witness is offered; examination on the voir dire shows he has been convicted of a felony and is an atheist. Objection on the above grounds to the witness testifying. What ruling?

A. At common law, both objections were unquestionably good. By statute, however, these disqualifications have been removed in many states, and recently by judicial decision the United States Supreme Court has removed the disqualification for conviction of a felony.

Rosen v. U. S., 38 S. Ct. 148, 245 U. S. 467, 62 L. Ed. 406.

Jones, Evid. (3d Ed.) §§ 712-715.

For other cases see *Decennial Digests, Courts* ¶349.

Q. 18. Plaintiff v. Defendant. Action to recover \$1,000.00 for goods sold and delivered. Pending the action, and before trial, defendant dies, and his executor is substituted as defendant. On the trial the plaintiff takes the stand and is asked in regard to the sale and delivery of the goods. Objection on the ground that he is disqualified.

A. At common law parties to an action and all interested in the action were disqualified as witnesses. Among those interested, besides parties, were any persons who would gain a direct legal advantage by the action and the spouses of the parties. These disqualifications have been generally abolished, but in most jurisdictions there is still retained the disqualification of a plaintiff suing on a claim against the estate of a decedent. The situations to which the disqualification applies differ in different jurisdictions, and the law is technical. The hardship to the plaintiff is apparent, and it has been suggested that the disqualification be abolished. If considered desirable, the defendant might be allowed to use the hearsay statements of the decedent, or it might be required that the plaintiff produce other evidence to corroborate his testimony.

Wigmore, §§ 576-578.

30 Yale Law J. 593.

Tipps v. Landers, 190 P. 173, 182 Cal. 771

For other cases see *Decennial Digests, Witnesses* ¶167.

Q. 19. In a prosecution for rape, defendant objected to the testimony of a six year old child, on the ground that she was not a competent witness. What ruling?

A. At common law a person 14 years of age was presumed to have sufficient intelligence as a witness; but, if he was under that age, the party using him as a witness had the burden of proving that he had sufficient qualifications. *State v. Anderson*, 158 S. W. 817, 252 Mo. 83. To-day any one with sufficient intelligence to observe, recollect, and narrate, and who understands the impropriety of falsehood, will not be excluded as a witness because of immature age. Intelligence, and not age, is the test, and the determination of this is almost wholly within the discretion of the court. *Peters v. State*, 63 So. 666, 106 Miss. 333.

For other cases see *Decennial Digests, Witnesses* ⇨40(1, 2).

Q. 20. In a trial for murder, the prosecution calls the wife of the defendant. She had not been living with him for some time, the parties having entered into a separation agreement. D objects. What ruling? If D had called her to testify in his favor, could the prosecution have objected? Would there have been any difference, if the action had been a civil one?

At common law a spouse was absolutely incompetent to testify in any sort of action in which the other was a party, but these disqualifications have generally been removed. There is also a privilege, in cases where a spouse is a party, that the other spouse should not testify. By the better authority the privilege may be asserted by the party spouse or by the witness spouse. This husband and wife privilege exists until there is an absolute divorce or death, when it ceases. In this latter respect it must be distinguished from the communications between the spouses. These, where they are privileged, survive divorce and death.

Hendrix v. U. S., 31 S. Ct. 193, 219 U. S. 79, 55 L. Ed. 102.

Schreffler v. Chase, 92 N. E. 272, 245 Ill. 395, 137 Am. St. Rep. 330.

Jones, *Evid.* (3d Ed.) §§ 773-735.

See, also, Question 28.

For other cases see *Decennial Digests, Witnesses* ⇨52(2, 7), 188(1).

(b) *Privileges of Witnesses*

Q. 21. A sued X, a corporation, for damages resulting from a violation of the Sherman Anti-Trust Law. W was called in as a witness, and asked a question as to his whereabouts at a certain time. Objection, on the ground that an answer would tend to incriminate him under the laws of the United States and of the state in which the court was sitting, and that witness was the sole judge as to whether his answer would have this effect.

A. The court is the judge. The answer would not directly incriminate the witness, but it might furnish a clue, and a witness is protected from furnishing clues. This is a civil proceeding, but the scope of the privilege is to protect from disclosure to any tribunal which has the power by law to summon witnesses, if the disclosure will assist in convicting the witness of a crime. It is no ground of objection in the federal court that the answer may disclose a crime against the state law.

Counselman v. Hitchcock, 12 S. Ct. 195, 147 U. S. 547, 35 L. Ed. 1110.
For other cases see *Decennial Digests, Witnesses* ¶297.

Q. 22. In a grand jury investigation as to customs frauds, a witness refused to answer certain questions, on the ground that he would incriminate himself. A pardon was granted to him for all offenses he had committed against the United States concerning the subject of the investigation. He refused to accept the pardon, and again set up his privilege. Could he maintain his privilege?

A. Yes; one does not have to accept a pardon, because acceptance of a pardon carries with it an imputation of guilt, thereby subjecting the one pardoned to opprobrium. A distinction exists from cases of legislative immunity, since the latter is noncommittal, merely being a protection against the sinister use of the testimony. In the case of a pardon, the witness may refuse, and still assert his privilege. *Burdick v. U. S.*, 35 S. Ct. 267, 236 U. S. 79, 59 L. Ed. 476. If, however, the witness is given complete protection by an immunity statute, he may not refuse to testify. *Glickstein v. U. S.*, 32 S. Ct. 71, 222 U. S. 139, 56 L. Ed. 128.

For other cases see *Decennial Digests, Witnesses* ¶303, 304(3).

Q. 23. A corporation is indicted in the federal court for violation of the Sherman Anti-Trust Law. On the trial the secretary of the corporation was subpoenaed to produce the books of the corporation. Objection by the secretary, on the ground that the books would incriminate him personally, and by the secretary and officers of the corporation, on the ground that the books would incriminate the corporation.

A. Objection overruled. The privilege against incrimination, as conferred by the Fifth Amendment to the Constitution of the United States, extends to the production of documents, as well as to testimony before a court or other tribunal. The privilege does not, however, extend to a corporation, nor to the officers of a corporation, in so far as evidence against them is contained in the cor-

poration books. A corporation is held to be within the protection of some constitutional provisions, but not of others.

Wilson v. U. S., 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

11 Col. Law Rev. 445.

For other cases see Decennial Digests, Witnesses ⇨298.

Q. 24. In the above case, demand was made that the corporation produce all its papers and documents of every kind. Objection that this constituted a violation of the Fourth Amendment against unreasonable search, and the Fifth Amendment against self-crimination.

A. As has been said, a corporation cannot claim the privilege of the Fifth Amendment. It can, however, claim the benefit of the Fourth Amendment, to be free from unreasonable searches and seizures; and a compulsory wholesale production of papers (a fishing expedition) would probably be too broad, and would constitute unlawful search and seizure.

Hale v. Henkel, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652.

25 Col. Law Rev. 11.

For other cases see Decennial Digests, Searches and Seizures ⇨7.

Q. 25. A corporation is under investigation by a grand jury for violation of the Sherman Anti-Trust Law. A raid was made by state officers under orders of the federal officers, and incriminating letters and other evidence seized. Demand for a return of the evidence was made, and the government returned everything after making photographs thereof. Objection was made to the use of the photographs on the trial.

A. There is a conflict. Ordinarily the illegality by which the evidence was obtained is no ground for refusing to admit it in evidence; but some courts, in order to uphold the policy against unreasonable searches and seizures, refuse to admit evidence gained thereby, if demand is made for its return. This prevents unreasonable searches and seizures, by removing some of the temptation to make them. Had the state officers not acted under the authority of the federal officers, the objection would probably have been overruled.

People v. Mayen, 205 P. 435, 188 Cal. 237, 24 A. L. R. 1383.

Silverthorne Lumber Co. v. U. S., 40 S. Ct. 182, 251 U. S. 385, 64 L. Ed. 319.

Weeks v. U. S., 34 S. Ct. 341, 232 U. S. 383, 58 L. Ed. 652, L. R. A.

1915B, 834, Ann. Cas. 1915C, 1177.

4 Or. Law Rev. 160.

For other cases see Decennial Digests, Searches and Seizures ⇨7.

(c) Privileged Communications

Q. 26. A client consults a lawyer in regard to a proposed business transaction. Later on, in a lawsuit of P against D, the lawyer was examined in regard to the communication between himself and his client. The lawyer objected, on the ground that it was a privileged communication, and that it was not competent for the court to require an answer to this question. The client was in court, and refused to claim the privilege.

A. Objection overruled. It is the client's privilege, not the lawyer's. If the client were not present, it would be the duty of the lawyer to claim it for him.

Hunt v. Blackburn, 9 S. Ct. 125, 128 U. S. 464, 32 L. Ed. 488.

For other cases see Decennial Digests, Witnesses ¶219(5).

Q. 27. A consulted his lawyer in regard to entering into a contract with B. Later on B sued C, and the statement A made to his lawyer became material evidence. B put A's lawyer on the stand, and asked what statements A made to him. Objection by defendant that it was a privileged communication. The court overruled the objection, on the ground that A's communication did not contemplate litigation, and that A was not a party to this action. The lawyer then testified. Error is claimed. What ruling?

A. The objection should have been sustained. It is not necessary that the communication be in regard to prospective litigation. Legal advice, if privileged when made, continues to be privileged, whether the client is a party to the action or not. On the other hand, the client, A, could have waived the privilege, and the other party could not complain. Here there was no waiver; evidence has come in, but the privilege of a third person not a party has been violated. Some courts hold this is not error as against C. Others, perhaps in order to maintain the privilege, consider its violation error, and ground of reversal. If the privilege has been erroneously allowed, it would be error, because competent evidence would have been excluded.

In re Dowie's Estate, 19 A. 936, 135 Pa. 210.

Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

66 Ohio Law Bul. 235.

Wigmore (2d Ed.) §§ 2196, 2321.

For other cases see Decennial Digests, Witnesses ¶199(1), 217.

Q. 28. P v. D. P calls the divorced wife of witness X, and asks when X left home on December 24, 1924, and where he said he was going. Objection by X; confidential and privileged communication.

A. Objection probably sustained as to the communication. Some jurisdictions consider all communications between husband and wife privileged (*Whitehead v. Kirk*, 61 So. 737, 62 So. 432, 104 Miss. 776; contra, *Jacobs v. U. S.*, 161 F. 694, 88 C. C. A. 554); others only communications made in confidence. If this communication is held to be in confidence, it would be privileged in all jurisdictions. Privilege continues after the termination of the marriage relation, and whether the spouse is a party or not. It must be distinguished from the privilege of the spouses that one shall not testify against the other. That privilege applies only when a spouse is a party, and is terminated by death or divorce.

People v. Bowen, 130 N. W. 706, 165 Mich. 231.

72 Cent. Law J. 385.

See Question 20.

For other cases see *Decennial Digests, Witnesses* ¶192, 195.

Q. 29. P v. D. In a suit against D for rescission of a contract for fraud, P offers a letter written by D to his wife, telling of his part in the fraudulent scheme, directing her to keep it secret. Objection, confidential communication. P offers to show that the letter was obtained by theft by a detective hired by him. Should the objection that the letter is a confidential communication be sustained?

A. No; some cases maintain the rule that, if the statement is one about which the spouse cannot be examined as a witness, the shield of privilege is never laid aside, no matter in whose possession the communication, if in writing, may fall. *Gross v. State*, 135 S. W. 373, 61 Tex. Cr. R. 176, 33 L. R. A. (N. S.) 477. The weight of authority, however, is that the communications, although in writing, are produced by third parties, even if secured surreptitiously, are admissible in evidence, and the court will not concern itself how possession of them was acquired. *State v. Wallace*, 78 S. E. 1, 162 N. C. 622, Ann. Cas. 1915B, 423; *People v. Dunnigan*, 128 N. W. 180, 163 Mich. 349, 31 L. R. A. (N. S.) 940. This rule is analogous to that allowing persons who overheard the communications to testify to them. *O'Toole v. Ohio German Fire Ins. Co.*, 123 N. W. 795, 159 Mich. 187, 24 L. R. A. (N. S.) 802.

For other cases see *Decennial Digests, Witnesses* ¶188(1, 2), 191.

Q. 30. Contest of will of decedent. Physician attended decedent, at decedent's request, six months before his death, and during period will was made. The physician was an attesting witness to the will. The beneficiary under the will asks the physician if at that time the testator was sane. Objection, privileged communication,

and that question calls for information obtained by reason of the relationship of physician and patient.

A. Objection overruled. At common law there was no privilege for the communications of a patient to a physician. By statute in many jurisdictions in the United States the privilege has been allowed, although the reasons for it are not sound. Under the usual form of statute, however, the objection should be overruled, and in this case because, by the weight of authority, the personal representative can waive privileged communications. Furthermore, making the physician an attesting or subscribing witness should be a waiver by the decedent, so far as testimony going to the validity of the will is concerned.

In re Walker's Will, 128 N. W. 386, 152 Iowa, 154.

Wigmore (2d Ed.) § 18.

For other cases see *Decennial Digests, Witnesses* ¶211(2).

SECTION 6.—RELEVANCY, COMPETENCY, AND MATERIALITY

(a) *In General*

Q. 31. *State v. D*. Question by D to his own witness: "Isn't it a fact that X struck in self-defense, and that therefore D's blow was unjustified?" Objection, incompetent, immaterial, and irrelevant. What ruling?

A. Objection should be overruled. The questions are relevant to the issue. The objection is to the form, and must be specific. Had the objection been on the ground that the question was leading, argumentative, and assuming a conclusion of law, the objection should have been sustained, for on direct examination questions must not be leading, argumentative, nor call for a conclusion of law. A general objection, however, is of no value, unless the evidence is inadmissible for any purpose.

State ex rel. West v. Diemer, 164 S. W. 517, 255 Mo. 336.

For other cases see *Decennial Digests, Trial* ¶82.

Q. 32. P sues D in an action for breach of contract. A partnership relation between D and X is a material part of P's case. The written partnership articles have been introduced in evidence. P asks: "Were there any oral terms of the partnership?" Objection that the evidence called for is immaterial, irrelevant, and an attempt to vary a written contract by oral evidence. Objection sustained. Is this error?

A. So far as the objection on the ground of varying the writing is concerned, the ruling is error, for the rule against varying a written

contract applies only as between the parties to the proceeding. On the other grounds, however, the case is not so clear. On direct examination the relevancy must appear. If it is not apparent from the question and objection thereto, the party asking the question must show exactly what he expects to prove by the witness, and offer to prove it by witnesses present in court.

White v. Woods, 109 N. E. 761, 183 Ind. 500.

Oldham v. Ramsner, 87 P. 18, 149 Cal. 540.

For other cases see Decennial Digests, Evidence ⇨424; Trial ⇨47(1).

Q. 33. P v. D. Action for goods sold and delivered. D denies he ever bought or received the goods and offers evidence of an established reputation in the community for honesty and for meeting his obligations, etc., and also the bad reputation of P for making false claims. Objection, incompetent, immaterial, and irrelevant.

A. Objection sustained. While undoubtedly extremely probative, evidence of the character of the parties is considered collateral; it would prolong the trial, and confuse the issue; the courts would be trying the men, and not the specific case. Such evidence is therefore rejected.

Wright v. McKee, 37 Vt. 163.

For other cases see Decennial Digests, Evidence ⇨106(2).

Q. 34. State v. D, for murder. Plea not guilty. Defense insanity. D also offers evidence of his good reputation for peace and quiet. Objection, incompetent, immaterial, and irrelevant.

A. Objection overruled. In a criminal case, defendant may always offer his good character, not only to show that he did not do the act, but also to show that, if he did the act, he did not have an evil state of mind. The state cannot offer evidence of bad character, except to rebut the defendant's evidence of good character, in case the defendant relies on such evidence.

Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231.

For other cases see Decennial Digests, Homicide ⇨163(1).

Q. 35. In the above case, after the defendant's evidence of good character, the prosecution offered the following:

- (1) Defendant's reputation for truth and veracity was bad.
- (2) His reputation for peace and quiet was bad.
- (3) Evidence of several violent assaults committed on several different persons.

All the evidence is admitted over objection. What ruling?

A. If the defendant did not take the stand, his reputation for truth and veracity is not in question, so evidence of that reputation is im-

material. If he had taken the stand, then he could be impeached as a witness by evidence of bad reputation for truth and veracity, but not for peace and quiet. If, however, he had offered evidence in his own behalf of good reputation for peace and quiet, then the state might show his bad reputation in those respects. The state could not, however, show such bad reputation by specific acts of misconduct.

Brantley v. State, 65 S. E. 426, 133 Ga. 264, affirmed 30 S. Ct. 514, 217 U. S. 284, 54 L. Ed. 768.

For other cases see *Decennial Digests*, *Homicide* ¶163(1).

Q. 36. *State v. D.* Murder by placing subtle and deadly poison in a bromo seltzer outfit and sending it to the decedent, who partook thereof and died. Prosecution offers evidence that the defendant had killed another person in the same way. Objection, incompetent, immaterial, and irrelevant; attempt to prove character by specific wrongful acts. What ruling?

A. Obviously the defendant's bad reputation as a murderer cannot be shown in evidence, nor can that reputation be proved by showing other murders. However, if the evidence proves some element in the crime other than the defendant's bad character, the evidence should come in. The fact that it is incompetent to prove character does not exclude it as admissible to prove some essential issue in the case. Ordinarily, in poison cases, other poisonings by the same defendant can be used to show that he knew the deadly effect of the poison used. Here, however, no one could have compounded this particular poison without knowing its deadly effect. Had the second person killed been related in some way, as, for example, if by their death the defendant would have succeeded to property, the killing of the other would be evidence showing motive, and a plan or scheme. In the actual case there was no such relationship. The only ground on which the evidence could be admitted is the remarkable similarity in the peculiar method used, pointing to the same person as the perpetrator of both crimes. This is the *modus operandi* method of detection used by police departments. The probative quality of the evidence has not, however, received as yet much judicial recognition.

People v. Molineux, 61 N. E. 286, 168 N. Y. 264, 62 L. R. A. 193.

Wigmore (2d Ed.) § 363.

State v. Hazzard, 134 P. 514, 75 Wash. 5.

State v. Gilligan, 103 A. 649, 92 Conn. 526.

For other cases see *Decennial Digests*, *Criminal Law* ¶369(1), 371(1,4), 372(4).

Q. 36a. P v. D. D is administrator of X's estate, and sues under statute for the death of X. X was a truck driver, and while driving across the tracks was killed by D's locomotive. On the issue of X's contributory negligence, P offers evidence that X, before crossing railroad tracks, always stopped, looked, and listened. Objection, incompetent, immaterial, and irrelevant.

A. There is a conflict of authority on this point. It is generally conceded that the character for care of the decedent is not admissible to show that he was careful at the time of the accident. On the other hand, an invariable habit is admissible. If the decedent always stopped, looked, and listened on approaching a crossing, it would be evidence to show that he did so on the occasion in question. Some courts, however, reject the evidence in this case on the ground that such habits are not sufficiently invariable, and that the situations are not sufficiently standardized. Other courts admit the evidence, and still others admit the evidence only where necessary by reason of the absence of eyewitnesses.

Wallis v. Southern Pac. Ry. Co., 195 P. 408, 184 Cal. 662, 15 A. L. R. 117.
16 Ill. Law Rev. 628.

For other cases see Decennial Digests, Negligence ¶132(3).

(b) *Cross-Examination*

Q. 37. P sues D for a conspiracy with X to injure P in his business, by inducing Y to break a contract with P. D puts a witness on the stand, who testifies to the following facts: That he was with D in Chicago during the whole of the month of June, 1925, and that D and X were never together during that month. He gives no further testimony. On cross-examination, witness is asked: "Were you in St. Louis during July, 1925?" Objection, incompetent, immaterial, irrelevant, leading, and not within the scope of the direct examination.

A. Objection overruled. The relevancy need not appear on cross-examination. The purpose of the cross-examination is to test the truth of the direct, and this is often accomplished by asking a relevant and pertinent question suddenly between irrelevant ones. Leading questions can be asked on cross-examination, unless the witness is obviously friendly and is being led. The scope of a direct examination is not exceeded here. If the conspiracy could have taken place at a time other than June, the question is certainly proper, and, if it is conceded that it took place in June, the question might still be allowed, to test memory, accuracy, etc.

People v. Manasse, 94 P. 92, 153 Cal. 10.

Wigmore, § 780.

For other cases see Decennial Digests, Witnesses ¶268(1), 277(3, 4).

Q. 38. The same witness is then asked on cross-examination: "Did not Y break his contract with P?" Objection, not within the scope of the direct examination. What ruling?

A. At common law the objection would be overruled. On cross-examination, as on direct, the witness may be asked as to what he knows about the case, in so far as it is relevant at that particular step of the proceedings. In the federal courts the rule is that the cross-examination is limited by the scope of the direct, although the court in its discretion might allow the question. *Ferry-Hallock Co. v. Orange Hatbox Co.* (C. C.) 185 F. 816. In some states it is error for the court to allow cross-examination on issues not taken up on the direct examination. The cross-examination may bring in additional facts as to the issues inquired about on the direct, and a wide range of collateral questions may be asked, to test memory, credibility, and bias of the witness; in short, the ability to observe, recollect, and narrate. *Holt v. Nielson*, 109 P. 470, 37 Utah, 566.

For other cases see *Decennial Digests, Witnesses* ¶269(1, 15), 329.

(c) Impeachment of Witnesses

Q. 39. P sues D. D claims payment. X, a witness for D, testifies that D met him as he stopped on the corner to buy a copy of the *Globe*, and D asked to go with him to the bank; that they went over to the First National Bank on February 12, 1925, where D cashed a check for \$200, receiving the money in currency, and immediately went to P and paid it to him. P produces a witness who, in response to a question, testifies that he is the janitor of the First National Bank, that he took care of the bank on that day, and that the doors were locked during the entire day on account of the holiday. Another witness testifies that the paper X bought was not the *Globe*, but the *World*. Objection, immaterial, incompetent, and irrelevant. What ruling?

A. It is clear the particular paper which the witness bought is immaterial, or collateral, which is the term generally used. The question might possibly be admitted, on the cross-examination of X, to test his memory of events on that day; but his answer could not be contradicted. The fact that the bank was closed disproves the testimony of payment, and is so material that it should be admitted.

Northern Pac. Ry. Co. v. Heaton, 191 F. 24, 111 O. C. A. 548.

For other cases see *Decennial Digests, Witnesses* ¶405(1).

Q. 40. Assume, in the above case, that witness X had told Y that he had bought a copy of the *World*, and that he had gone with D to

pay P, but that the bank was closed. Objection, improper impeachment, no foundation, incompetent, immaterial, and irrelevant.

A. The objection should be sustained. The particular paper bought is clearly immaterial and collateral. The question as to the payment is, however, important; but if it is desired to contradict a witness by an inconsistent statement, the witness' attention must be called, while he is on the stand, to the inconsistency, by stating time, place, and persons present. If this is not done, other witnesses cannot be brought to contradict the statement.

Denver City Tramway Co. v. Lomovt, 126 P. 276, 53 Colo. 292, Ann. Cas. 1914B, 106.

People v. Jones, 117 P. 176, 160 Cal. 368.

For other cases see *Decennial Digests*, *Criminal Law* ⚡672; *Witnesses* ⚡330(1), 388(1), 404.

Q. 41. P v. D. X has testified as a witness for P. Y testifies as witness for D, and is asked: "Did not X tell you that he would like to kill D?" Objection, incompetent, immaterial, and irrelevant; no foundation for impeachment.

A. Objection sustained. It is generally held that, while statements of bias and prejudice are not inconsistent statements, nevertheless some of the same reasons of fairness apply to these statements, and they should not be proved by another witness, unless the attention of the first witness has been called to them, together with the time, place, and persons present.

Fagan v. Lenoz, 105 P. 951, 156 Cal. 631, 20 Ann. Cas. 221.

Contra: *People v. Lustig*, 99 N. E. 183, 206 N. Y. 162.

Wigmore (2d Ed.) 953.

25 Green Bag 225.

For other cases see *Decennial Digests*, *Witnesses* ⚡373.

Q. 42. In a trial for murder, the accused is asked: "Didn't you testify in the preliminary examination that you didn't know the man until later?" Objection is made that there was no foundation laid. What ruling?

A. Objection overruled. When a question is asked for purposes of impeachment, a foundation must be laid, to the end that the witness' attention may be called to every circumstance which will tend to refresh his memory, and prevent his falling into error. However, it does not follow that every question is meant to be an impeaching question, since it may be upon a collateral matter, in which case the answer could not be contradicted by other witnesses. In this question, the witness might answer, "Yes," and then no impeaching

question would be necessary. On the other hand, if the answer was "No," the impeaching question could then be asked.

People v. Jones, 117 P. 176, 160 Cal. 358.

For other cases see *Decennial Digests*, Criminal Law ⚡672.

Q. 43. P v. D. Witness testifies for P. On cross-examination he is asked: "Were you discharged by E, your employer, a year ago for stealing?" Objection, incompetent, immaterial, irrelevant, not proper cross-examination, and improper impeachment.

A. At common law the objection would be overruled. It should be understood, however, that, if the witness denied that he was discharged for stealing, the fact could not be proved by other witnesses. The collateral rule would forbid. *People v. Williams*, 124 N. W. 555, 159 Mich. 518. In many jurisdictions in this country, the question would be allowed or disallowed in the discretion of the court. In some jurisdictions, the question would be absolutely prohibited. *Mathis v. State*, 58 So. 541, 63 Fla. 21. *Contra: Keith v. State*, 152 S. W. 1029, 127 Tenn. 40.

For other cases see *Decennial Digests*, Witnesses ⚡337(4), 344(1), 383.

Q. 44. In jurisdictions where a witness cannot be impeached by proof of specific wrongful acts, how may his character be shown?

A. By proof of conviction of a felony on cross-examination, or by production of the record; by proof by qualified witness that his general reputation in the community in which he lives for truth and veracity is bad.

People v. Soeder, 87 P. 1016, 150 Cal. 12.

Hunt v. Waterloo, C. F. & N. Ry. Co., 141 N. W. 334, 160 Iowa, 722.

For other cases see *Decennial Digests*, Witnesses ⚡337(5), 342.

Q. 45. P v. D, for automobile accident. P puts witness X on stand. Witness testifies D was not driving the automobile. P offers witness Y to show: (1) Defendant was driving the automobile; (2) X's reputation for truth and veracity is bad; (3) X told witness D was driving the automobile; (4) X is near-sighted and a brother-in-law of D. This evidence is all objected to. How much, if any, is admissible?

A. Ordinarily a witness is the witness of the party first calling him. There is no question that in the above case P can contradict the testimony of his first witness, X, that D was not driving the automobile, by producing witnesses who will testify that D was. The bad reputation of the witness X cannot be shown. This is unquestioned. A party cannot hold a club over his witnesses, by having

the power to expose their bad reputation if they do not testify favorably. That X was near-sighted goes to his ability to observe, recollect, and narrate. There is a conflict of authority on whether one's own witness can be impeached in this way. What witness told X is an attempt to impeach one's own witness by inconsistent statements. As to whether this can be done at all, and, if so, under what conditions, the authorities are in conflict. When a witness proves hostile, a certain amount of refreshing of recollection may be permitted in cross-examination. But what X told witness is hearsay, and therefore many courts exclude proof of it entirely. Other courts allow it, if P can show surprise or damage, or both.

O'Neil v. Adams, 122 N. W. 976, 144 Iowa, 385.

McLaughlin v. Los Angeles R. Corporation, 182 P. 44, 180 Cal. 527.

34 Yale Law J. 214.

For other cases see Decennial Digests, Witnesses ¶324, 372(1).

Q. 46. State v. D. Prosecution for embezzlement August 1, 1925. D took the stand and testifies that he did not embezzle any sum of money August 1, 1925. Cross-examination: "Did you embezzle \$1,000 by means of a false entry July 1, 1925?" "Have you ever been convicted of a felony?" Objection, not proper cross-examination.

A. It is a rule that ordinarily the defendant's character cannot be attacked, either directly, by showing his bad reputation, or indirectly, by specific wrongful acts, where, as here, the defendant has not offered his good character as a defense. Here, however, the defendant takes the stand. He may be impeached as any other witness, and therefore his bad reputation for truth and veracity may be shown, and whether he has been convicted of a felony. His mistakes in testimony and his inconsistent statements may be shown, just as with any other witness. To rebut any inferences of mistake, and to show plan or scheme, the prosecution is allowed to prove other embezzlements. Whether this can be done on the cross-examination of defendant presents a question on which there is a conflict. If the scope of the direct examination is claimed to be exceeded on cross-examination in the case of the ordinary witness, no great harm is done, for the cross-examiner can make the witness his own. But the prosecution cannot make the defendant in a criminal case its own witness. Therefore, if the scope of the direct examination cannot be exceeded, the prosecution will be precluded from getting these facts before the court. In some jurisdictions, the defendant, by taking the stand, is considered to waive his privilege not to criminate himself as to the offense charged, and can therefore be examined as to all features of it. In other jurisdictions, the scope of the cross-

examination is more or less narrowly limited by the testimony on the direct examination. Where the question above as to another embezzlement would tend to convict the defendant of an independent crime, he could, of course, claim his privilege not to criminate himself.

Dungan v. State, 115 N. W. 350, 135 Wis. 151.

State v. Brandenberger, 130 N. W. 1065, 151 Iowa, 197.

For other cases see *Decennial Digests, Witnesses* ¶277(1, 2).

(d) *Opinion of Witness*

Q. 47. P sues D for services in the construction of a steel building. D defends, on the theory that the steel is too light for a building of that weight. W is proved to be a structural engineer. He testifies to the weight and dimensions of the steel, the load, the stress, and other factors. He is asked whether the building is safe. Objection that the question calls for the opinion of the witness—calls for an opinion of the very fact in issue, and usurps the function of the jury. What ruling?

A. Objection overruled. The recital to the jury of the size and weight of the steel would not enable the jury to draw the conclusion as to whether the structure is safe. Only an expert can do that. If it were a very simple structure, and anybody could draw the conclusion, then the expert's opinion would be superfluous, and his testimony could be excluded. Its admission, however, even in that case, should not be considered prejudicial error. If the jury cannot draw the conclusion from the facts the expert is needed. If the jury can draw the conclusion, no serious harm would seem to have been done by letting the evidence in.

Pennsylvania Steel Co. of Philadelphia v. Nace, 77 A. 1121, 113 Md. 460, 45 L. R. A. (N. S.) 281.

For other cases see *Decennial Digests, Evidence* ¶513(9).

Q. 48. P sues D for personal injury. W is a witness, and is asked: "How did defendant appear?" Answer: "Drunk." Motion to strike out this answer, on the ground that it is a conclusion of the witness.

A. Motion denied. When the witness' impressions are such that the witness cannot convey them to the jury, and present to the jury the picture as he saw it, he is allowed to sum up the impression that was made on his mind.

Palmer v. Schurz, 117 N. W. 150, 22 S. D. 283.

In re Miller's Estate, 102 P. 996, 36 Utah, 228.

For other cases see *Decennial Digests, Evidence* ¶470, 478(1, 3).

SECTION 7.—HEARSAY RULE AND EXCEPTIONS

(a) Admissions of Parties, Privies, and Predecessors in Title

Q. 49. P v. D. Personal injury from work elevator falling. P puts witness on the stand, who testifies that D said the accident was caused by the rope breaking. On appeal from a judgment for the plaintiff, it was claimed that there was no evidence to sustain the finding that the accident was caused by the rope breaking. What decision?

A. Whatever a party says may be used against him. As an exception to the hearsay rule, the admission of the party constitutes affirmative evidence for P. that the rope broke.

Salminen v. Ross (O. C.) 185 F. 997.

Ross v. Salminen, 191 F. 504, 112 C. C. A. 148.

30 Yale Law J. 355.

For other cases see Decennial Digests, Evidence ¶222(1, 2).

Q. 50. P sues D for breach of contract. D pleads: (1) That no contract was made; (2) The contract was not in writing, as required by the statute of frauds. On the trial, to prove that a contract was entered into, D offers the plea of the statute of frauds. Objection, that the plea does not constitute an admission.

A. The objection must be sustained. In as far as inconsistent causes of action and defenses, and fictitious allegations are allowed by the rules of pleading, an exception must be made to the rule that anything a party says can be used against him. However, with this exception, admissions in pleadings generally are admissible against a pleader, even though the pleadings have been superseded, withdrawn, or abandoned.

Susznik v. Alger Logging Co., 147 P. 922, 76 Or. 189, Ann. Cas. 1917C, 700.

Loomis v. Norman Printers' Supply Co., 71 A. 358, 81 Conn. 343.

For other cases see Decennial Digests, Evidence ¶208(6); Pleading ¶93(1).

Q. 51. P sues D for an automobile accident. The accident was caused by D's machine, which was driven by X, a chauffeur. D wrote to P, and said: "My chauffeur, X, is a very careful driver. I do not wish a lawsuit, and will pay \$1,000 to settle the matter." On the trial, the defendant denies that X is his chauffeur. P offers D's letter in evidence. Objection on general grounds, and that the letter was by way of compromise, and therefore inadmissible as an admission.

A. It is not necessary that it be expressly stated that the offer is a compromise. The law wishes to encourage settlements, and therefore the offer to pay \$1,000 will not be allowed in evidence as an admission of liability. On the other hand, it does not appear that there was at the time any controversy as to X's capacity; that seems to have been affirmed by D, and therefore his statement that X was his chauffeur was an admission of fact, and not a hypothetical statement for the purpose of compromise. It should therefore be admitted in evidence.

Whitney v. Cleveland, 91 P. 176, 13' Idaho, 558.

For other cases see Decennial Digests, Evidence §213(4).

Q. 52. In a suit for damages for personal injuries, the plaintiff offered evidence of the fact that in a former trial of the same issue the defendant had attempted to corrupt jurors, and also had made inducements to witnesses to testify in his favor. The defendant objected, on the ground that it was incompetent, irrelevant, and immaterial. What ruling?

A Objection overruled. The evidence is relevant, as showing an admission by the defendant of the weakness and unrighteousness of his case, and raises a presumption in favor of the opposite party. The commonest example of the raising of this presumption in favor of an adverse party is where there had been a destruction or spoliation by one party of the evidence in the case. In all of these cases, there seems to be an admission by conduct, and it may be used against a person, just as what he expressly admits may be used against him.

McHugh v. McHugh, 40 A. 410, 186 Pa. 197, 41 L. R. A. 805, 65 Am. St. Rep. 849.

For other cases see Decennial Digests, Evidence §79.

Q. 53. P sues a street railroad company for personal injury in an accident. The motorman told W the next day that the brakes were out of order, and that he had reported the matter to the company the day before the accident. W is asked on the stand as to this conversation. Objection, hearsay, *res inter alios acta*, and in no way admissible against the defendant.

A. Ordinarily the statements of a third person are not admissible against a party. Where, however, there is a relationship, such as principal and agent, or master and servant, the statements of the agent or servant in the course of his employment are admissible. The whole question then is as to the course of the employment. Had the statements been made before the accident,

they would have been admissible. After the accident, it is generally held that it is not within the scope of the servant's authority to make statements that can be used against the master.

Morse v. Consolidated Ry. Co., 71 A. 553, 81 Conn. 395.

4 Or. Law Rev. 222.

For other cases see Decennial Digests, Evidence ¶244(15).

Q. 54. P sues D for conversion of an automobile. D proves that he bought the automobile from X. W testifies for P that, at the time X was in possession, he told W he had borrowed the automobile, but did not own it. The court admitted this testimony over the objection that it was hearsay, *res inter alios acta*, and in no way admissible against D. Was the admission error?

A. No. The admissions of a predecessor in title, at the time the predecessor is claimed by his successor to have been the owner, are admissible against the successor. This is true as to real property, and in all but a few jurisdictions is true of personal property.

Cooper v. Spring Valley Water Co., 153 P. 936, 171 Cal. 158.

Contra: Paige v. Cagwin, 7 Hill (N. Y.) 361, 42 Am. Dec. 68.

4 Cal. Law Rev. 250.

For other cases see Decennial Digests, Evidence ¶229, 235.

(b) Confessions

Q. 55. State v. D, for murder of X. The people offer a witness, and ask: "Did D make any statement to you in regard to the killing of X?" Objection, on the ground that no foundation has been laid. On the overruling of the objection, D requests that the jury be excluded while evidence is offered as to the voluntary character of the evidence. This request is denied, and the witness testifies that D said: "I killed X with a revolver to get his money." Is this error?

A. Yes; before a confession can be offered in evidence, the prosecution must prove that it was obtained without any threat, menace, force, inducement, or hope of reward. There is some conflict and technicality as to the inducement that will exclude a confession. The voluntary character of the confession is to be passed on by the judge, although some jurisdictions later submit it to the jury. The best practice is to exclude the jury on request, while the court determines whether the confession is voluntary.

State v. Spanos, 134 P. 6, 66 Or. 118, 18 L. R. A. (N. S.) 768.

25 Col. Law Rev. 673.

For other cases see Decennial Digests, Criminal Law ¶517(3).

Q. 56. P sues D for conversion of automobile. Evidence is offered that the car was stolen by X in Chicago March 1, 1925. P offers W as a witness to testify that D told him he was in Chicago on March 1, 1925, and met X there. Objection by D, no foundation, and the statement of D not shown to be voluntary.

A. Objection overruled. By the doctrine of admissions, any statement a party makes may be used against him, whether voluntary or not, since the involuntary character of an admission in a civil proceeding merely goes to the weight of the evidence. The confession exception applies only to criminal cases, not to civil cases, and applies only to statements acknowledging the commission of the crime charged. This was not a criminal prosecution, and D did not acknowledge that he committed the crime. His statement was simply an admission which, with other evidence, might connect him with the stolen car.

Wigmore (2d Ed.) §§ 815, 1051.

Fidler v. McKinley, 21 Ill. 308.

Contra: State v. Willis, 41 A. 820, 71 Conn. 293.

For other cases see Decennial Digests, Criminal Law Ⓒ406(3); Evidence Ⓒ203.

Q. 57. D is prosecuted for robbery. Statements of a co-conspirator, in whose possession the stolen goods were found, were offered by the prosecution. Objection is made that the declarations of a co-conspirator are not competent evidence against the other, if made after the conspiracy is ended. What ruling?

A. The objection will be overruled. The general rule is that declarations of a co-conspirator will be admissible only if made during the furtherance of the conspiracy. An exception to this rule exists where it is shown that a co-conspirator is in possession of the fruits of the crime, or of the weapons with which the crime was committed.

Arlington v. State, 263 S. W. 593, 98 Tex. Cr. R. 68.

Contra: Wiley v. State, 124 S. W. 249, 92 Ark. 586.

23 Mich. Law Rev. 181.

For other cases see Decennial Digests, Criminal Law Ⓒ424(1).

Q. 58. P v. D. Death of P's intestate by D's negligent operation of automobile. To prove negligence, verdict of coroner's jury to that effect offered. Objection, hearsay.

A. Objection sustained by great weight of authority. The verdict, which is clearly hearsay, is inadmissible as evidence.

Rowe v. Such, 66 P. 862, 67 P. 760, 134 Cal. 573.

For other cases see Decennial Digests, Death Ⓒ61.

(c) Questions of Pedigree

Q. 59. P v. D. Action on life insurance policy. Defense, misrepresentation of age by decedent. To prove age, D offers a certified copy of registrar's books, containing a record of marriage of decedent, in which record of the age was given. Objection, hearsay.

A. Objection overruled. The record is hearsay, but usually a certified copy is admitted as evidence of a public record. The reason is that it avoids the necessity of calling public officers every time a record is offered in evidence. To an undefined extent, some official records, such as weather reports, etc., are evidence of facts therein stated, by an exception to the hearsay rule, and under statutes for the keeping of vital statistics the facts therein stated are generally held to be within the exception.

Succession of Derigny, 55 So. 552, 128 La. 853.

For other cases see Decennial Digests, Evidence ⇨341.

Q. 60. In the matter of the estate of A. B had a son X, who died, leaving a son Y, who now claims the estate of A. To establish this claim, Y offers a statement of his deceased father: "My father, B, has a brother, A." Objection, hearsay. What ruling?

A. The statement is hearsay, but under an exception to the hearsay rule the statement of a deceased person in regard to matters of family history or pedigree is admissible, if made before any controversy, and where there were no suspicious circumstances. It would be conceded everywhere that the above statement would be admissible on behalf of a descendant of A who was claiming B's estate, and the argument is that it should be equally admissible, whether A's estate or B's is in litigation. There is, however, a conflict of authority. Some courts would admit the above statement (*Estate of Hartman*, 107 P. 105, 157 Cal. 206, 36 L. R. A. [N. S.] 530, 21 Ann. Cas. 1302); others would say that Y must first connect himself with A's family by other evidence before the statement can be admitted.

Aalholm v. State, 105 N. E. 647, 211 N. Y. 406, L. R. A. 1915D, 215, Ann. Cas. 1915C, 1039.

For other cases see Decennial Digests, Evidence ⇨290.

Q. 61. P v. D. Action for price of goods sold and delivered. Plea, infancy. To establish the age of D, a Bible in D's family is offered in evidence, showing the date of D's birth. Objection, hearsay.

A. The objection might be sustained, if there were plenty of living witnesses, and the entry in the Bible was in the handwriting of an available living person. Assuming, however, that the entry is that of a deceased person, or that the entrant is unknown, the Bible, like a genealogical chart, monument, inscription, etc., would be evidence of the reputation in the family, and therefore admissible as an exception to the hearsay rule (*Bryant v. McKinney*, [Ky.] 96 S. W. 809), unless the exception is limited, as is done by some courts, to pedigree cases; that is, cases where questions of birth, death, marriage, or relationship are directly involved, and not to cases where the question arises incidentally, as in the plea of infancy or in statutory rape. *Eisenlord v. Clum*, 27 N. E. 1024, 126 N. Y. 552, 12 L. R. A. 836.

For other cases see *Decennial Digests*, Evidence ⇨287, 291.

(d) *Dying Declarations*

Q. 62. *State v. D*, for murder of *X*. State offers witness *Y*, who says that he found *X* bleeding profusely from a bullet wound in the body, and in response to a question *X* said faintly, "*D* shot me, because I did not pay him for work he had not done." Motion to strike out as hearsay, opinion, and no proper foundation.

A. Objection overruled. The statement of the victim of a homicide, made in contemplation of immediate death, as to the cause of death, is admissible. It is not necessary that the victim should have stated that he expected to die. That expectation may be inferred from the circumstances. Nor is the objection that the statement was made in response to a question, even a leading question, valid. Had the motion to strike been separated, some courts would have excluded the latter part of the statement. As to how much of the circumstances surrounding the killing come in under a dying declaration, the courts are in conflict.

Donnelly v. State, 26 N. J. Law 601, 617.

For other cases see *Decennial Digests*, Homicide ⇨200, 214(3).

Q. 63. *P v. D*. Conversion of *P*'s automobile. Evidence shows *D* purchased it from *X*. Dying declaration of *X* offered, that he stole the car. Objection, hearsay.

A. Objection sustained. The admission of dying declarations as an exception to the hearsay rule does not, by the great weight

of authority, apply to civil cases, and in criminal cases only to homicide, and then only to dying declarations of the victim.

Pippin v. Commonwealth, 86 S. E. 152, 117 Va. 919.

Contra: Thurston v. Fritz, 138 P. 625, 91 Kan. 468, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212.

For other cases see Decennial Digests, Evidence $\S$ 275½; Homicide $\S$ 211.

Q. 64. State v. D. for murder of X. D offers in evidence statement of E, just before he died and while conscious that he was about to die, that he, E, killed X. Objection, hearsay.

A. Objection sustained. It is not a dying declaration, as it is not a statement by the victim of the accident, and it is not a declaration of a decedent against interest, as it does not refer to pecuniary or proprietary interest. There is, however, some dissent from this conclusion (Hines v. Commonwealth, 117 S. E. 843, 136 Va. 728, 35 A. L. R. 431); some courts holding that the admission of a crime subjects a person to both a criminal prosecution and usually to some civil tort action. The argument for this latter theory would be stronger, if the statements were not made in view of impending death. Donnelly v. U. S., 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710; 3 Tex. Law Rev. 319.

For other cases see Decennial Digests, Criminal Law $\S$ 417(15), 419, 420(10).

(e) *Account Books and Entries in Course of Business or Against Interest*

Q. 65. P v. D, to foreclose a mortgage. P is administrator of estate of X. He offers in evidence a pocket memorandum book, in which X had entered: "March 1, 1926, received \$50 interest from D." Objection hearsay.

A. Objection would probably be overruled. The declaration of a decedent against his pecuniary or proprietary interest is admissible. Here it is true the effect is to establish a claim in his own favor, but the entry itself shows a credit to another, and is therefore against interest.

Taylor v. Witham, L. R. 3 Ch. D. 605.

4 Or. Law Rev. 222.

For other cases see Decennial Digests, Evidence $\S$ 272, 276.

Q. 66. P v. D, for ejectment. Question as to boundary line of a Mexican grant to a private individual, on which in course of time a considerable number of people had settled and acquired titles. Question: "What have you heard old men now deceased say as to

the reputation in the community as to where the boundary line was located?" Objection, hearsay.

A. Objection overruled. In ancient matters, there is usually no other evidence, and ancient reputation, either in the form of statements of deceased persons or in the form of maps, charts, etc., is admissible. Ordinarily this evidence is not admissible to prove private boundaries, but when large numbers of people are involved it is treated in the United States much like a public boundary. By the weight of authority in America, field notes and statements of a deceased surveyor are admissible in boundary cases.

Morton v. Folger, 15 Cal. 275.

For other cases see Decennial Digests, Evidence ¶274(9).

Q. 67. P v. D, for goods sold and delivered. P offers his account books, kept by himself. Objection, hearsay.

A. Objection overruled. At common law parties were disqualified from testifying, so in the United States a common-law exception grew up that a party might identify his books, and in some jurisdictions by suppletory oath affirm the correctness of them, and then offer the books in evidence, subject to many limitations, as, for example, that he kept no clerk, that the amounts were small, that they did not include cash items, did not show to whom credit was given, etc. Now that parties can testify, the books can be used by the party to refresh his recollection. Strictly, therefore, there is no need of the books being put in evidence. Actually, however, the old practice of putting in the books continues, and rightly so, as the books are, from a business man's point of view, evidence of the highest probative value. Whether the books come in, subject to the old shop book limitations, is in some confusion.

Wigmore (2d Ed.) § 1518.

14 Cal. Law Rev. 263, Account Books in California, by Professor Clarke B. Whittier.

Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A. L. R. 1423.

For other cases see Decennial Digests, Evidence ¶318(6), 354(2, 14, 25, 26).

Q. 68. P v. D. Action against an indorser on a promissory note. To prove demand on the indorsers, P offers a book kept by a messenger of a bank, in which he entered a record of demands and notices presented by him through the bank. P proves the messenger is dead. Objection to the book, on the ground that it is hearsay.

A. Objection overruled. Entries in a book in the regular course of business of a deceased third person are admissible in evidence as an exception to the hearsay rule, because of the necessity arising

from the unavailability of the witness, and because of the probable trustworthiness of the entries due to habit, and the duty owed to the employer to keep correct accounts.

Wigmore (2d Ed.) §§ 1521-1528.

Nicholls v. Webb, 21 U. S. (8 Wheat.) 326, 5 L. Ed. 628.

For other cases see Decennial Digests, Evidence ◊333(1).

Q. 69. P v. D, for goods sold and delivered two years ago. P offers books in evidence. It appears that P has a large store, and that orders are taken by sales clerks, who make a memorandum in duplicate and give it to the shipping clerk, who prepares the goods for delivery and gives one tag to the bookkeeper and another to the deliveryman. The deliveryman reports orally to the bookkeeper. After this period of time it would be practically impossible to find out what clerks took the order and prepared the shipment for delivery. Objection to the offer of the books, on the ground that they are hearsay and not properly authenticated.

A. By the weight of authority the difficulty of obtaining the witnesses who actually carried out the transaction and knew the facts of their own knowledge is so great that it is treated as if they were dead, and their books are admitted in evidence, and even, by the weight of authority, their oral statements in the course of business, if taken down by a bookkeeper. In other words, the ordinary method of carrying on a large business is recognized by the courts in the admission of these books as an exception to the hearsay rule.

Montgomery & Mullen Lumber Co. v. Ocean Park Scenic R. Co., 161 P. 1171, 32 Cal. App. 32.

For other cases see Decennial Digests, Evidence ◊376(9).

(f) *Res Gestæ*

Q. 70. P v. D. Action on life insurance policy. Defense, misrepresentation as to health and suicide. D offers statements of decedent, prior to the issuance of the policy, "I have a terrible pain in my heart;" also a statement, shortly before death, "I am going to commit suicide." Objection to statements as hearsay.

A. The evidence is admissible. Some courts have rejected statements of bodily feeling, unless made to a physician; but the weight of authority is that, whenever the intention, feeling, belief, or other mental state of a person at a particular time, including his bodily feeling, is material to an issue on trial, evidence of such person's declarations at the time, indicative of his then mental state, is admissible. The theory is that by an exception to the hearsay rule the statement of a person proves his intention, which

shows some probability that he carried it out. Some courts reject statements, unless made while the person is doing something in execution of the intention, as in the above case if the decedent made the statement while buying poison, or, if the statement were that "I am going to Chicago," if made on his way to the train. Most courts, however, recognize no such limitations. Statements of past feeling would not be admissible, unless made to a physician for his diagnosis, and usually not then, if made for the purpose of suit.

Mutual Life Ins. Co. v. Hillmon, 12 S. Ct. 909, 145 U. S. 285, 36 L. Ed. 706.
In re Carson's Estate, 194 P. 5, 184 Cal. 437, 17 A. L. R. 239; 38 Harv. Law Rev. 709.

For other cases see Decennial Digests, Evidence ◊268, 269(1), 357; Wills ◊165(1).

Q. 71. Estate of D. Proceeding to establish a will, lost or destroyed without the knowledge of testator. Proponent offers statements of decedent: "I am going to make a will and leave my property to X." "I have made a will and have left my property to X." Objection, hearsay.

A. Objection overruled as to the statement of intention before the will was executed, on the principle of the last case. As to his statements made after the will, there is a conflict. Some courts admit them, on the theory of the preceding case, that they show the present belief of the party that he made a will, and from the belief it is inferred that he must have made a will, or he would not have had that belief. It is claimed that the inference from belief back to the fact is stronger than that from intention to the fact. If this theory were adopted for cases other than wills, it would nullify in great part the hearsay rule. Some courts reject evidence of post-testamentary declarations, others admit them, and still others admit the evidence, but do not allow the contents of the will to be proved by hearsay statements alone.

In re Morrison's Estate (Cal.) 242 P. 939.

38 Harv. Law Rev. 959.

For other cases see Decennial Digests, Wills ◊297(1).

Q. 72. Estate of D. Will contested on ground of undue influence of brother. Statement of decedent, offered by contestant: "I have made my will, but I did not make it as I wanted." "That brother of mine nags at me all the time, and I had to make a will in his favor." Objection, hearsay.

A. Objection probably overruled. The evidence would be admitted, not to show that the brother did use influence, but that, if influence was used and can be proved by other evidence, the tes-

tator was affected by it. In other words, the evidence is admitted simply to show the state of mind of the testator at the time he made the statement, and from this an inference is drawn as to his state of mind toward his brother at the time the will was executed.

Zibble v. Zibble, 92 N. W. 348, 131 Mich. 655.

38 Harv. Law Rev. 959.

For other cases see Decennial Digests, Wills ⌘165(1).

Q. 73. P v. D. Personal injuries in automobile accident. Statement of X, just before the accident and about 50 yards away: "That fellow is going 80 miles an hour." Objection, hearsay.

A. There is a conflict on this point. Generally a spontaneous exclamation, even of a bystander, induced by an accident or some exciting cause, is admitted as an exception to the hearsay rule. Here there was no exciting cause, but some courts consider the spontaneity sufficient to admit the affirmation, on the theory that it is better than the later recollection of X, when testifying under oath. As to the time the utterance must be made, there is a hopeless conflict of authority. Some courts mistakenly require the statement to be made contemporaneously with the exciting cause. This is a mistake, as the ground for the admission of the testimony is spontaneity. The statement has no tendency to explain the act. Some courts allow so much time to intervene that the statement cannot be considered spontaneous.

Weber v. State, 197 N. W. 193, 183 Wis. 85.

Travelers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437.

Contra: *Shadowski v. Pittsburg Ry. Co.*, 75 A. 730, 226 Pa. 537, 29 L. R. A. (N. S.) 302.

33 Yale Law J. 889.

Wigmore (2d Ed.) § 1755.

31 Yale Law J. 229.

For other cases, see Decennial Digests, Criminal Law ⌘368(1); Evidence ⌘122(6), 126(2).

SECTION 8.—FUNCTIONS OF COURT AND JURY

Q. 74. P v. D, for breach of contract. Contract signed by D, per A, "Agent." P offers some evidence that A was D's agent, and then offers the contract in evidence. Objection that it was not proved that A was D's agent, and the jury must first determine that fact before the contract can be admitted.

A. Objection overruled. The court determines all preliminary questions of fact, as to the competency of witnesses, whether a prima facie case has been made, whether a sufficient foundation has been laid, as in this case, for the introduction of a document

signed by the alleged agent. The ultimate issue of fact, whether the contract was executed on behalf of D, will be decided by the jury. All incidental matters arising during the trial are determined by the court.

Hathaway v. Congregation Ohab Shalom, 104 N. E. 379, 216 Mass. 539.
For other cases see Decennial Digests, Evidence ¶242(3).

Q. 75. State v. D. Libel. D asks for an instruction that the jury are the judges of both law and fact. The instruction was refused. Was this error?

A. No; among the facts that the court passes on is the construction of a written document, for when trial by jury developed jurors could not read. In libel there was considerable authority for holding that all the jury had to do was to determine whether the defendant published the writing. If he had, the court decided whether or not it was a libel. Lord Fox's Act, adopted generally in this country, gave the jury the right to return a general verdict of guilty or not guilty, as in other criminal cases. While the jury has the power to return a general verdict in criminal cases, the jury should take the law from the court. If, however, the jury brings in a verdict of not guilty, where under the instructions it should have been guilty, there is no remedy. The jury cannot be punished, for the state cannot appeal. By the great weight of authority it is the duty of the jury to take the law from the court; but their discretion cannot be controlled, after a verdict of not guilty is rendered.

Erie Crawford Oil Co. v. Meeks, 81 N. E. 518, 40 Ind. App. 156.
23 Harv. Law Rev. 123.

For other cases see Decennial Digests, Trial ¶134, 350(2).

SECTION 9.—PRESUMPTIONS

Q. 76.—P v. D. Action by passenger on a railroad for injury received by the train backing, running off the track at a switch, and overturning the car in which P was riding. Instruction that on these facts P has made out a prima facie case, and D, in order to avoid liability, must show that he used the highest degree of care known to careful, diligent, and skillful persons in the railroad business. D claims error.

A. There is a conflict of authority. In some situations, by proof of the occurrence of an injury by an instrumentality under the exclusive control of defendant, where the accident would not happen in the ordinary course of events, unless the defendant were at fault,

the plaintiff is held to have made out a sufficient case to go to the jury, under the doctrine of *res ipsa loquitur*. In still other situations, the proof of the facts, not merely gets the plaintiff to the jury, but raises a presumption in his favor. This means that he has satisfied the burden of proof for the time being. This shifts the burden of rebuttal, so that the jury must bring in a verdict for the plaintiff, unless the defendant offers evidence of freedom from fault. If, however, the defendant does offer such evidence of freedom from fault, the burden is still with the plaintiff to prove the negligence of the defendant by a preponderance of evidence.

Effect of Rebuttable Presumptions of Law upon Burden of Proof, by Prof. Bohlen, 68 *Univ. of Pa. Law Rev.* 307.

Winslow v. Norfolk Hardware Co., 60 S. E. 1130, 147 N. C. 275.

For other cases see *Decennial Digests, Evidence* ¶90.

Q. 77. *State v. D.* D. asks for an instruction that the presumption of innocence goes with the accused until the termination of the case, and that this presumption of innocence is evidence in the defendant's favor. Should the instruction be granted?

A. No; by the weight of authority presumptions are not evidence. It is impossible to weigh with the evidence in a particular case a presumption that the defendant is innocent, or a presumption of sanity from the fact that most people are sane. What is probably meant is that in a criminal case the prosecution must prove the commission of the crime to a moral certainty and beyond a reasonable doubt as to all the issues in dispute.

Holt v. U. S., 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 *Ann. Cas.* 1138.

State v. Brauneis, 79 A. 70, 84 *Conn.* 222.

For other cases see *Decennial Digests, Criminal Law* ¶308, 778(4).

Q. 78. A makes a will, leaving his entire property to B and C in 1915. In 1916 B leaves for China, and is never heard of again. In 1922 A and C were on a vessel which was lost at sea. Both perished, and there was no evidence which survived the other. A's heirs and the heirs of B and C claim the property on distribution in 1923. To whom will A's estate go?

A. To A's heirs. While the seven years' absence of B raises a presumption of death, according to the weight of authority, it raises no presumption of death at any particular time. B's heirs can therefore not prove that B survived A. Similarly, where there is death in a common disaster, there is no presumption (except where statute otherwise provides) that either survived, and, as C's

heirs must prove that C was alive when A died, C's heirs must fail in proving that C took under the will of A.

Cowman v. Rogers, 21 A. 64, 73 Md. 403, 10 L. R. A. 550.

Security Bank of Richmond v. Equitable Life Assur. Soc. of United States, 71 S. E. 647, 112 Va. 462, 35 L. R. A. (N. S.) 159, Ann. Cas. 1913B, 836.

4 Cal. Law Rev. 145.

For other cases see *Decennial Digests*, Death ⚡2(2), 5.

SECTION 10.—PAROL EVIDENCE RULE

Q. 79. A and B entered into a complete written contract. A sued B on the contract, and B set up in defense that the contract was obtained from him by false representations. A objects to the evidence on the ground that it violates the parol evidence rule. Objection sustained. Appeal.

A. The objection was improperly sustained. The parol evidence rule has no operation until a contract has been actually entered into, free from fraud, duress, mistake, etc., in its inception. The question is not as to the terms of the contract, but as to whether a valid contract was ever made.

Minneapolis Threshing Machine Co. v. Otis, 110 N. W. 550, 78 Neb. 233.

For other cases see *Decennial Digests*, Evidence ⚡434(8).

Q. 80. P v. D, for breach of warranty that an engine sold by D to P was capable of operating P's mill at full capacity. D offers contract of sale, which contains no such warranty, and objects to any evidence of the warranty, as forbidden by the parol evidence rule. Evidence excluded. What ruling?

A. The ruling would probably be sustained, if the parties put their agreement into a document or instrument, and if from an examination of the writing, construed in view of the circumstances in which and the purpose for which it was executed, it seems that the parties intended this particular writing to embody their whole agreement, then even prior and contemporaneous provisions in writing are excluded. If, on the other hand, the writing appears to be merely a memorandum of some of the terms, it would not exclude previous or contemporaneous letters, telegrams, conversations, etc., which supplement them.

Thompson v. Libby, 26 N. W. 1, 34 Minn. 374.

Barry-Wehmiller Machinery Co. v. Thompson, 104 S. W. 137, 83 Ark. 283. 22 Col. Law Rev. 178.

Contra: *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512.

For other cases see *Decennial Digests*, Evidence ⚡400(6), 417(12), 441(9).

Q. 81. Testator leaves Blackacre to John Smith. It appears that he owned two Blackacres, and there is no John Smith, but a James Smith, and a Joseph Smith. Evidence is offered, showing the relationship of James Smith to the testator, and their connection with a particular Blackacre. Evidence is also offered that the testator said, pointing to one of the Blackacres, "I have left that to this boy," indicating James Smith. All the evidence is received over objection. What ruling?

A. The problem here differs from the previous case. There the attempt was to put something into a writing that was admittedly not there. Here the problem is to interpret what has been improperly expressed. Ordinarily all relevant evidence comes in to show what the testator meant, with the possible limitation by some courts that it must not disturb a plain meaning. Direct statements of the testator, however, are as a rule not admissible, perhaps because they would be given too much weight, and compete with the will. In cases of equivocation, however, as above, where there are two Blackacres, each answering perfectly the description, statements of the testator are allowed to show which one he meant. There is a conflict of authority whether such statements of the testator can be used in cases of misdescription, like the above, where the name John Smith fits neither claimant exactly. On principle, cases of misdescription should be treated as cases of equivocation, and direct statements of the testator admitted.

In re Donnellan's Estate, 127 P. 166, 164 Cal. 14.

Hoffner v. Custer, 86 N. E. 737, 237 Ill. 64.

For other cases see *Decennial Digests, Wills* ¶486, 489 (2, 4, 5), 490, 491, 560(3).

FEDERAL COURTS AND PROCEDURE¹

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Section

1. The Federal Courts and State Law.
2. Crimes Against the United States.
3. Habeas Corpus in Federal Courts.
4. Original Jurisdiction of the United States District Court.
5. Jurisdictional Amount in the United States District Court.
6. Jurisdiction of United States District Court as Affected by Assignment.
7. Removal Jurisdiction of United States District Court.
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9. State Statutes Cannot Limit the Jurisdiction of Federal Courts.
10. Venue in United States District Court.
11. Admiralty Jurisdiction of United States District Court.
12. Distinction Between Law and Equity in the Federal Courts.
13. Original Jurisdiction of the United States Supreme Court.
14. Equity Procedure in the Federal Courts.
15. Appellate Jurisdiction of the Federal Courts.

SECTION 1.—THE FEDERAL COURTS AND STATE LAW

Q. 1. Muck, an injured employee, brought suit for damages based on personal injuries due (it was alleged) to the negligence of his employer, Raker. The case of *Muck v. Raker* is being tried in the United States District Court for the Southern District of Mississippi. The federal judge must decide, in the progress of the case, the following questions:

(1) Shall he follow the system of pleading used in the state courts of Mississippi?

(2) Shall he follow the state statute of limitations?

(3) Shall he follow state decisions as to the scope of the fellow servant doctrine?

(4) Shall he follow state decisions as to the common-law rules of evidence?

How should these questions be decided?

A. (1) The federal general Conformity Act (U. S. Comp. St. § 1537 [U. S. C. tit. 28, § 724]) requires the United States District Court to "conform, *as near as may be*, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such * * * district courts are held, any rule of court to the contrary notwithstanding." This applies only to civil cases on the law side of the court, and not to

¹ References herein to "Hughes" are to Hughes on Federal Procedure, 2d Edition.

criminal cases, or equity or admiralty cases. The chief object of the statute was to save the bar the trouble and confusion involved in two different (code or common-law) systems of pleading. This being a civil case on the law side of the court, the federal judge would follow the system (common-law pleading) in vogue in Mississippi. *Indianapolis & St. Louis Ry. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Hughes*, §§ 136, 141.

For other cases see *Decennial Digests, Courts* ⇨352.

(2) State statutes regulating substantive rights and controlling remedies on the law side of the court are enforced (when they do not conflict with the federal Constitution or a federal statute) by the federal courts. Here the federal judge, then, would follow the state statute of limitations. *Security Trust Co. v. Black River National Bank*, 23 S. Ct. 52, 187 U. S. 230, 47 L. Ed. 147. The same principle applies to the state statute of frauds. *Moses v. Lawrence County Bank*, 13 S. Ct. 900, 149 U. S. 298, 37 L. Ed. 743. The same is true of a state statute giving a right of action for death by wrongful act. *Atchison, T. & S. F. Ry. Co. v. Sowers*, 29 S. Ct. 397, 213 U. S. 66, 53 L. Ed. 695; *Hughes*, § 6.

For other cases see *Decennial Digests, Courts* ⇨363, 366(13); *Territories* ⇨20.

(3) In questions of a general or commercial character, the federal courts (when there is no state statute) do not feel obliged to follow the decisions of the state courts, but decide these questions for themselves and blaze their own trail. The law of master and servant (including the fellow servant rule) is deemed to be a question of general interest, not of mere local concern, and the federal court would decide this question without reference to state court decisions. *Baltimore & O. Ry. Co. v. Baugh*, 13 S. Ct. 914, 149 U. S. 368, 37 L. Ed. 772. The same is true of the law merchant. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865. Also the liability of common carriers. *New York Cent. Ry. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. Also the interpretation of policies of insurance. *Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 21 S. Ct. 1, 179 U. S. 1, 45 L. Ed. 49; *Hughes*, § 11.

For other cases see *Decennial Digests, Carriers* ⇨150; *Courts* ⇨372(1, 3, 6).

(4) On questions of the rules of evidence under the common law (in the absence of statute), the federal courts, it seems, follow the state court decisions, though this is doubtful. See *Ryan v. Bindley*, 1 Wall. 66, 68, 17 L. Ed. 559; *Nashua Savings Bank v. Anglo-Amer-*

ican Land, Mortgage & Agency Co., 189 U. S. 220, 228, 23 S. Ct. 517, 47 L. Ed. 782; Franklin Sugar Refining Co. v. Luray Supply Co., 6 F. (2d) 218. But see, contra, Chicago & N. W. R. Co. v. Kendall, 167 F. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; Hughes, § 11.

For other cases see Decennial Digests, Courts ⇨376.

SECTION 2.—CRIMES AGAINST THE UNITED STATES

Q. 2. Squadde and Wright run a gambling house at Fortress Monroe, a United States army post situated in Virginia. There is a Virginia statute that makes gambling houses a crime, but there is no federal criminal statute that covers gambling houses. What, if any, is the criminal responsibility of Squadde and Wright?

A. There are no common-law crimes against the United States; no act is a crime against the United States unless made so by a federal statute. Pettibone v. U. S., 13 S. Ct. 542, 148 U. S. 197, 37 L. Ed. 419. But section 289 of the federal Penal Code (U. S. Comp. St. § 10462 [U. S. C. tit. 18, § 468]) provides that any act which is an offense under the law of the state in which land under federal jurisdiction is situated shall be an offense against the United States, and punishable as it is by the state law in force at the time of the federal enactment. (This statute went into effect January 1, 1910). Congress cannot make state laws *subsequently to be passed* applicable to federal territory, which would be an unwarranted delegation of its power to a state Legislature. So Congress, at brief intervals, re-enacts the above statute to keep abreast of state legislation.

Squadde and Wright would thus be guilty under the Virginia statute, adopted by the federal statute, and punishable as prescribed by the Virginia statute. Franklin v. United States, 30 S. Ct. 434, 216 U. S. 559, 54 L. Ed. 615. For limitation of this statute, see U. S. v. Press Publishing Co., 31 S. Ct. 212, 219 U. S. 1, 55 L. Ed. 65, 21 Ann. Cas. 942; Hughes, § 14, p. 27.

For other cases see Decennial Digests, Courts ⇨385(1½); Crim. Law ⇨97(4); Obstructing Justice ⇨6.

Q. 3. Fox (a federal secret service man) learns that Wolf (a counterfeiter long wanted by the federal authorities) is hiding in Lexington, Va. Fox (on arriving in Lexington) ascertains that two confederates of Wolf will arrive in Lexington in two hours to take Wolf away in an automobile. Fox has no warrant for Wolf's arrest, and there are no federal officials within miles of Lexington. Fox applies to you for advice as to how he can make a valid arrest of Wolf. Advise him.

A. A federal statute (Rev. St. § 1014, U. S. Comp. St. § 1674 [U. S. C. tit. 18, § 591]) provides that for any crime against the United States the offender may by a justice or judge of the United States, "or any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeable to the usual mode of process against offenders in such state, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

Under this statute (passed to cover just such cases as the one in question), since no federal judicial officers were available, Fox should apply to any of the state officers mentioned (a justice of the peace would probably be most easily found) to issue a warrant under which Wolf could be arrested and imprisoned or bailed.

Roberts v. Brown, 94 S. W. 388, 43 Tex. Civ. App. 206.

McIntosh v. Bullard, 129 S. W. 85, 95 Ark. 227.

Hughes, §§ 16, 17, pp. 28, 29.

For other cases see Decennial Digests, Criminal Law ¶207(3).

SECTION 3.—HABEAS CORPUS IN FEDERAL COURTS

Q. 4. Pettibone, charged with murder in Idaho, was illegally kidnapped in Colorado by Idaho officials, was forcibly denied the right to test before any court in Colorado the legality of his arrest, was secretly brought into Idaho, and there arrested under an Idaho warrant. Pettibone seeks a writ of habeas corpus from the United States District Court of Idaho. Should the writ be issued?

A. Habeas corpus in the federal courts (Rev. St. § 753, U. S. Comp. St. § 1281 [U. S. C. tit. 28, § 453]) extends only to cases in which (1) the petitioner is in custody by the authority of the United States or committed for trial before some United States court; (2) or is in custody for some act done or omitted in pursuance of some law, order, or process of the United States; (3) or where a citizen or subject of some foreign state (and domiciled therein) is in custody for an act done or omitted under some title, authority, or privilege claimed under that state or under the law of nations; (4) or is in custody in violation of the Constitution, or a law or treaty, of the United States; (5) or unless it is necessary to bring the prisoner into court to testify.

Habeas corpus would be sought here under (4). But the use of the writ has been greatly restricted by decisions of the United States Supreme Court. The most striking limitation is that the writ raises only the question of *jurisdiction* or power to hold the petitioner, and cannot be used (as a writ of error) to correct mere

errors or procedural irregularities. The writ is issued by the federal courts only under circumstances of special urgency. Here the Idaho process under which Pettibone was held was valid, as he was arrested in Idaho under a warrant from an Idaho court having jurisdiction. So the United States Supreme Court refused to go into the methods used to get him into Idaho, where he was arrested, and denied the writ. *Pettibone v. Nichols*, 27 S. Ct. 111, 203 U. S. 192, 51 L. Ed. 148, 7 Ann. Cas. 1047; *Hughes*, §§ 86-90. Procedure in habeas corpus is governed by Rev. St. §§ 754-761 (U. S. Comp. St. §§ 1282-1289 [U. S. C. tit. 28, §§ 454-461]).

For other cases see *Decennial Digests, Habeas Corpus* ⚭45(3).

SECTION 4.—ORIGINAL JURISDICTION OF THE UNITED STATES DISTRICT COURT

Q. 5. In which of the following cases, jurisdictional amount conceded, has the United States District Court jurisdiction on the ground that the case (under Judicial Code § 24, par. 1 [U. S. Comp. St. § 991(1)] U. S. C. tit. 28, § 41[1]) "arises under the * * * laws of the United States":

(1) Suit on a judgment previously obtained in a federal court.

(2) Suit against a national bank for negligence in collecting negotiable instruments.

(3) Bill to establish title in complainant to certain lands conveyed to the state of Minnesota in trust by the United States, and to annul certain deeds to these lands by the Governor of Minnesota to defendants as grantees. Complainant's claim was based partly on the interpretation of certain contracts, partly on Minnesota statutes, and partly on whether certain limitations in federal statutes negated the Governor's power to execute valid deeds to the defendants.

A. (1) A case arises under the laws of the United States only when the case turns necessarily or may reasonably turn upon an interpretation of a federal law, so that the plaintiff would win under one interpretation and lose under another. Here the suit on the judgment in itself raises no such question. The judgment is "but a security of record showing a debt due from one person to another." "It is simply the case of an ordinary right of property sought to be enforced."

Provident Savings Society v. Ford, 5 S. Ct. 1104, 114 U. S. 635, 29 L. Ed. 261.

Hughes, § 99, p. 240.

See, also, *H. C. Cook Co. v. Beecher*, 30 S. Ct. 601, 217 U. S. 497, 54 L. Ed. 855.

For other cases see *Decennial Digests, Courts* ⚭264(5), 290; *Removal of Causes* ⚭19(1).

(2) Suits against corporations organized under acts of Congress, since the very existence of such a corporation (and whether suable in its corporate capacity) depends on the construction of a federal law, necessarily involve a federal question. But, from wise expediency, Congress has provided that, as to jurisdiction of ordinary suits by and against them in the United States District Court, national banks shall stand on the same footing as citizens of the state in which the bank is located. So the United States District Court has not jurisdiction of this suit. It is now provided by Act Feb. 13, 1925, § 12 (U. S. Comp. St. § 991d [U. S. C. tit. 28, § 42]), that the District Court shall not have jurisdiction of an action against a corporation merely because it was incorporated by an act of Congress, unless the federal government owns more than one-half of its capital stock.

Judicial Code, § 24, par. 16 (U. S. Comp. St. § 991[16] U. S. C. tit. 28, § 41 [16]).

Continental National Bank v. Buford, 24 S. Ct. 54, 191 U. S. 119, 48 L. Ed. 119.

Hughes, § 99, p. 240.

For other cases see Decennial Digests, Courts ⇨382(2).

(3) When it appears from the plaintiff's complaint that, in any aspect which the case may assume, the right of recovery may reasonably (not merely colorably) turn on the construction of a federal statute, the case is one over which the United States District Court has jurisdiction (since it "arises under the laws of the United States"), though the right of recovery is predicated on other grounds (not involving federal questions), and even though the case may ultimately be determined on nonfederal grounds. The case in question satisfied these requisites, and the jurisdiction of the United States District Court was (it seems quite properly) sustained.

St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 68 F. 2, 15 C. C. A. 167 (affirmed by United States Supreme Court 18 S. Ct. 946, 42 L. Ed. 1212).

Hughes, § 99, p. 237.

See, also, New Orleans M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96.

For other cases see Decennial Digests, Courts ⇨282(1), 284.

Q. 6. In which of the following cases (jurisdictional amount conceded) has the United States District Court jurisdiction on the ground that the suit is "between citizens of different states" (Judicial Code, § 24, par. 1 [b], being U. S. Comp. St. § 991 [1 (b)] U. S. C. tit. 28, § 41 [1[b]]).

(1) A (of Virginia), executor of B (of Georgia), against X (of Georgia). The sole beneficiary of A's will is C (of Georgia).

(2) Suit by H (of New York) against L, a citizen of the United States, who had (before suit was instituted) abandoned her domicile in Missouri and acquired a domicile in London, England. H claims, too, that L acquired her London domicile solely for the purpose of attempting to defeat the jurisdiction of the United States courts.

(3) O (of Maine), P (of Vermont), and Q (of Delaware) against S (of Ohio), T (of Maryland), and U (of Vermont).

A. (1) For purposes of jurisdiction, on the basis of diverse citizenship, the court will look to the party of record who is the actual dominus litis, and not to mere nominal parties, or to parties who are merely beneficially interested. Though suing in a representative character, the executor is a real plaintiff, to whom the judgment can be validly paid. So the citizenship of A controls here. He being from Virginia and X from Georgia (even though B and C are also from Georgia), the United States District Court has jurisdiction. *Cincinnati, H. & D. R. Co. v. Thiebaud*, 114 F. 918, 52 C. C. A. 538. This is also true of a trustee. But in case of an infant, suing by next friend, the citizenship of the infant controls, and not that of the next friend, who is not a real (but at best a mere formal) party to the suit. *Blumenthal v. Craig*, 81 F. 320, 26 C. C. A. 427; *Hughes*, § 100, p. 247.

For other cases see Decennial Digests, Courts ☞311.

(2) Citizen of a state here involves both of two things: (a) citizenship of the United States; and (b) domicile within one of the states of the United States. The defendant here satisfied (a), since she had not lost her citizenship of the United States by acquiring a domicile in England; but she does not satisfy (b), since she is not domiciled in any state of the United States. The United States District Court has accordingly no jurisdiction of this case under the clause in question. The defendant was a citizen of the United States (which is acquired by birth or naturalization), but not a citizen of the state of the United States (Missouri), which depends on domicile. She was thus not an alien, and, accordingly, not suable in the United States District Court on that basis. *Hammerstein v. Lyne* (D. C.) 200 F. 165. A citizen of the District of Columbia is not a citizen of a state, within the meaning of the clause in question. *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. Ed. 332. If the domicile in London is real, the motive for acquiring it is of no consequence.

For other cases see Decennial Digests, Courts ☞307(1, 2).

(3) Where there is a plurality of litigants, every plaintiff must be capable of suing every defendant on the basis of diverse citizenship. The jurisdiction is defeated if one plaintiff and one defendant are from the same state. Since here P (a plaintiff) and U (a defendant) are from the same state (Vermont), the United States District Court has no jurisdiction. *Strawbridge v. Curtis*, 3 Cranch, 267, 2 L. Ed. 435; *Florida Cent. & P. Ry. Co. v. Bell*, 20 S. Ct. 399, 176 U. S. 321, 44 L. Ed. 486. Here, if P and U were both plaintiffs, or both defendants, the other parties remaining the same, the United States District Court would have jurisdiction. *Hughes*, § 102.

For other cases see *Decennial Digests, Courts* ¶308.

Q. 7. In which of the following cases (jurisdictional amount conceded) has the United States District Court jurisdiction?

(1) Suit by A (a French citizen domiciled in France) against B (a British subject domiciled in England).

(2) Suit by D (citizen of the United States domiciled in Ohio) against H (French citizen domiciled in Maine) and K (citizen of United States domiciled in Delaware).

A. Judicial Code, § 24, par. 1 (b), covers "suits between citizens of different states," while Judicial Code, § 24, par. 1 (c), extends to suits between "citizens of a state and foreign states, citizens or subjects."

(1) It is quite clear that no reasonable construction of these clauses could well cover suits by aliens against aliens. Accordingly it is well settled that this suit will not lie in the United States District Court. *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 14 S. Ct. 367, 151 U. S. 368, 38 L. Ed. 195; *Pooley v. Luco* (C. C.) 72 F. 561; *Hughes*, § 118. The situation would not be changed were A, B, or both, domiciled in a "state," which, as that term is used by itself in the statute in question, always means a state of the United States.

For other cases see *Decennial Digests, Courts* ¶321; *Removal of Causes* ¶41.

(2) There is still grave debate on this question. *Tracy v. Morel* (C. C.) 88 F. 801, denied the jurisdiction, but it was upheld in *Ryan v. Ohmer* (D. C.) 233 F. 165; *Hughes*, § 118. It is believed that there is no jurisdiction here. Certainly the case is not "between citizens of different states," nor does it seem to be "between citizens of a state and foreign states, citizens or subjects." If the two clauses are added together, the case would then be cognizable by the United States District Court. But there seems to be

no warrant for that, particularly as in the federal courts, which are courts of limited jurisdiction, every presumption is against jurisdiction, and the United States Supreme Court is inclined to construe quite strictly the statutes that define the jurisdiction of the federal courts.

For other cases see *Decennial Digests, Courts* ¶308; *Removal of Causes* ¶41.

SECTION 5.—JURISDICTIONAL AMOUNT IN THE UNITED STATES DISTRICT COURT

Q. 8. Clippe (of Ohio) brings suit in the United States District Court against the Buckshot Corporation (incorporated in Indiana) for \$3,600. Of this amount, \$2,500 represents the principal of past-due bonds of the corporation; \$1,100 represents matured interest coupons from the bonds. Clippe maintains the jurisdictional amount is sufficient on two grounds:

- (1) That the coupons can be added to the amount of the bonds.
- (2) That he has other similar bonds, soon to mature, the validity of which will be determined by the decision in the instant suit.

Discuss the soundness of these contentions.

A. As to (a) suits arising under the Constitution, laws, or treaties of the United States, and (b) suits between citizens of different states, and (c) suits between citizens of a state and foreign states, citizens, or subjects, there is no jurisdiction in the United States District Court, unless "the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000" (Judicial Code, § 24, par. 1). (Suits under (a) are frequently called "cases involving a federal question"; suits under (b) and (c) are known as "diverse citizenship cases," though these designations do not appear in the federal statutes).

(1) The statute excludes "interest" as such. But this applies only when the interest is merely incidental to the principal, or, in other words, when the interest is only an accessory to the chief demand. But interest coupons on bonds are themselves "written contracts for the payment of a definite sum of money on a given day." Each coupon is detachable, negotiable, and gives rise to a cause of action separate from the bond. One person may own the bond, while "title to several matured coupons of the same bond may be in as many different persons." So the coupons can be added to the principal of the bonds to make up the required jurisdictional amount, and the United States District Court here has juris-

diction. *Edwards v. Bates County*, 16 S. Ct. 967, 163 U. S. 269, 41 L. Ed. 155. See *Hughes*, § 98, p. 231.

For other cases see *Decennial Digests, Courts* ☞328(9).

(2) The jurisdictional amount involves merely the "sum or value" directly at issue between the parties in the particular suit in question. The courts will not consider the collateral effect of the instant suit on other suits or other causes of action, however similar to the particular suit. So the consideration involved in this question would not be effective in helping to make up the amount required. See *Bruce v. Manchester & K. Ry. Co.*, 6 S. Ct. 849, 117 U. S. 514, 29 L. Ed. 990. Where suit was on detached coupons for less than the jurisdictional amount, and the issues raised involved (in addition to the validity of the coupons) the validity of the bonds themselves, jurisdiction was denied.

For other cases see *Decennial Digests, Appeal and Error* ☞50(1).

Q. 9. Plaintiff sought in the United States District Court to restrain the defendant from so erecting poles and wires as to injure the plaintiff's poles, wires, and business. The court held that the jurisdictional amount was fixed by the *cost to the defendant* of removing its poles and wires in the streets and alleys, where they conflicted or interfered with the poles and wires of the complainant. The amount, as fixed on this basis, being less than \$3,000, the District Court dismissed the bill for want of the jurisdictional amount. Discuss the correctness of this decision.

A. The amount in controversy in the United States District Court is always to be determined by the value to the plaintiff of the right which he in good faith asserts in his pleading, that sets forth the operative facts which constitute his cause of action. So the jurisdictional amount here is to be fixed by the value of the right asserted by the plaintiff, not by the cost to the defendant of recognizing that right of the plaintiffs. These two sums frequently are (as in the case in question) quite different. The right here asserted was the plaintiff's "right to maintain and operate its plant and conduct its business free from wrongful interference by the defendant." As the value of this right exceeded \$3,000, the United States District Court has jurisdiction.

Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 36 S. Ct. 30, 239 U. S. 121, 60 L. Ed. 174.

See article, A. M. Dobie, "The Jurisdictional Amount in the U. S. District Court," 38 *Harv. Law Rev.* 733.

Hughes, § 98, p. 232.

For other cases see *Decennial Digests, Courts* ☞328(3).

SECTION 6.—JURISDICTION OF UNITED STATES DISTRICT COURT AS AFFECTED BY ASSIGNMENT

Q. 10. Kew (of New York), life tenant of a fund, to secure the remaindermen, executed (with surety) a bond running to them, their executors and assigns, conditioned for the preservation of the fund by Kew and for the payment of the interests of the remaindermen to them upon Kew's death. Orr (of New York), one of the remaindermen, assigned his remainder interest to Ess (of Pennsylvania). Later (on Kew's death), Kew having squandered a large part of the fund, Ess brought suit for \$5,000 against Tee (of New York), executor of Kew, and Zedd (of New York), surety on the bond executed by Kew, in the United States District Court. Has this court jurisdiction of the action?

A. The second sentence of paragraph 1 of Judicial Code, § 24, may thus be paraphrased: When the jurisdiction of the United States District Court is invoked on the basis of diverse citizenship, the assignee of a chose in action arising out of contract (with the exception of both foreign bills of exchange and the instruments of corporations made payable to bearer) cannot sue thereon unless the requisite diversity of citizenship exists (at the time the suit is commenced), not only between the *assignee* and the defendant, but also between the *assignor* and the defendant.

The statute was passed to prevent causes of action (not cognizable by the court, since both plaintiff and defendant were from the same state) being made justiciable in the United States District Court by the simple expedient of having the plaintiff assign his claim to the citizen of another state. The importance of not hampering the negotiability of foreign bills of exchange and corporate obligations payable to bearer was ample warrant for excluding these from the terms of the restrictive statute.

In the problem here, Orr could not have sued Kew, Tee, and Zedd (or any of them) in the United States District Court, since all of them are from the same state, New York. Does the restrictive statute prevent Ess (of Pennsylvania) from suing, since his assignor could not have sued? The restrictive statute applies only to choses in action arising out of contract; it does not apply to transfers of title to land or personal chattels. But the *bond* here is a chose in action arising out of contract; hence the restrictive statute does apply to prevent Ess from suing on this bond, since his assignor could not have sued, in the United States District Court. *Brainerd, Shaler & Hall Quarry Co. v. Brice*, 39 S. Ct. 458, 250 U. S. 229, 63 L. Ed. 951; *Hughes*, § 107. See, also, article,

A. M. Dobie, "Jurisdiction of the U. S. District Court as Affected by Assignment," 6 Va. Law Rev. 553. The restrictive statute does not apply to causes of action arising out of tort, so the assignee sues here in the United States District Court, without regard to the citizenship of the assignor. *Ambler v. Eppinger*, 11 S. Ct. 173, 137 U. S. 480, 34 L. Ed. 765.

For other cases see *Decennial Digests, Courts* 312(6, 8).

SECTION 7.—REMOVAL JURISDICTION OF UNITED STATES DISTRICT COURT

Q. 11. Kahn (of Virginia) sued Cobb (of Virginia) to compel Cobb (under the provisions of a Virginia statute so requiring) to chop down cedar trees on the land of Cobb, which, owing to cedar rust, injured the apple orchard of Kahn. Cobb, claiming in good faith that the Virginia statute contravenes the United States Constitution, in that he is deprived of his property without due process of law, desires to remove the case from the Virginia state court to the United States District Court. Can he do this?

A. The United States District Court has jurisdiction, not only of suits originally filed in this court, but it acquires jurisdiction of cases originally filed in state courts, which the defendant may remove to the federal court. The juristic anomaly is then presented of a defendant, properly sued in a court of competent jurisdiction, becoming dominus litis by removing the case to a forum of his own choosing.

Judicial Code, § 28, is the broad statute defining the removal jurisdiction. Yet other statutes (Judicial Code, § 31 [U. S. Comp. St. § 1013; U. S. C. tit. 28, § 74]), providing for removal on the ground of denial of civil rights, and Judicial Code, § 33 (U. S. Comp. St. § 1015 [U. S. C. tit. 28, § 76]), providing for removal of suits against federal revenue officers) provide for removal in specific instances.

The removal in the problem is sought under sentence 1 of Judicial Code, § 28 (U. S. Comp. St. § 1010 [U. S. C. tit. 28, § 71]), providing that civil suits "arising under the *Constitution* or laws of the United States, * * * of which the *District Courts of the United States* are given jurisdiction by this title, * * * may be removed by the defendant or defendants therein to the District Court of the United States for the proper district."

But here the removal fails. In removal jurisdiction (as in original jurisdiction) of the United States District Court, this jurisdiction is determined by the plaintiff's own statement of his own case. Manifestly here the plaintiff's case raises no federal constitutional

question, for the plaintiff invokes only the Virginia statute. Since removability is determined by the case made out in the plaintiff's pleading, before any pleading is filed by the defendant, and the federal Constitution is first brought into the case by the defendant in his petition for removal, the removal here should be denied. *Tennessee v. Union & Planters' Bank*, 14 S. Ct. 654, 152 U. S. 454, 38 L. Ed. 511; *Hughes*, § 113, pp. 312, 313. So, too, the plaintiff cannot invoke the original jurisdiction of the United States District Court, when the federal question is no part of his own case, by alleging the anticipated defenses (involving a federal question) of the defendant. *Louisville & N. Ry. Co. v. Mottley*, 29 S. Ct. 42, 211 U. S. 149, 53 L. Ed. 126. In removals under the first sentence (the basis of jurisdiction being the nature of the controversy, and not the citizenship of the parties), the defendant need not be a nonresident in order to remove the case; but, when there is more than one defendant, all must join in the removal petition.

For other cases see *Decennial Digests, Courts* ¶299; *Removal of Causes* ¶25(1).

Q. 12. Which of the following suits (jurisdictional amount conceded), brought in a state court with full jurisdiction of the suit, may be removed (and by whom) to the United States District Court:

(1) Suit by A (of Virginia) and B (of Georgia), based on diverse citizenship, against R (of Delaware) and S (of Kentucky)?

(2) Suit by C (of Alabama) against Q (of Louisiana) and R (of Arkansas), when Q (a negro) can show there is bitter prejudice against him in Louisiana on account both of his race and the fact that he was suspected (though he is innocent) of a heinous crime against a white woman? The suit is brought in a Louisiana state court.

(3) Suit in an Ohio state court by the city of Bellaire (a municipal corporation of Ohio) against G (of Kentucky) and H (of Maryland) to condemn a strip of land for the purpose of extending a street? G is the owner of the fee in the property and H is the lessee.

A. (1) The removal here is based on sentence 2 of Judicial Code, § 28 (U. S. Comp. St. § 1010 [U. S. C. tit. 28, § 71]), providing that "any other suit * * * of which the District Courts are given jurisdiction by this title * * * may be removed by the defendant or defendants, being nonresidents." This suit, being between citizens of different states, is clearly a suit of which the United States District Court is given original jurisdiction, so on that ground it is removable. But here (as was not the case under sentence 1 of Judi-

cial Code, § 28) the removing defendant or defendants must not be domiciled in the state in the courts of which the suit is brought, and, unless recourse can be had to sentence 3 [separable controversy, discussed under (3) of this problem] or to sentence 4 [prejudice or local influence discussed under (3) of this problem], since the phrase "defendant or defendants" is used collectively, all the defendants must join in the removal petition, and all must be nonresidents. *Martin v. Snyder*, 13 S. Ct. 706, 148 U. S. 663, 37 L. Ed. 602. See, also, *Hackett v. Kuhne* (C. C.) 157 F. 313; *McNaul v. West Indies Securities Corporation* (C. C.) 178 F. 308.

Accordingly both R and S must join in the removal petition. Even if they do, the case is not removable if brought in a state court of either Delaware (domicile of R) or Kentucky (domicile of S); but, if the suit is brought in any other state except Kentucky or Delaware, the case can be removed by both R and S.

For other cases see Decennial Digests, Removal of Causes ☞26, 45, 46.

(2) Sentence 4 of Judicial Code, § 28, provides for the removal by a single defendant (unlike sentences 1 and 2) when "from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said case." But the same sentence limits this right to suits pending in a state court "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." Then only "any defendant, being such citizen of another state, may remove such suit." Hence, since in this problem the plaintiff, C, is not a citizen of the state in which the suit is brought (Louisiana), and since the defendant Q is not a nonresident of Louisiana, Q cannot remove the case to the United States District Court. *Gann v. Northeastern R. Co.* (C. C.) 57 F. 417; *Hughes*, § 121, p. 340. The removal petition here is filed in the United States District Court, while in all the other cases mentioned in Judicial Code, § 28, the petition is filed in the state court. The whole suit here must be one of which the United States District Court would have original jurisdiction. *Cochran v. Montgomery County*, 26 S. Ct. 58, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451.

For other cases see Decennial Digests, Removal of Causes ☞67, 68.

(3) This suit is removable by both G and H under the second sentence of Judicial Code, § 28. H (a nonresident) seeks a removal (G not joining in the removal petition) under the third sentence of

Judicial Code, § 28, on the ground that in the suit is a "controversy which is wholly between citizens of different states, and which can be fully determined as between them." This is called a "separable controversy." But this "separable controversy" must be a principal controversy, in order that it may be ground for removal, and not something merely incidental to the main issue in the case. Here the right of condemnation is the real issue; the division of the proceeds (or the rights among themselves of those claiming interests in the land) is incidental only. So there can be no removal on this ground. *Bellaire v. Baltimore & O. Ry. Co.*, 13 S. Ct. 16, 146 U. S. 117, 36 L. Ed. 910. *Hughes*, § 120, p. 331. But, when there are two defendants each the owner in fee of a separate lot, and condemnation of both lots is sought in single suit, then either lot owner could alone remove the case, for he has a "separable controversy." *Union Pac. Ry. Co. v. Kansas*, 5 S. Ct. 1113, 115 U. S. 2, 29 L. Ed. 319. The whole suit must be one cognizable by the United States District Court, and (though there are cases to the contrary, see *Stanbrough v. Cook* [C. C.] 38 F. 369, 3 L. R. A. 400), by what is believed to be the better rule, only a nonresident can remove. *Thurber v. Miller*, 67 F. 371, 14 C. C. A. 432; *Hughes*, § 120, p. 337.

For other cases see *Decennial Digests, Removal of Causes* ¶13, 52, 60.

Q. 13. W (of Missouri) brought suit in a Missouri state court for \$5,000 damages against the N corporation (incorporated in New Jersey) and S (of Missouri). The N corporation seeks to remove the case to the United States District Court on the ground that the statements in the plaintiff's petition on which a recovery against S is sought are utterly false, and that S was fraudulently joined as a defendant (with no hope of any recovery against S) solely to defeat the N corporation's right of removal. Decision?

A. While the plaintiff has a right to frame the case on which he seeks a recovery according to his own theory of the case, yet, when it appears that a resident has been joined (with no hope of recovery against such defendant) solely to defeat the right of removal by the real defendant, the court will treat the case as if the real defendant were the only defendant and the removal would be granted. So the N corporation, on a showing of the facts set out in the question, can remove the case. S is here a sham party, and the device to defeat a removal will not succeed. *Wecker v. National Enameling & Stamping Co.*, 27 S. Ct. 184, 204 U. S. 176, 51 L. Ed. 430, 9 Ann. Cas. 757; *Hughes*, § 116, p. 324. The same result follows when the plaintiff's complaint (or declaration) fails to state

a cause of action against the sham defendant. *Floyd v. Shenango Furnace Co.* (C. C.) 186 F. 539. If, however, the plaintiff has a bona fide cause of action against the resident defendant (as well as one against the nonresident), and his pleading states the case (on that theory) against both defendants, then there can be no removal. *Chicago, R. I. & P. Ry. Co. v. Martin*, 20 S. Ct. 854, 178 U. S. 245, 44 L. Ed. 1055.

For other cases see *Decennial Digests, Removal of Causes* ⇨36, 82.

Q. 14. A (of North Carolina) had a contract claim for \$4,000 against B (of Virginia). A assigned this claim to C (of Virginia), under an agreement that C was to collect the claim and turn over all the proceeds to A. C brought suit on the claim against B in a North Carolina state court. B seeks to remove the case to the United States District Court, on the ground that A is the real plaintiff, and that the assignment to C was colorable, and was made merely to defeat B's right of removal. Decision?

A. Had this suit been brought by A (of North Carolina) against B (of Virginia) in a state court of North Carolina, clearly B could have removed it to the United States District Court. But the suit is brought by C against B. In this form, there is no removal on the ground of diverse citizenship, for both C (plaintiff) and B (defendant) are from the same state. Now, though the court (in deciding removability) will strike out sham parties, it will not strike out the only plaintiff and substitute another person (without his consent) as plaintiff. If C has no cause of action against B (on the ground that C has not sufficient title to the claim sued on), then that defense is available to B in the state court. If C has sufficient title on which he can sue, then he is not a sham party, whatever may have been the motive behind A's assignment of the claim to C. B, accordingly, cannot remove the suit of C against B to the United States District Court.

Oakley v. Goodnow, 6 S. Ct. 944, 118 U. S. 43, 30 L. Ed. 61.

Hughes, § 116, p. 323.

For other cases see *Decennial Digests, Removal of Causes* ⇨35.

Q. 15. (1) A (of Virginia) sued B (of Virginia) and C (of Maryland) in a Virginia state court for \$5,000. After the pleadings were all filed, and just before the day set for the trial, A dismissed as to B. C then filed a petition in the state court for the removal of the case to the United States District Court. Should the petition be granted?

(2) Suppose, now, that this case proceeded to trial against both B and C. At the end of the plaintiff's evidence, the trial judge di-

rected a dismissal as to B. Can C then file the removal petition and secure the removal?

A. Judicial Code, § 29 (U. S. Comp. St. § 1011 [U. S. C. tit. 28, § 72]), which controls removal procedure in all the cases removable under section 28 (save in removals on the ground of prejudice or local influence), requires the filing of the removal petition in the state court "at the time, or any time before, the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

(1) But "the incidental provision as to the time must, when necessary to carry out the statute, yield to the principal enactment as to the right, and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes (by the act of the plaintiff) the shape of a removable case in the court in which it was brought." *Powers v. Chesapeake & O. Ry. Co.*, 18 S. Ct. 264, 169 U. S. 92, 42 L. Ed. 673. So, here, C can remove the case by filing his petition after the plaintiff, A, dismissed as to the resident defendant B. For the case has by the act of plaintiff just assumed the shape of a removable case. *Hughes*, § 129, p. 369. See A. M. Dobie, "The Time for Removing Cases to the United States District Court," 9 Va. Law Rev. 573.

For other cases see Decennial Digests, Removal of Causes ⇨79(2).

(2) In order, however, that the principle just discussed may apply, the dismissal of a defendant (or other amendment which first makes the case removable, as by increasing the amount in controversy) must be the voluntary act of the plaintiff. The removability of the case is determined (subject to sham parties, previously discussed) by the form which the plaintiff voluntarily gives to his pleadings initially and as the case progresses. Removability does not depend on what the court, after a hearing on the merits, may in invitum order. Here, then, the dismissal as to B is not by plaintiff's own change in his pleadings, but is rather by court order after a hearing on the merits. So C cannot now file his removal petition and remove the case. *Whitcomb v. Smithson*, 20 S. Ct. 248, 175 U. S. 635, 44 L. Ed. 303; *Hughes*, § 129, p. 370. See also, *Alabama G. S. Ry. Co. v. Thompson*, 26 S. Ct. 161, 200 U. S. 206, 50 L. Ed. 441.

For other cases see Decennial Digests, Removal of Causes ⇨30, 49(3).

SECTION 8.—ANCILLARY JURISDICTION OF UNITED STATES DISTRICT COURT

Q. 16. Suit in the United States District Court to foreclose one of several mortgages on the W Railway Company. The road was sold under the foreclosure decree, but the court did not order the property turned over to the purchasers by the receivers then in possession. While the railroad property was still in the possession of the receivers, the mortgagees under a prior mortgage sued in the same United States District Court to foreclose their mortgage. Will the suit be entertained?

A. This case involves an exceedingly important principle. When the United States District Court has assumed jurisdiction of a case, this draws to the court jurisdiction of all matters incidental to that case. This is called ancillary jurisdiction. In order to give complete relief in the main case, the court must dispose of all matters that depend upon the main case. The ancillary or incidental matter, then, need not in itself involve either the requisite jurisdictional amount or the other requisites (diverse citizenship, for example) for the jurisdiction of the United States District Court. This, too, is a suit in rem, and, the United States Court having first assumed jurisdiction of the res, no other court can interfere with (or make orders that would bind) this res.

In the problem, the United States District Court has assumed control of the res (the railroad property), and the suit of the prior mortgagees (regardless of diversity of citizenship or amount in controversy) is ancillary to the main suit. So the United States District Court has jurisdiction of the suit of the prior mortgagees under the ancillary jurisdiction principle just discussed.

Compton v. Jesup, 68 F. 263, 15 C. C. A. 397.

Hughes, § 109.

See, also, *New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

For other cases see *Decennial Digests*, Courts ⚡264(1, 5).

SECTION 9.—STATE STATUTES CANNOT LIMIT THE JURISDICTION OF FEDERAL COURTS

Q. 17. A new York statute prohibited foreign corporations doing business in the state without a New York license from bringing suit in the courts of New York. The Smarty Corporation (incorporated in Maine), doing business in New York without a New York license, brought suit for \$4,000 in the United States District Court for the Southern District of New York against Wise (of

New York) on a contract arising out of business done in New York. Has the United States District Court jurisdiction here?

A. State statutes cannot prescribe the qualifications of suitors in the federal courts, nor can such statutes deprive of their privileges those who, under the United States Constitution and laws, are entitled to resort to the federal courts. The Smarty Corporation (incorporated in Maine) is, for purposes of jurisdiction in the United States courts, a citizen of Maine. Since Wise is a citizen of New York, and \$4,000 is involved, the suit will lie in the United States District Court as one between citizens of different states. The New York statute is totally ineffective, so far as it attempts to limit (or extend) the jurisdiction of the United States District Court. *David Lupton's Sons Co. v. Automobile Club of America*, 32 S. Ct. 711, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; *Hughes*, § 111, pp. 305, 306. So a state statute, having created a cause of action for death by wrongful act, cannot limit the enforcement of this cause of action to state courts, and thereby defeat the jurisdiction of the federal courts in a case cognizable therein under the federal statutes and Constitution. *Railway Co. v. Whitton*, 13 Wall. 270, 20 L. Ed. 571. Nor can a state statute, as to the federal courts, provide validly that counties (municipal corporations are citizens of a state for purposes of jurisdiction of the United States courts) shall be suable only in the state courts. *Lincoln County v. Luning*, 10 S. Ct. 363, 133 U. S. 529, 33 L. Ed. 766. A state cannot expel a foreign corporation for exercising its right of removing a case from a state to a federal court. *Terral v. Burke Construction Co.*, 42 S. Ct. 188, 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186.

For other cases see Decennial Digests. Constitutional Law ⚡307; Corporations ⚡661(6); Courts ⚡259; Removal of Causes ⚡3.

SECTION 10.—VENUE IN UNITED STATES DISTRICT COURT

Q. 18. Discuss venue of the following cases in the United States District Court:

(1) Suit by A (of Virginia) and B (of Maryland) against J (of Ohio) and K (of Kentucky).

(2) Suit by M (of the Eastern district of Virginia) against the X Corporation (incorporated in New York, with its principal office in New York City), which does no business in Virginia.

(3) R (of Maine) owns valuable realty at Norfolk (in the Eastern district of Virginia), and claims to this property (hostile to

R) have been asserted by S (of Delaware), T (of Kansas), and U (of Oregon). Suit by R to quiet title to this property.

A. Venue must be carefully distinguished from jurisdiction. "Jurisdiction," said Justice Brown, "is the power to adjudicate a case upon the merits and dispose of it as justice may require." The *Resolute*, 18 S. Ct. 112, 168 U. S. 437, 42 L. Ed. 533. Venue refers merely to the place of the suit. Jurisdiction controls the judicial capacity to hear the case; venue answers solely the question of where the case may be heard. In the federal courts, venue is always freely waivable, but jurisdiction can never be conferred even by the express consent of the parties. See article, A. M. Dobie, "Venue in the United States District Court." 2 Va. Law Rev. 1. The district is the geographical unit for the United States District Court.

Judicial Code, § 51, is the great federal statute on venue. This provides: (a) In cases when jurisdiction is based only on the fact that the action is between citizens of different states, then the proper venue is either the district of the plaintiff or the district of the defendant; (b) In other cases, the venue must be the district of the defendant. (Judicial Code, §§ 52-57 [U. S. Comp. St. §§ 1034-1039; U. S. C. tit. 28, §§ 113-118]), provide for certain exceptional cases.)

For other cases see *Decennial Digests, Courts* ⇨502.

(1) The terms "plaintiff" and "defendant" here (as is usual in the federal statutes) mean all the plaintiffs or all the defendants. So, whether the case comes under (a) or (b) of the preceding paragraph, the result is the same. There is no district common to all the plaintiffs; no district common to all the defendants. Accordingly, there is no district of "the plaintiff"; no district of "the defendant." Hence there is no proper venue for this suit, as long as these parties are all indispensable, and the suit must be brought and adjudicated as to them all. But see Judicial Code, § 51 (U. S. Comp. St. § 1033 [U. S. C. tit. 28, § 112]), and the Thirty-Ninth equity rule. *Smith v. Lyon*, 10 S. Ct. 303, 133 U. S. 315, 33 L. Ed. 635; *Hughes*, § 105.

For other cases see *Decennial Digests, Courts* ⇨273.

(2) This being a case "between citizens of different states," the proper venue would be either the district of the plaintiff (Eastern district of Virginia) or the district of the defendant (Southern district of New York), the district of its principal office. But, though the plaintiff's district is proper from the standpoint of venue, the

federal rule is that service of process on a corporation can be validly made only in a district in which the corporation does business. So, since the corporation cannot be validly served with process (even though one of its officers lived in Virginia) in Virginia, where the corporation does no business, the venue would have to be the Southern district of New York, the district of the defendant, where the corporation can be validly served with process. *Green v. Chicago, B. & Q. Ry. Co.*, 27 S. Ct. 595, 205 U. S. 530, 51 L. Ed. 916. See, also, *Galveston, H. & S. A. Ry. Co. v. Gonzales*, 14 S. Ct. 401, 151 U. S. 496, 38 L. Ed. 248; *Hughes*, § 104, pp. 268, 269.

For other cases see Decennial Digests, Courts ⇨274.

(3) This exceptional case is covered by Judicial Code, § 57 (U. S. Comp. St. § 1039 [U. S. C. tit. 28, § 118]), applicable to suits "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property." Here the proceeding is purely in rem, and the venue is the district where the res is situated. The scope of this provision has been rigidly narrowed by the United States Supreme Court.

R's suit here, though a suit to quiet title, falls clearly within this section. Hence R can bring the suit in the United States District Court for the Eastern district of Virginia, the district in which the land lies. *Dick v. Foraker*, 15 S. Ct. 124, 155 U. S. 404, 39 L. Ed. 201; *Hughes*, § 106. For cases not coming under Judicial Code, § 57, see *Ladew v. Tennessee Copper Co.*, 31 S. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069; *Jones v. Gould (C. C.)* 141 F. 698. Judicial Code, § 57, makes elaborate provision for service by publication on the nonresident defendants.

For other cases see Decennial Digests, Courts ⇨269.

Q. 19. Black (of Delaware) brought suit for \$4,000 against White (of Kentucky) in the Circuit Court of Albemarle county, Va. White removed the case to the United States District Court for the Western District of Virginia. Black promptly moved the United States District Court to remand the case (to the state court), urging the impropriety of the venue, since the Western district of Virginia was the district of neither the plaintiff nor the defendant. Should the case be remanded?

A. This case formerly gave great trouble, as to venue in removal cases, under the unfortunate decision in *Ex parte Wisner*, 27 S. Ct. 150, 203 U. S. 449, 51 L. Ed. 264. Removal venue has been clarified, simplified, and an admirable result reached in the recent case (expressly overruling the *Wisner Case*) of *Lee v. Chesapeake &*

Ohio Ry. Co., 43 S. Ct. 230, 260 U. S. 653, 67 L. Ed. 443. This case held that the removal must be to the District Court for the district in which the suit is pending in the state court (which is required in all removal cases by Judicial Code, § 29 [U. S. Comp. St. § 1011; U. S. C. tit. 28, § 72]), and that this district is the proper venue, regardless of the fact that it is neither the district of the plaintiff nor that of the defendant. So, the venue here being proper, the case should not be remanded to the state court. See note, 9 Va. Law Rep. pp. 552-556.

For other cases see Decennial Digests, Removal of Causes ⇨ 12, 14.

SECTION 11.—ADMIRALTY JURISDICTION OF UNITED STATES DISTRICT COURT

Q. 20. A, an employee of **B** (a contracting stevedore), was injured while unloading a vessel anchored in navigable waters of the port of Honolulu. Is a suit by **A** against **B** for damages within the admiralty jurisdiction of the United States District Court?

A. Judicial Code, § 24, par. 3 (U. S. Comp. St. § 991[3]; U. S. C. tit. 28, § 41[3]), gives the United States District Court (regardless of the amount involved) jurisdiction of "all civil causes of admiralty and maritime jurisdiction." This jurisdiction is, of course, of great practical importance. The problem presents the question: When is a case one "of admiralty, and maritime jurisdiction"? A distinction must first be made between contract and tort cases. As to contract cases, the nature of the contract governs, regardless of where the contract is made. A charter party of an ocean-going ship, executed on land, is obviously a maritime contract. A lease of a New York City hotel, signed at sea, is obviously not maritime. *New England M. Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. As to torts, the better rule (believed to be the only practical and workable rule) is that admiralty jurisdiction depends solely on the place where the tort is committed, without reference to the nature of the tort. In the instant problem, the tort was committed on navigable waters under admiralty jurisdiction, and (by the rule suggested) the United States District Court should have jurisdiction of this case. In *Campbell v. H. Hackfeld & Co.*, 125 F. 696, 62 C. C. A. 274 (which involved the exact facts of the problem), the Circuit Court of Appeals for the Ninth Circuit denied the jurisdiction. The decision is not believed to be sound, and is criticized in 16 Harv. Law Rev. pp. 210, 211. See *Hughes*, § 29. And in *Gonsalves v. Morse Dry Dock & Repair Co.*, 266 U. S. 171, 172, 45 S. Ct. 39, 69 L. Ed. 228,

the Supreme Court said: "That admiralty jurisdiction in tort matters depends upon locality is settled."

Judicial Code, § 24, par. 3, besides giving admiralty jurisdiction to the United States District Court, saves "to suitors in all cases the right of a common-law remedy where the common law is competent to give it." So, in many cases, the suitor can elect whether he will bring a libel in rem against a vessel (a distinctive admiralty proceeding) in the United States District Court or a common-law action in personam in a state court. Or he might (in a diverse citizenship case, for example) bring an ordinary tort action in personam on the common-law side of the United States District Court.

For other cases see *Decennial Digests, Admiralty* ¶10, 18, 20.

SECTION 12.—DISTINCTION BETWEEN LAW AND EQUITY IN THE FEDERAL COURTS

Q. 21. (1) A state statute permitted one out of the possession of land to file a bill in equity to determine title to the land against an adverse claimant in possession of the land. The requisite jurisdictional amount and diversity of citizenship are conceded. Discuss whether the United States District Court would entertain a bill in equity brought under this statute.

(2) An action of ejectment has been brought on the law side of the United States District Court. Defendant has a perfect equitable title. How would you proceed as counsel for defendant?

A. (1) The law and equity sides of the United States District Court (though ordinarily presided over by the same judge) are in many ways quite separate. State statutes cannot do away with this distinction, nor can they give jurisdiction to the equity side of that court of a case which (under the federal rules and decisions) is cognizable on the law side. In the problem, there is an adequate remedy at law, ejectment. Accordingly the federal court will not give equitable relief, in spite of the state statute. Again, the Seventh Amendment to the United States Constitution declares (as to the federal courts): "In suits at common law, where the value in controversy, shall exceed twenty dollars, the right of trial by jury shall be preserved." This is a suit at common law, and if the case in question were tried on the equity side of the United States District Court this would defeat the right to a jury trial guaranteed under the Seventh Amendment. *Whitehead v. Shattuck*, 11 S. Ct. 276, 138 U. S. 146, 34 L. Ed. 873; *Hughes*, § 95. See, also, *Scott v. Neely*, 11 S. Ct. 712, 140 U. S. 106, 35 L. Ed. 358.

For other cases see *Decennial Digests, Courts* ¶335(5); 'Quieting Title' ¶20.

(2) From what has just been said, it would seem to follow that equitable titles (recognized only in equity) could not be set up as defenses to a common-law action, such as ejectment, brought on the law side of the United States District Court. And this was long the law. *Schoolfield v. Rhodes*, 82 F. 153, 27 C. C. A. 95; *Hughes*, § 135, p. 390. But an excellent procedural reform was worked by an amendment to the Judicial Code, section 274b (U. S. Comp. St. § 1251b [U. S. C. tit. 28, § 398]), which provides "that in all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the court." Act March 3, 1915, 38 Stat. 956. So now, under this provision, the equitable defense could be set up in the common-law action. For cases construing and applying Judicial Code, § 274b, see *Plews v. Burrage* (C. C. A.) 274 F. 881; *Ford v. Huff* (C. C. A.) 296 F. 652.

For other cases see *Decennial Digests*, Action ⚡23, 24; Courts ⚡335(1).

SECTION 13.—ORIGINAL JURISDICTION OF THE UNITED STATES SUPREME COURT

Q. 22. A and B (both citizens of New Hampshire) owned past-due bonds of the state of Louisiana. A New Hampshire statute provided that the holders of such bonds (being citizens of New Hampshire) could assign such bonds to the state of New Hampshire, which would bring suit thereon in the United States Supreme Court and deliver to the assignor the amount recovered, minus costs and expenses. A and B assigned their bonds to the state of New Hampshire as provided by the statute. Will the United States Supreme Court entertain the suit (on the bonds) of New Hampshire *v.* Louisiana?

A. The Constitution of the United States (article 3, § 2) gives the United States Supreme Court original jurisdiction in cases affecting ambassadors, other public ministers, and consuls, and in cases in which a state shall be a party. "Original," here, is contrasted with "appellate," and does not mean "exclusive." Accordingly, Judicial Code, § 233 (U. S. Comp. St. § 1210 [U. S. C. tit. 28, § 341]), as to certain of the cases mentioned in Const. U. S. art. 3, § 2, has given the United States Supreme Court exclusive jurisdiction, and as to other of these cases has given that court concurrent (but not exclusive) jurisdiction. Formerly a citizen of one state (of the United States) could sue another such state under the original jurisdiction of the United States Supreme Court. *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440. But this is now prohibited by the Eleventh

Amendment to the United States Constitution, which provides that the judicial power of the United States shall not extend to such suits.

In the problem, then, this suit can be brought originally in the United States Supreme Court only if the state of New Hampshire is a real party to the suit. But, as New Hampshire has no real interest in this suit (which is brought for the benefit of A and B, who are the real parties), the Supreme Court properly refused to entertain the suit. *New Hampshire v. Louisiana*, 2 S. Ct. 176, 108 U. S. 76, 27 L. Ed. 656; *Hughes*, § 133. When, however, the state is the actual owner of the bonds (though acquired by gift), the Supreme Court may entertain original jurisdiction. See *South Dakota v. North Carolina*, 24 S. Ct. 269, 192 U. S. 286, 48 L. Ed. 448. Boundary disputes are, perhaps, the most common instance of the jurisdiction in question. *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *Louisiana v. Mississippi*, 26 S. Ct. 408, 202 U. S. 1, 50 L. Ed. 913.

For other cases see *Decennial Digests, Courts* §303(1, 2), 304.

SECTION 14.—EQUITY PROCEDURE IN THE FEDERAL COURTS

Q. 23. (1) Bill in equity was filed in the United States District Court. Defendant objected to the jurisdiction on the ground that there was a complete and adequate remedy at law. If this be true, should the bill be dismissed?

(2) After a bill in equity has been filed in the United States District Court, you are called in to take entire charge of the case as counsel for plaintiff. On reading the bill, you find it is defective in many ways. How would you proceed?

(3) As counsel for defendant in an equity suit in the United States District Court, you find (a) that the bill is open to attack on the ground of insufficiency of fact to constitute a valid cause of action in equity; (b) that defendant has two meritorious pleas, one in abatement and one in bar. How would you proceed?

A. The equity procedure of the federal courts is quite independent of that used in the state courts. This procedure is now regulated by the federal equity rules laid down by the United States Supreme Court, and by certain rules of the inferior federal courts, which regulate details of such procedure in those courts.

(1) Equity rule 22 provides that, if "a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alterations in the pleadings as shall

be essential." Accordingly the objection here is no ground for dismissal of the bill, but ground only for a motion to transfer the case to the law side of the court. Failing to make such a motion, and proceeding to a hearing, is a waiver.

Fay v. Hill, 249 F. 415, 161 C. C. A. 389.

See, also, Pierce v. National Bank of Commerce in St. Louis (C. C. A.) 268 F. 487.

For other cases see Decennial Digests, Courts 352; Equity 220, 362; Trial 11(3).

(2) The plaintiff may (under equity rule 28) amend the bill, as of course (without the necessity of consent by the opposing party or the court), "before the defendant has responded thereto." But, "after pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge."

But equity rule 19 provides: "The court may at any time, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended." This puts amendments (when not as of course under equity rule 28) in the sound discretion of the court.

Whitaker v. Whitaker Iron Co. (D. C.) 238 F. 980.

United States v. New England Fish Exchange (D. C.) 258 F. 732.

See, also, Radio Corporation of America v. Emerson (C. C. A.) 296 F. 51.

Hughes, § 161, pp. 442, 443.

For other cases see Decennial Digests, Courts 343, 347, 351½.

(3) By equity rule 29, "demurrers and pleas are abolished." (a) By the second sentence of this rule, this defense "shall be made by motion to dismiss or in the answer." (b) By the third sentence of the rule, "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer."

For cases construing equity rule 29, see Thome v. Lynch (D. C.) 269 F. 995, United States v. Railway Employes' Department American Federation of Labor (D. C.) 286 F. 228 and Conway v. White (C. C. A.) 292 F. 837.

Hughes, § 161.

For other cases see Decennial Digests, Courts 347, 351½.

SECTION 15.—APPELLATE JURISDICTION OF THE FEDERAL COURTS

Q. 24. Discuss the course of federal appeal in the following cases:

(1) Suit, jurisdiction based on diverse citizenship, in the United States District Court. Defendant filed a plea to the jurisdiction, which the court overruled, and judgment on the merits went for plaintiff in the full amount claimed.

(2) Suit in the circuit court of Albemarle county, Va., plaintiff's case being based on a Virginia statute, which the defendant attacked as impairing the obligation of a contract and thus being in contravention of the United States Constitution; but the court sustained the statute, and judgment went for plaintiff. As only \$175 was involved, there could be no appeal to the Virginia Supreme Court of Appeals.

(3) Criminal case in United States District Court, defendant being indicted under a federal statute making it a crime for officers of national banks to make false entries with intent to injure or defraud the bank. Defendant demurred to the indictment on the ground that his false entry (which showed the bank to be in a more favorable condition than it really was) was not made with intent to injure or defraud the bank. The court sustained the demurrer.

A. The United States Constitution (article 3, § 1) provides that the judicial power shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The Circuit Court of Appeals is the only court of broad appellate jurisdiction (besides the Supreme Court) now in operation. There are nine of these courts, one for each federal circuit. Each court consists of three judges, normally United States Circuit Judges, but District Judges are frequently called on to sit in this court. The organization and jurisdiction (exclusively appellate) of these courts is controlled by chapter 6 of the Judicial Code (U. S. Comp. St. §§ 1107-1126 [U. S. C. tit. 28, §§ 211-229]).

(1) Here the defendant lost on the jurisdictional question, and there was a final judgment in the United States District Court against the defendant on the merits. Under the former practice (under Judicial Code, § 238 [U. S. Comp. St. § 1215; U. S. C. tit. 28, § 345]), the Supreme Court had a broad appellate jurisdiction direct from the District Courts, extending to jurisdictional cases, prize cases, and federal constitutional cases. Yet diverse citizenship cases, as such, went on appeal to the Circuit Court of Appeals. The defendant (under the old practice) could elect whether he would go to the Circuit Court of Appeals on the whole case (including the question of jurisdiction of the United States District Court), or whether he would go direct from the United States District Court to the Supreme Court on the jurisdictional question alone. He could do either, but not both. If the case went to the Circuit Court of Appeals, it was final there (that is, the parties could not, by writ of error or appeal, take it to the Supreme Court as a matter of right), and could

reach the Supreme Court (from the Circuit Court of Appeals) only by certificate (the act of the Circuit Court of Appeals in its discretion), or by certiorari (the act of, and discretionary with, the Supreme Court). See *McLish v. Roff*, 12 S. Ct. 118, 141 U. S. 661, 35 L. Ed. 893 (1891); *U. S. v. Jahn*, 15 S. Ct. 39, 155 U. S. 109, 39 L. Ed. 87. *Anglo-American Provision Co. v. Davis Provision Co.*, 24 S. Ct. 93, 191 U. S. 376, 48 L. Ed. 228; *Hughes*, § 174, pp. 476, 477.

For other cases see *Decennial Digests, Courts* ☞ 385(4), 405(3).

But under the recent amendment to Judicial Code, § 238 (Act Feb. 13, 1925 [U. S. Comp. St. Supp. 1925, § 1215; U. S. C. tit. 28, § 345]) effective in May, 1925, the Supreme Court now has appellate jurisdiction direct from the District Courts only in cases arising under five specific federal statutes (outlined in (3) of this answer), and the appeal from the United States District Court would go to the Circuit Court of Appeals, from which the case could go to the Supreme Court only by certificate (when the Circuit Court of Appeals certifies a question, or questions, in the case to the Supreme Court for an answer or answers), or by the certiorari writ of the Supreme Court. There is no required jurisdictional amount for appeals from District Courts to the Circuit Court of Appeals.

(2) Under Judicial Code, § 237 (a), as amended by the act just discussed (U. S. Comp. St. Supp. 1925, § 1214 [U. S. C. tit. 28, § 344]), "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court by a writ of error." Since here the circuit court of Albemarle county is the highest court of Virginia "in which a decision in the suit could be had," and the decision is in favor of its (the state statute's) validity under the federal Constitution, the case may go by writ of error from the circuit court of Albemarle county, Va., to the United States Supreme Court. See *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Missouri, K. & T. Ry. Co. v. Elliott*, 22 S. Ct. 446, 184 U. S. 530, 46 L. Ed. 673; *Tidal Oil Co. v. Flanagan*, 44 S. Ct. 197, 263 U. S. 444, 68 L. Ed. 382; *Hughes*, §§ 186-192.

For other cases see *Decennial Digests, Courts* ☞ 391(1), 394(1,9).

(3) Under Judicial Code, § 238 (as amended by Act Feb. 13, 1925, now in force), the Supreme Court can *directly* review the de-

cisions of the District Courts of the United States only in cases arising under five specific federal statutes: (1) Act Feb. 11, 1903 (U. S. Comp. St. §§ 8824, 8825 [U. S. C. tits. 15, 49, §§ 28, 29, 44, 45]), "to expedite the hearing and determination" of certain suits brought by the United States under the anti-trust or interstate commerce laws; (2) Act March 2, 1907 (U. S. Comp. St. § 1704 [U. S. C. tit. 18, § 682]) "providing for writs of error in certain instances in criminal cases," where the District Court's decision is adverse to the United States; (3) Act March 4, 1913 (U. S. Comp. St. § 1243 [U. S. C. tit. 28, § 380]), as to interlocutory injunctions to suspend the enforcement of state statutes or administrative orders; (4) Act Oct. 22, 1913 (U. S. Comp. St. § 994 [U. S. C. tit. 28, § 43]), as to review of judgments or decrees "in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission"; (5) section 316, Act Aug. 15, 1921 (U. S. Comp. St. § 8716¼r [U. S. C. tit. 7, § 217]), "to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products and eggs."

The facts here come under (2), sustaining a demurrer to an indictment based on the construction of the federal statute, and the United States can take the case by writ of error direct from the United States District Court to the United States Supreme Court. See *United States v. Corbett*, 30 S. Ct. 81, 215 U. S. 233, 54 L. Ed. 173; *Hughes*, § 180, p. 504.

For other cases see *Decennial Digests, Courts* ☞ 385(1½).

INSURANCE

By RAY A. BROWN, Assistant Professor, University of Wisconsin

Section

1. What is Insurance?
2. Insurable Interest.
3. Consummation of the Contract.
4. The Contract of Fraternal Insurance.
5. Concealment and Misrepresentation.
6. Warranty.
7. Suicide.
8. Waiver and Estoppel.
9. Rights of Parties in the Policy.
10. Loss by Fire.
11. Subrogation.
12. Measure of Recovery.
13. Proofs of Loss.

SECTION 1.—WHAT IS INSURANCE?

Q. 1. The Physicians' Defense Company contracts with physicians for an annual consideration to furnish defense in all civil suits for malpractice, which may be brought against such physicians. It does not agree, however, to pay any portion of the damages that may be recovered. A statute of the state provides that, before any person or corporation engages in the insurance business, that certain prerequisites must be fulfilled. These are quite burdensome. Must the Physicians' Defense Company comply with this statute?

A. Yes; by the better authority. The Physicians' Defense Company is engaged in the insurance business. Insurance is a contract whereby the insurer for a consideration undertakes to indemnify the insured against loss from specific perils. The indemnity or compensation may be either in money, property, or services, and, if it be the essence of the contract thus to indemnify another, the contract is one of insurance. In the above case the peril insured against is the expense of conducting the defense of malpractice suits. The indemnity promised is the performance of services. The indemnity feature is of the essence, and not a mere incident of the contract.

Physicians' Defense Co. v. Cooper, 199 F. 576, 118 C. O. A. 50, 47 L. R. A. (N. S.) 290.

Cowles v. United States Fidelity & Guaranty Co., 72 P. 1032, 32 Wash. 120, 98 Am. St. Rep. 838.

Atty. Gen. v. C. E. Osgood Co., 144 N. E. 371, 249 Mass. 473, 35 A. L. R. 1037.

People ex rel. Daily Credit Service Corporation v. May, 147 N. Y. S. 487, 162 App. Div. 215.

See notes in 24 Col. Law Rev. 802, and 23 Mich. Law Rev. 191.

For other cases see *Decennial Digests*, Insurance ¶2; *Principal and Surety* ¶100(4).

SECTION 2.—INSURABLE INTEREST

Q. 2. Cooper has contracted to move the house of Donaldson from one part of the city to another for \$500. He has expended \$200 in preparation for moving, when he learns that Donaldson has allowed the fire insurance on the property to lapse. Cooper then insures the house in his own name, explaining to the insurance company the nature of his interest. Is the insurance valid?

A. Yes; fire insurance, like other kinds of property insurance, is a contract of indemnity, and it is necessary to its validity that the insured be so situated in respect to the property insured that the destruction of it would involve him in pecuniary loss. He must have what is called an "insurable interest," or the contract will be a mere wager, and contrary to public policy, as tending to promote the willful destruction of property. In order to have an insurable interest, it is not necessary that he have title to, or even a lien on, the property. In the present case Cooper, the mover, has already expended money and has an expected profit, which would be lost if the building were destroyed.

Warren v. Davenport Fire Ins. Co., 31 Iowa, 464, 7 Am. Rep. 160.

Crossman v. American Ins. Co. of Newark, 164 N. W. 428, 198 Mich. 304, L. R. A. 1918A, 390.

Planters' & Merchants' Ins. Co. v. Thurston, 9 So. 268, 93 Ala. 255.

Ulmer v. Phoenix Fire Ins. Co., 39 S. E. 712, 61 S. C. 459.

For other cases see Decennial Digests, Insurance §115(1), (2).

Q. 3. A is the son and only heir of B, an old gentleman in feeble health. B is the owner of an office building, which he many times has said shall go to A on B's death. B has neglected to insure the building against fire, and so A insures in his own name, notifying the insurance company of his particular interest in the building. B dies. The building is later destroyed by fire. May A recover on the policy?

A. Probably not. By the better rule, hopes, expectations, and possibilities do not constitute insurable interest. The insured's interest in the property must be founded on some legal right. A's interest in this building is only that of an expectant heir, which is not a right, but a mere possibility. As A had no insurable interest when the contract was made, the policy was invalid, and the subsequent acquisition of title would not validate it. Though a party may contract for insurance to take effect on the future ac-

quisition of property, here A attempts to insure in præsentî property in which he has no interest.

Bassett v. Farmers' & Merchants' Ins. Co., 122 N. W. 703, 85 Neb. 85, 19 Ann. Cas. 252.

Farmers' Mut. Ins. Co. v. New Holland Turnpike Road Co., 15 A. 563, 122 Pa. 37.

Home Ins. Co. of New York v. Mendenhall, 45 N. E. 1078, 164 Ill. 458, 36 L. R. A. 374.

McCluskey v. Providence Washington Ins. Co., 126 Mass. 306.

For other cases see *Decennial Digests, Insurance* ⇨115(1, 2, 7), 220.

Q. 4. Adams, the owner of land, has contracted with Carpenter to build him a house. By the terms of the contract Carpenter is responsible for loss by fire, so that, if the house burns in process of construction, Carpenter will have to rebuild it. Has Adams an insurable interest in the house while it is in the process of construction?

A. Yes; Adams' title to the property gives him an insurable interest. For an injury to this interest he may recover from the insurer, even though he possesses other means of reimbursement. It is no concern of the insurer what other means Adams may have of avoiding the loss. If the insured's interest is not bottomed on title, or on a specific lien on the property, then the rule would seem to be that he can recover only by showing that the destruction of the property will actually involve him in loss.

Foley v. Manufacturers' & Builders' Fire Ins. Co., 46 N. E. 318, 152 N. Y. 131, 43 L. R. A. 664.

Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. Law, 541, 548.

Spare v. Home Mut. Ins. Co. (C. C.) 15 F. 707.

Ætna Fire Ins. Co. v. Kennedy, 50 So. 73, 161 Ala. 600, 135 Am. St. Rep. 160.

For other cases see *Decennial Digests, Insurance* ⇨115(1, 2, 5).

Q. 5. B owes A \$5,000. A in his own behalf insures B's life for that amount. B subsequently pays the \$5,000 and accrued interest in full. A continues to pay the premiums on the policy. May he recover in the event of B's death?

A. Yes; life insurance, unlike property insurance, is not a contract of strict indemnity. Rather it is a contract to pay the insured a sum of money upon the happening of a given contingency, the death of a certain person. Nevertheless, the reasons of policy which require an interest in the insured to support a contract of property insurance are even more cogent in the case of life insurance. With the possible exception of New Jersey, it is therefore required that the one effecting the insurance have such a connection with the life insured "as will justify a reasonable expectation of advantage or benefit from the continuance of his life." It is

everywhere recognized that a creditor has an insurable interest in the life of the debtor, since the latter's death may render improbable the payment of the debt. The almost universal rule is that, if there is insurable interest at the inception of the policy, the insured may recover upon it, even though such interest did not exist at the time of the death. This rule is justified on the ground that life insurance is not an indemnity contract. But the reasons of policy which require insurable interest at the inception of life insurance would seem to be operative here. A few courts so hold.

Appeal of Corson, 6 A. 213, 113 Pa. 438, 57 Am. Rep. 479.

Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251.

Mechanics' Nat. Bank v. Comins, 55 A. 193, 72 N. H. 12, 101 Am. St. Rep. 650.

Western & Southern Life Ins. Co. v. Webster, 189 S. W. 429, 172 Ky. 444.

See *Insurable Interest in Life*, E. W. Patterson, 18 Col. Law Rev. 381.

For other cases see *Decennial Digests, Insurance* ⇨ 114, 116(1, 4, 5), 119, 123.

Q. 6. Arthur Jones, the uncle of Clarence, an orphan, has given Clarence, the best kind of an education and all advantages at an expense of \$20,000, and has established him in an independent business. Arthur has a great fondness for Clarence, and they are constant companions. Has Arthur an insurable interest in Clarence's life? Would Clarence's administrator have any claim to insurance on Clarence's life effected by Arthur?

A. Most courts would probably say that Arthur had an insurable interest in Clarence's life, and could therefore insure it. There is a conflict of authority whether family relationship alone furnishes an insurable interest. Such relationship is, however, by all the cases confined to parent and child, brother and sister, and husband and wife. However, if, in addition to the family tie, there are reasonable grounds to expect a material advantage from the continuance of the life, this will afford sufficient interest. In the present case Arthur would be held to have such an expectation of advantage from the natural inclination on the part of Clarence to reciprocate his uncle's kindness. Clarence's administrator would have no claim to the insurance in any event. If the insurer is willing to pay Arthur, any lack of insurable interest is waived, and Clarence's administrator cannot take advantage of it.

Life Insurance Clearing Co. v. O'Neill, 106 F. 800, 45 C. C. A. 641, 54 L. R. A. 225.

Woods v. Woods' Adm'r, 113 S. W. 79, 130 Ky. 162, 19 L. R. A. (N. S.) 233.

Thomas v. National Ben. Ass'n, 86 A. 375, 84 N. J. Law, 281, 46 L. R. A. (N. S.) 779, Ann. Cas. 1914D, 1121.

Home Mut. Ben. Ass'n v. Keller, 230 S. W. 10, 148 Ark. 361.

Meyers v. Schumann, 34 A. 1066, 54 N. J. Eq. 414.

For other cases see *Decennial Digests, Insurance* ⇨ 116(1), (2), 593(1).

Q. 7. Adams has taken out insurance in the Boston Life Insurance Company, the policy providing that, in the event of Adams' death, the insurance shall be paid to Peters. Peters' only connection with Adams was that of personal friendship, and the evidence showed that Adams took out the insurance in question at the suggestion of Peters, and that all the premiums were paid by Peters. On the death of Adams, the Boston Insurance Company refused to pay Peters, on ground that he had no insurable interest. May he recover on the policy?

A. No; as a general rule it is unnecessary that the beneficiary in a policy have an insurable interest. A person may always insure his own life, and may designate any one he desires to receive the proceeds on his death. The danger of homicide is said to be obviated by the fact that the insured himself designates the beneficiary. However, the beneficiary may not employ this qualification of the rule requiring insurable interest as a means of evading the rule itself. Accordingly, if it be shown that the beneficiary is in fact the contracting party, and the insured only a nominal party, the policy is a wager and invalid. Such is the situation in the above case.

Rupp v. Western Life Indemnity Co., 127 S. W. 490, 138 Ky. 18, 29 L. R. A. (N. S.) 677.

United Security Life Insurance & Trust Co. of Pennsylvania v. Brown, 113 A. 443, 270 Pa. 264.

For other cases see Decennial Digests, Insurance §114.

Q. 8. Peter Poor is in hard circumstances and in need of ready money. He owns a life insurance policy of \$5,000, which he procured in more affluent days, and which is payable to himself or his estate. Poor advertises that he will sell the policy for \$1,000, and John Chance, an utter stranger, accepts the offer, and the policy is sold to him for the figure named, Chance to pay the premiums accruing in the future. May Chance recover on the policy in the event of Poor's death?

A. Yes; the policy in this case was perfectly valid when issued to Poor. Poor had invested money in it for several years, and should be allowed to realize on it, when occasion demands. This is not a prearranged attempt to procure a gambling policy by indirection, but a sale of a valid policy, secured bona fide by Poor for his own interest. Most courts allow this to be done. Some courts, however, hold that an assignment of insurance to one without an

insurable interest is as much opposed to sound public policy as is the original issue of such a policy.

Hawley v. *Ætna Life Ins. Co.*, 125 N. E. 707, 291 Ill. 28.

Finnie v. Walker, 257 F. 698, 168 C. C. A. 648, 5 A. L. R. 831.

• For other cases see *Decennial Digests, Insurance* ¶122.

SECTION 3.—CONSUMMATION OF THE CONTRACT

Q. 9. A telephones B, agent of the C Insurance Company, saying, "Will you place \$5,000 fire insurance on my house at 12 Main street for three years?" B answers, "Yes; you may be assured that you are covered; I will mail you the policy." Before anything is done by B, A's property is destroyed by fire. May A recover against C?

A. Yes. The first question is as to the construction to be placed on the conversation between A and B. Is this a present contract of insurance, an agreement to insure, or an agreement to issue a regular policy in the future, keeping A protected in the meantime? It seems to be the third of these possibilities. May such agreement be by parol? Yes. There is no requirement in the common law, the statute of frauds, or the ordinary standard fire policy statute that insurance contracts be in writing. The agreement must, of course, contain the essential terms of the contract: The property covered, the amount of insurance, the term, and the premium. All are mentioned here, except the premium. As insurance premiums are, however, standardized by agreement among insurers, it may be assumed that the regular rate will govern. As to the other terms of the contract, the regularly used policy of the insurer, or the standard fire policy, when required by law, will be supplied. While there may be doubt whether the agent, B, had implied authority to make an oral agreement of insurance over the entire period of three years, it is agreed that agents with authority to issue the ordinary policies of the company may make oral agreements such as the present.

Massachusetts Bonding & Insurance Co. v. Vance, 180 P. 693, 74 Okl. 261, 15 A. L. R. 981.

Sanford v. Orient Ins. Co., 54 N. E. 883, 174 Mass. 416, 75 Am. St. Rep. 358.

Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co., 55 P. 435, 34 Or. 228.

De Grove v. Metropolitan Ins. Co., 61 N. Y. 602, 19 Am. Rep. 305.

For other cases see *Decennial Digests, Insurance* ¶128(1), (2), 131 (1), 148.

Q. 10. Adams applies for life insurance in the Bee Insurance Company, through Collins, its agent. The written application provided: "The insurance herein applied for shall become effective only when the policy is delivered to the insured while he is in

good health." The application was forwarded by Collins to the main office of the company, and accepted by the company, and a policy of life insurance duly executed. This policy, with the same provision as the application, was mailed to Collins, with directions to deliver to Adams only if the latter were in good health. When Collins received the policy, Adams was in good health. Collins, however, negligently delayed in delivering the policy, and ten days later Adams was killed in an automobile accident, and died while the policy was still in Collins' possession. Has Adams' wife, to whom the policy is payable, any right against the Bee Insurance Company?

A. Yes; according to some recent authorities. In order for her to recover on the contract of insurance, the offer of Adams contained in the application must have been accepted, and the insurance have attached according to the terms of the policy. In the present case it is stipulated that this shall not be prior to the delivery of the policy to the insured while in good health. This condition is valid and binding. Where the policy is delivered to the agent for unconditional delivery to the insured, this is a sufficient "delivery." The agent is the mere bailee of the insured. If, however, the agent still has duties to perform on behalf of the insurer, the delivery is not unconditional. Here the agent, Collins, is under a duty to see that Adams is in good health before he makes delivery to him, and, while there is conflict of authority, the better view would seem to preclude recovery *on the contract*. However, it was solely the fault of Collins that this insurance did not take effect, and the fault occurred while he was acting as agent of the insurer. For this neglect neither Adams nor the beneficiary should suffer. While it is unusual to impose a tort liability for negligence in acting on an offer, a constantly increasing number of courts, on account of the semi-public service nature of insurance companies, would hold the Bee Insurance Company liable in tort for Collins' negligent failure to deliver the policy to Adams.

New York Life Ins. Co. v. Babcock, 30 S. E. 273, 104 Ga. 67, 42 L. R. A. 88, 69 Am. St. Rep. 134.

Bowen v. Prudential Ins. Co., 144 N. W. 543, 178 Mich. 63, 51 L. R. A. (N. S.) 587.

Duffie v. Banker's Life Ass'n of Des Moines, 139 N. W. 1087, 160 Iowa, 19, 46 L. R. A. (N. S.) 25.

Bradley v. Federal Life Ins. Co., 129 N. E. 171, 295 Ill. 381, 15 A. L. R. 1021.

Fox v. Volunteer State Life Ins. Co., 116 S. E. 266, 185 N. C. 121.

See Delivery of a Life Insurance Policy, E. W. Patterson, 33 Harv. Law Rev. 198.

6 Minn. Law Rev. 596.

For other cases see Decennial Digests, Insurance ⇨128(1), (2), 130 (1, 4), 136(1), (2).

SECTION 4.—THE CONTRACT OF FRATERNAL INSURANCE

Q. 11. Adams, a railroad brakeman, was a member of the Grand Order of American Patriots, a fraternal order, which also undertook to insure the lives of its members. The membership certificate provided that the member agreed to abide by the constitution and by-laws of the order and all amendments thereto. Subsequent to Adams' entrance into the order a by-law was enacted forbidding its members from engaging in the liquor business. Subsequent to this Adams' health required that he stop outdoor work, and he bought and operated a saloon. He died soon afterwards. May his beneficiary recover the insurance?

A. The cases are in conflict. The Grand Order of American Patriots was in the insurance business. The insurance contract was composed of the application, certificate of membership, by-laws, and the constitution of the order. The agreement to abide by future changes in the constitution and by-laws was legal and binding. It would be unjust, however, to hold Adams bound by such changes as would virtually forfeit his rights to the insurance, or would substitute an entirely different contract. Practically all courts hold that only "reasonable changes" are contemplated by the provision as to amendments. Is the particular amendment here reasonable? On the one hand, at the time of Adams' entrance into the order he had the right to enter into any occupation not then prohibited, as his convenience or necessities might dictate. On the other hand, the order, for the benefit of all its members, was interested in limiting its membership to occupations of a nonhazardous nature. On this particular point, and on others of a similar nature, the courts are divided as to whether the amendment is reasonable and valid, or unreasonable and invalid.

Ayers v. Grand Lodge, A. O. U. W., State of New York, 80 N. E. 1020, 188 N. Y. 280.

Norton v. Catholic Order of Foresters, 114 N. W. 893, 138 Iowa, 464, 24 L. R. A. (N. S.) 1030.

Sawyer v. Sovereign Camp, W. O. W., 181 N. W. 191, 105 Neb. 395.

For other cases see *Decennial Digests, Insurance* 719(1, 5).

SECTION 5.—CONCEALMENT AND MISREPRESENTATION

Q. 12. The Reliance Warehouse Company has in its warehouse some highly inflammable oils. Its president applies for insurance with the Security Insurance Company. He does not mention the matter of the oils, although he had recently posted notices to keep fire away on account of the presence of inflammable materials. He

also does not mention that there have recently been a number of serious fires in the city where the warehouse is located, and that incendiarism is suspected. A policy is issued. Later the warehouse is damaged by fire, which does not, however, reach the oils. The Security Insurance Company denies liability. May the warehouse company recover insurance?

A. Probably not. The president concealed from the insurer two matters of importance affecting the risk. The early rule in marine insurance was that even an innocent concealment of material facts avoided the policy, but in fire and life insurance it is believed that the rule today is that concealment must be intentional in order to avoid the policy. Although the question would be for the jury, it would seem that, since the president knew of the presence of the oil, and had recently posted warnings on account of its inflammable character, his failure to mention it must have been intentional. Although the presence of the oil did not cause or increase the loss, this does not affect the question. The oil did increase the risk, and would have led the insurer either to reject the insurance or increase its rates. The question was, therefore, material. It was not necessary to mention the incendiary fires, as this was a matter of common knowledge, as well known to the insurer as to the insured.

Boggs & Leathe v. American Ins. Co., 30 Mo. 63.

Arthur v. Palatine Ins. Co., 57 P. 62, 35 Or. 27, 76 Am. St. Rep. 450.

Hey v. Guarantors' Liability Indemnity Co., 37 A. 402, 181 Pa. 220, 59 Am. St. Rep. 644.

For other cases see *Decennial Digests*, Insurance ⚡258, 260, 283(1), 286.

Q. 13. Adams, a police officer, applied for life insurance. The application blank had 152 questions concerning his health, habits, and ancestry. Question 152 was as follows: "Is there any other fact relating to your physical condition, or personal or family history, with which the insurer should be made acquainted?" Adams left this unanswered. A policy was issued. Six months later Adams was killed by an unknown assailant. The insurance company then learns that prior to the application Adams had received anonymous threatening letters. Although there were no specific questions on this matter, the insurer denies liability on the policy. May there be recovery against it?

A. Yes; after Adams had been asked in the application so many specific questions, he was justified in considering that the insurer had inquired as to all matters concerning which it was interested, and he was not required to search his mind for other possible things

affecting the risk. Doubtless, if he had concealed a matter of such obvious importance to the risk as that he was about to fight a duel, it would be presumed that his concealment was intentional and fraudulent. But in the case of a police officer a threatening letter would not be such an uncommon thing as to raise a presumption, though the jury should be allowed to pass on the question. Question 152 cannot aid the insurer. In the first place, it requires only the opinion of the applicant, and an honest answer is all that it can expect to get. Any other rule would require Adams to be his own insurer. In the second place, the question was left unanswered. The insurance company, by issuing the policy, must be deemed to have waived Adams' failure to answer, and cannot raise the point now.

Louis v. Connecticut Mutual Life Ins. Co., 68 N. Y. S. 683, 58 App. Div. 137.
Phoenix Mutual Life Ins. Co. v. Raddin, 7 S. Ct. 500, 120 U. S. 183, 30 L. Ed. 644.

For other cases see *Decennial Digests*, Insurance ⇨255, 264(2), 300.

Q. 14. John Merchant applies for insurance upon his store and stock of goods. Thinking that it would help him to obtain the insurance, he tells the company that he has the largest business in town, though he knows that his competitor, Brown, has the larger trade. He also states that he is solvent. The fact was that he was insolvent, because of his liability as indorser on the matured note of Cabot for \$10,000. Merchant's answer was made in good faith, however, as he had inquired of Cabot, who told him falsely that the note was paid. The policy is issued. Can Merchant recover upon it in event of a loss?

A. No; the policy is avoided by Merchant's misrepresentation as to his solvency. The representations of the insured as to the risk are the basis on which the insurance is written, and a misrepresentation as to a matter which would influence the insurer in declining or accepting the insurance, or in fixing the rate, avoids the policy. The solvency of the insured affects the moral hazard, and it makes no difference that the statement was made in good faith. The insurer is misled. The statement as to the size of Merchant's business was not material. While there are judicial dicta, and even statutory declarations, that a misrepresentation which is not material, nor made with intent to deceive, will not avoid a policy, thus implying that fraudulent misrepresentations will avoid, the better rule is that even intentional misstatements as to immaterial matters do not affect the insurance. The exact size of Merchant's business

would not influence the insurer in accepting, declining, or fixing the rate on this insurance.

Farmers' Insurance & Loan Co. v. Snyder, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118.

Armour v. Transatlantic Fire Ins. Co. of Hamburg, Germany, 90 N. Y. 450.

Johnson v. National Life Ins. Co., 144 N. W. 218, 123 Minn. 453, Ann. Cas. 1915A, 458.

For other cases see Decennial Digests, Insurance ◊250(1), 255, 256(2), 265, 267, 286.

Q. 15. Ames made application for life insurance. He stated in the application, in answer to questions asked, that he did not have any cancer or ulcer; that his occupation was that of a railroad yard switchman. The company rejected the application because of his occupation. Ames wrote that he would give up his occupation at the end of the year. The policy was then issued. Ames, however, continued to work as a brakeman, and was killed in an accident. It was also shown that, at the time of the application, Ames, unknown to himself, had a cancer of the stomach. May there be a recovery in the policy?

A. Yes; Ames' statement that he would quit the occupation of a switchman, if not fraudulent when made, cannot be relied upon by the insurer. This is not a representation of a fact, but a promise, and the parol evidence rule forbids its inclusion in the contract embodied in the subsequent policy. Ames' statement as to the cancer was not accurate. He, however, had no way of knowing that he had a cancer. The insurance company knew as to this question, and as to many other questions concerning various diseases with which the applicant might be afflicted, that the latter could only give an opinion. The better view would seem to be that the policy would not be avoided as long as Ames' answer was true to the best of his knowledge.

Kimball v. Aetna Ins. Co., 9 Allen (Mass.) 540, 85 Am. Dec. 786.

Owen v. Metropolitan Life Ins. Co., 67 A. 25, 74 N. J. Law, 770, 122 Am. St. Rep. 413.

For other cases see Decennial Digests, Insurance ◊264(1, 2), 323(1).

SECTION 6.—WARRANTY

Q. 16. In an application for life insurance, among the many questions asked was this: "Have you ever received any wound, hurt, or serious bodily injury?" This was answered: "No." The application ended with the following: "It is understood that any untrue or fraudulent answers, or willful suppression of material facts, will avoid the policy. The subsequently issued policy provided that it

should be void if any statement in the application was in any respect untrue. The insurer defends an action on the policy on the ground that the insured, when a boy of ten, had received a cut six inches long in his leg which disabled him for two months. They failed to show any serious after effects, however. Is this a good defense?

A. No; the policy provided that it should be void if any answer in the application were incorrect. The answer by the insured as to wounds, hurts, or serious bodily injuries was therefore a warranty, and, if untrue, avoided the policy. The materiality of the question or the good faith of the applicant is not involved, for the parties have settled the effect of a wrong answer by their contract. The forfeiture which would result in such a case as this, however, should lead the court to pause before holding that there has been a breach of warranty. The application called attention to the fact that "untrue and fraudulent answers or willful suppression" would avoid the policy. This required good faith only. Where there are such provisions in an application or policy, which limit the harshness of the doctrine of warranty, they are held to affect the whole application. The insurance company could not avoid the policy, therefore, if the applicant's answer to this question was made in good faith. It is also doubtful whether the cut the insured received is included in the category, "wound, hurt, or serious bodily injury." Not every cut, bruise, or hurt which the applicant had received since the cradle could be included. If they were, no policy could be valid. Accordingly, only such as would materially affect the risk at the time of the application should be considered as within the purview of this question.¹

Alabama Gold Life Ins. Co. v. Johnston, 2 So. 125, 80 Ala. 467, 59 Am. Rep. 816; Moulou v. American Life Ins. Co., 4 S. Ct. 466, 111 U. S. 335, 28 L. Ed. 447; Bancroft v. Home Benefit Ass'n, 23 N. E. 997, 120 N. Y. 14, 8 L. R. A. 68.

For other cases see Decennial Digests, Insurance ☞256(2), 259, 264(1), 265, 291(1), 665(3).

Q. 17. A has insured his property against fire in the B Insurance Company. The premises are described in the policy as "the two-story frame building at 102 Main street, used as a livery stable." This was error, in that the building was at 104 Main street. There was no building at all at 102 Main street. Later the livery stable was given up, and the building was used for storage of carriages

¹ In most states the law of warranty has been altered by statutes, the general effect of which is to make the forfeiture of the policy depend on the materiality of the warranty. See History of the Development of Warranty in Insurance, William R. Vance, 20 Yale Law J. 323.

when destroyed by fire. The B Company, under the above circumstances, refuses to pay the insurance. Has A a cause of action against the B Company?

A. Yes; the mistake in the street number is not a defense. The number was given merely for purposes of identification, and not to define or limit the risk. As long as there is sufficient to identify the property insured, there may be a recovery. Where the words in the description do define the risk, however, they will be considered as a warranty by the insured, and any breach thereof will avoid the policy. As the use of the premises as a livery stable is not for purpose of identification merely, but relates to the risk, an error in this regard would have avoided the policy. It would make no difference that the actual risk might be less hazardous than the defined one. The parties may make what contract they please. The warranty is, however, only that the premises are at present used as a livery stable. Such warranties are strictly construed, and are held not to relate to the future, unless such intent clearly appears. The fact of the subsequent change in the use of the premises will not prevent A's recovery of the insurance.

Shivers v. Farmers' Mut. Fire Ins. Co., 55 So. 965, 99 Miss. 744.

Thomas v. Commercial Union Assur. Co., 37 N. E. 672, 162 Mass. 29, 44 Am. St. Rep. 323.

Smith v. Mechanics' & Traders' Fire Ins. Co., 32 N. Y. 399.

For other cases see *Decennial Digests, Insurance* ¶163(1), 256(1), 275, 276, 278, 319(1).

Q. 18. A policy of fire insurance on a factory contains an agreement that the insured "shall keep a watchman constantly on the premises," and further, "upon a failure of the insured to fulfill any of the terms or agreements of the policy, that the same shall be void." The insured maintained a regular watchman, and he was present and on duty when the fire occurred. The insurer, however, proves that a month before the fire the premises were left unguarded one night, when the watchman was taken sick on his way to the factory and was unable to get a substitute before morning. Is the defense a good one?

A. The authorities are divided. On a strict application of the rules of warranty, the defense is good. The insured agreed to keep the watchman constantly on the premises, and agreed that for failure to keep his promise the policy should be void. Many courts have so held. But, on the other hand, the breach of insured's agreement was but temporary, and at the time of loss did not affect the hazard. To enforce the letter of the contract results in a forfeiture.

Many courts hold that under such circumstances the policy is merely suspended during the breach, and not avoided. It may also be said that the promise of the insured should not be construed as an absolute undertaking that for every instant of the day and night the watchman should be on the premises. Short unauthorized absences were bound to occur, and the parties must have contemplated this. Some courts would accordingly say that there would be no breach under such circumstances as these, for all that was required of the insured was a bona fide attempt to keep the factory constantly guarded.

Dolliver v. Granite State Fire Ins. Co., 89 A. 8, 111 Me. 275, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765.

Beecher v. Vermont Mut. Fire Ins. Co., 98 A. 917, 90 Vt. 347.

Whealton Packing Co. v. Aetna Ins. Co., 185 F. 108, 107 C. C. A. 113, 34 L. R. A. (N. S.) 563.

McGannon v. Millers' Nat. Ins. Co. of Illinois, 71 S. W. 160, 171 Mo. 143, 94 Am. St. Rep. 778.

For other cases see *Decennial Digests*, Insurance ⇨323(2), 334(2).

SECTION 7.—SUICIDE

Q. 19. Adams' life was insured in the Boston Insurance Company, the policy being payable to his wife, Carrie. There was no provision in the policy excepting suicide by the insured from the risks assumed by the company. Adams committed suicide while sane. May Carrie recover on the policy?

A. Yes; although there is weighty authority to the contrary. Suicide may not be technically crime in modern law, owing to the impossibility of punishing the guilty party, yet it is manifestly against law. If the policy had contained an express agreement to pay the insurance on the suicide of the insured, such condition would be contrary to public policy. Also it is hardly to be supposed that the insurer would have agreed to pay the insurance upon the suicide of the insured, had the matter been called to its attention. To permit recovery would be in the nature of a fraud on the insurer. On the other hand, policies are seldom taken out with the present intention of committing suicide to obtain the insurance. Suicide is usually occasioned by other motives than fraud, and is one of the risks of death which insurers must consider in fixing their premiums. As the policy contained no exception of suicide as a risk, though such exceptions are common, it might be inferred that it was intended not to be excluded. Also the policy was payable to Carrie, and her interests in it should not be affected by the acts of Adams. Some cases, on this ground, distinguish between policies payable to the estate of the insured and to a third person. This

distinction, however, does not seem valid, for, if nonliability for suicide is an implied term of the contract, it is as binding on the beneficiary as on the insured.²

Ritter v. Mutual Life Ins. Co., 18 S. Ct. 300, 160 U. S. 139, 42 L. Ed. 693; *Patterson v. Natural Premium Mutual Life Ins. Co.*, 75 N. W. 980, 100 Wis. 118, 42 L. R. A. 253, 69 Am. St. Rep. 899; *Davis v. Supreme Council of Royal Arcanum*, 81 N. E. 294, 195 Mass. 402, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777.

For other cases see *Decennial Digests, Insurance* 139, 438, 445(1, 3), 788(1).

SECTION 8.—WAIVER AND ESTOPPEL

Q. 20. Adams applies for fire insurance in the Booster's Fire Insurance Company. On reading the policy, which is in the standard statutory form, he notices the following: "This policy shall be void, unless otherwise provided by agreement in writing added hereto, if foreclosure proceedings be commenced by reason of any mortgage." The policy also provides: "No agent shall have power to waive any provision of this policy, unless such waiver be in writing added hereto." Adams notifies Conant, the agent of the company, that a mortgagee of the property is threatening foreclosure. Conant says: "That won't matter. Your insurance is good during the year of redemption." The policy is then issued. Foreclosure proceedings are commenced, but Adams does not notify the insurer. A fire occurs. Adams then notifies Conant, telling him, also, of the foreclosure. Conant replies: "That is all right; the company will pay." Conant was a general agent of the company, with authority to issue policies and indorse consents thereon where allowed by the policy. He frequently gave consent orally to the company's knowledge. May Adams recover the insurance?

A. Probably yes. The policy was avoided by its terms, and Adams can recover only upon showing that there had been a waiver of the clause as to foreclosure. The statements of Conant prior to the issue of the policy are of no help to Adams, for the parole evidence rule forbids the use of prior or contemporaneous parole evidence to vary the terms of a written instrument. But the parties may orally change the terms of a contract after it is written. The provision restricting the power of agents to waive, except in writing, was valid, however, and should control, unless the company, in

² It has been held that execution of the insured for crime will prevent recovery on the policy, but there is a conflict on the question. See *Fields v. Metropolitan Ins. Co.*, 249 S. W. 798, 147 Tenn. 464, 36 A. L. R. 1250. See *Life Insurance, Suicide, and Execution for Crime*, George Richards, 22 Yale Law J. 292; 7 Minn. Law Rev. 45, 61; 6 Minn. Law Rev. 414.

spite of it, had conferred power on Conant to waive orally. The fact that he often did so would be evidence on this point. Some courts hold that the provision in the statutory policy requiring written waiver is a rule of law which cannot be changed. Under this view, of course, Adams is without relief. It is believed that such is not the usual holding. The final waiver of Conant, being made after a loss, was without consideration, nor was Adams led by it to act in any way to his prejudice. Whether waiver requires consideration, or an estoppel by change of position in reliance thereon, is a moot point. The weight of authority is that waiver is an independent doctrine in itself, which requires neither of these things to make it operate. Adams should recover.³

Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689.

Moore v. Hanover Fire Ins. Co., 36 N. E. 191, 141 N. Y. 219.

Hronish v. Home Ins. Co. of New York, 146 N. W. 588, 33 S. D. 428.

Gibson Electric Co. v. Liverpool & London & Globe Insurance Co., 54 N. E. 23, 159 N. Y. 418.

Home Fire Ins. Co. v. Kuhlman, 78 N. W. 936, 58 Neb. 488, 76 Am. St. Rep. 111.

For other cases see *Decennial Digests, Insurance* 371, 373(1), 376(1), 385, 388(3), 390, 665(8).

Q. 21. A has applied for life insurance in the B Insurance Company. C, the agent of the company, who sold him the insurance, assists him in drawing the application, propounding to A the various questions in the application, and inserting the answers himself. One question is: "Do you use intoxicating liquor in any form?" A tells C that he drinks two or three glasses of beer each day, but is never intoxicated. C replies to A, "Well, that does not amount to much," and writes down, "No," to the question, without telling A how he transcribed his answer. The final paragraph of the application is as follows: "I hereby certify that the above application is my own, that I have carefully re-read the same, and that the answers therein are true. It is agreed that, if the agent of the insurance company assisted me in making this application, he acted as my agent in so doing." A signs the application at C's direction, without reading any portion thereof. The policy provides that it shall be void if any statements in the application are untrue. A

³ On the subject-matter of the twentieth and twenty-first questions see *Waiver in Insurance Cases*, John S. Ewart, 18 Harv. Law Rev. 364; *Parol Waiver under the New York Fire Policy*, George Richards, 12 Col. Law Rev. 134; *Election in Insurance Cases*, John S. Ewart, 12 Col. Law Rev. 619; *Effect of Provision in an Insurance Policy Limiting Authority of an Agent to Alter the Contract*, Sam B. Warner, 6 Cal. Law Rev. 203; *Waiver and Estoppel in Insurance Law*, William R. Vance, 34 Yale Law J. 834. The distinction between waiver before and after breach of condition should be observed. See *Contracts*, Q. 112, p. 280.

dies, and in an action on the policy B defends on the ground that A used intoxicating liquor. Is the defense good?

A. By the weight of authority the defense is not good. It is true that the policy by its terms is invalid. But B, through its agent, C, knew this when the policy was issued. A, on the other hand, did not know that his answer had been incorrectly transcribed, but accepted the policy and paid the premiums, relying on the validity of the policy as impliedly asserted by B in delivering it to him. B should be estopped from asserting that the policy is invalid. It is true that, in the ordinary case, a party to a contract is conclusively presumed to have read it and to be acquainted with its conditions. To delete any of the terms of the same by oral testimony is to violate the parol evidence rule. Ordinarily estoppel applies only as to matters of fact, and the validity of the policy is a matter of law. But insurance contracts are not ordinary contracts, but long and involved documents, the legal significance of which it is difficult for a layman to understand. The parties do not deal on equal terms. C, in searching out A, and in assisting him in preparing his application, followed the ordinary practice of insurance agents. He represented B in so doing, and B should be held responsible for his acts and his knowledge. The stipulation that he shall be the agent of the insured cannot change the fact that he is the agent of the insurer. In many states statutes prescribe that those who represent the insurer in soliciting insurance shall be considered its agents. A and B could not, of course, change this by their private agreement.

Continental Ins. Co. v. Pearce, 18 P. 291, 39 Kan. 396, 7 Am. St. Rep. 557.
Modern Woodmen of America v. Lawson, 65 S. E. 509, 110 Va. 81, 135 Am. St. Rep. 927.

Lumber Underwriters of New York v. Rife, 35 S. Ct. 717, 237 U. S. 605, 59 L. Ed. 1140.

For other cases see *Decennial Digests*, Insurance ⇨ 379(6), 379(4), 388(1).

Q. 22. A made an oral request to B, agent of the C Insurance Company, for insurance upon his automobile. The policy was issued. A puts the policy away without reading it. A clause in the policy provided: "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property hereunder while encumbered by a chattel mortgage." The automobile, at time of issuance of the policy and at time of loss, was mortgaged; but A made no representation in regard thereto, nor did he know that the fact was material. Neither did B, or any other agent of C, make any inquiries concerning the condition of his title to the car. May A recover for a loss?

A. The authorities are in irreconcilable conflict. It is not correct to say that C is estopped to assert the invalidity of this policy, for it had no knowledge of such invalidity. Many of the cases allowing recovery would do so on the ground that, by failing to inquire as to the state of the title, it must be inferred that C was not interested in the matter, and so waived that clause of the policy. But the inference here rather would seem to be that no inquiry was made because the matter was expressly covered in the policy, and so inquiry was unnecessary; also to hold that there is a waiver does violence to the parol evidence rule. The fact that A was not guilty of concealment should be immaterial, for C's defense does not rest on any wrong by A, but on the terms of the contract.

If there is any ground for allowing recovery, it must be that ordinary legal rules are not applicable. The form of contract was not arrived at by negotiation of the parties, but it was established beforehand, known intimately to C, and unknown to A. If there are any clauses therein liable to trick an unsuspecting applicant for insurance, it may not be unjust to say that C should have advised A thereof, and, having failed to do so, could not use them as a defense.

Allesina v. London Ins. Co., 78 P. 392, 45 Or. 441, 2 Ann. Cas. 284.

In re Millers' & Mfrs' Ins. Co., 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144.

For other cases see *Decennial Digests, Insurance*, 389(1, 2, 7).

Q. 23. John Adams has insured his farm buildings with the Boston Insurance Company. They are described in the policy as "the dwelling house, barn, and sheds on the farm of John Adams." In the printed portions of the policy are the following provisions: "Unless otherwise provided by agreement in writing added hereto, this policy shall be void if gasoline is kept, used, or allowed on the premises, * * * or if the hazard is increased by any means within the control or knowledge of the insured." During the corn harvesting season it was customary for farmers in the locality to hire outside parties with proper machinery to fill their corn silos. Such machinery was usually run by gasoline engines. Adams had followed this practice for a number of years, but in 1925, while filling his silo in this manner, the barn is set afire by a backfire from the engine. May Adams recover on the policy?

A. Probably yes. If the literal wording of the policy be followed, it would seem that Adams would be without redress; but the often declared rule is that insurance policies are to be construed in favor of the insured in order to avoid forfeitures. Adams has paid premiums in good faith, relying on the validity of the policy, and should

be protected, if possible. It is doubtful if there was a breach under the terms of the policy. The words "kept, used, or allowed," in relation to gasoline on the premises, imply something more than a mere temporary presence or employment, and the same may be said as to increase of hazard. If this latter clause were given an extended construction, it would include all the various changes in the conditions or use of the premises which occur from day to day, and which vary the risk, such as lighting a stove fire, or using a lantern in the barn. It is apparent that the ordinary temporary changes in the hazard necessary to the use of the premises must be excluded. By the statement of facts the use of the gas engine was one of these. Then, also, the premises were described in writing in the policy as a dwelling house, barn, and sheds on a farm. It was contemplated that they should be used as such. One of the ordinary and known uses of the premises required the use of a gasoline engine to fill the silos. The description may then be said to qualify the printed portion of the policy, and in such case the written description would control.

Bouchard v. Dirigo Mut. Fire Ins. Co., 92 A. 899, 113 Me. 17, L. R. A. 1915D, 187.

Norfolk Fire Ins. Co. v. Talley, 71 S. E. 534, 112 Va. 413, Ann. Cas. 1913B, 806.

For other cases see *Decennial Digests, Insurance* ¶326(1, 2, 3), 333(1).

SECTION 9.—RIGHTS OF PARTIES IN THE POLICY

Q. 24. Henry Ames, in 1920, takes out a life insurance policy payable to Mary, his wife. The policy provides that the beneficiary may be changed on written request to the company, and the consent of the company indorsed on the policy. In 1921 Ames becomes insolvent, and remains so until his death. He, however, pays the premiums on the policy during the years 1921 to 1924, inclusive. In 1924 he determines to give his creditors the benefit of the insurance. Mary has the policy in her possession and refuses to surrender it. Ames accordingly executes to Bates, his assignee for the benefit of his creditors, an instrument assigning the policy. He writes the insurance company what he has done, but makes no request to change the beneficiary. Ames dies in 1924. What are the respective rights of Mary and Bates to the insurance?

A. When Ames designated his wife, Mary, as the beneficiary in the policy, he made it her property. He could make no disposition of it, except subject to her interest. This is the almost universal rule where the right to change the beneficiary is not reserved. The

weight of authority, where the right to change is reserved, is that the beneficiary receives a vested interest, same as before, but subject to be divested by the method provided in the policy. Here Ames could not follow that method, as Mary refused to surrender the policy. Had he changed the beneficiary, so far as circumstances permitted, in the manner provided, the court would, on equitable principles, consider the change made. He did not do that, however, but assigned the policy. The policy was not his to assign. This transaction has not, therefore, divested Mary of her interest in the policy. It appears, however, that, of the five premiums paid on this policy, four were paid while Ames was insolvent. By the statute of 13 Elizabeth a gift by an insolvent is conclusively presumed fraudulent, and is therefore void as to creditors, and, on the principle of tracing trust funds, the creditors can follow the fund into whatever form the gift has been converted. This would seem to give Bates, as representing Ames' creditors, a share in the policy, and a majority of the cases so hold. The United States Supreme Court has, however, held that even an insolvent may provide a reasonable amount of life insurance for his wife beyond the reach of creditors. If the creditors are allowed an interest in this policy, the better view would seem to be to apportion it according to the ratio between the premiums paid while insolvent and those while solvent, in this case four-fifths. On the theory that the first premium is the consideration of the contract, and the others merely conditions, some authorities would restrict the creditors' rights to a recovery of the premiums paid, with interest.⁴

Johnson v. New York Life Ins. Co., 138 P. 414, 56 Colo. 178, L. R. A. 1916A, 868.

Supreme Conclave, Royal Adelpia, v. Cappella (O. C.) 41 F. 1.

Washington Central Nat. Bank v. Hume, 9 S. Ct. 41, 128 U. S. 195, 32 L. Ed. 370.

Merchants' & Miners' Transp. Co. v. Borland, 31 A. 272, 53 N. J. Eq. 282.

Pullis v. Robison, 73 Mo. 201, 39 Am. Rep. 497.

For other cases see *Decennial Digests, Fraudulent Conveyances* ¶39; *Insurance* ¶219, 587, 590, 784(7).

Q. 25. A had purchased a phonograph on installment payments, the title being reserved in the seller until the purchase price was paid. He insured his household furniture in the B Insurance Company. The policy, which was in the standard form, contained the following provisions: "This entire policy shall be void, if the inter-

⁴ The question of the rights of creditors in insurance on the life of a deceased debtor is often regulated by statute. See *Beneficiary's Interest in a Life Insurance Policy*, William R. Vance, 31 Yale Law J. 343; *Can an Insolvent Debtor Insure His Life for His Wife's Benefit?* Samuel Williston, 25 Am. Law Rev. 185; 6 Minn. Law Rev. 170; 9 Minn. Law Rev. 681.

est of the insured be other than unconditional and sole ownership. Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property insured hereunder while incumbered by chattel mortgage." May A recover on the policy for loss of the phonograph by fire?

A. There is a conflict, but recent authority allows recovery. While a literal interpretation of the unconditional and sole ownership clause would preclude recovery, the clause is usually interpreted in light of its purpose. This is said to be to prevent those who would only suffer a partial loss from the destruction of the property from insuring for the full value of the property, and to give complete protection to those on whom the full burden of the loss would fall. As by the majority rule the vendee under a conditional sale contract is the beneficial owner of the property and bound to complete his payments, even though the subject of the sale be accidentally destroyed, he is considered an unconditional and sole owner, and allowed to insure for the full value. Under the equitable view of the conditional sale contract, the title of the vendor is in the nature of a chattel mortgage, and that clause of the policy must be considered. Here again there is a division of authority, some holding that the existence of the vendor's reserved title is a breach of this clause, and others holding to a strict construction, that it is not.

Dumas v. Northwestern Nat. Ins. Co., 12 App. D. O. 245, 40 L. R. A. 358.
Lancaster v. Southern Ins. Co., 69 S. E. 214, 153 N. C. 285, 138 Am. St. Rep. 665.

Petello v. Teutonia Fire Ins. Co., 93 A. 137, 89 Conn. 175, L. R. A. 1915D, 812.

For other cases see *Decennial Digests*, Insurance ⇨282(6, 13), 283(3).

Q. 26. Abbot mortgaged his home to Banks to secure a debt of \$1,000. The mortgage provided: "The mortgagor shall keep the premises insured for the benefit of the mortgagee. On failure to do so, the mortgagee may himself effect said insurance, and any premiums paid by the mortgagee are hereby made a part of the mortgage debt, or they may be recovered by the mortgagee in an action at law." Abbot failing to insure the premises, Banks insured in his own name as mortgagee with the Columbia Insurance Company. Before he had taken any steps to notify Abbot, a fire occurred. What are the respective rights of Abbot, Banks, and the Columbia Insurance Company?

A. The Columbia Insurance Company must pay the insurance to Banks, and is then entitled to an assignment of the mortgage

and the debt secured by it. By reason of his mortgage, Banks had an interest in the property, and it was this interest that was protected by the insurance, not Abbot's. Fire insurance is a personal contract of indemnity between the insurer and the insured. Abbot was not a party to the contract, and can have no claim to the proceeds of it. The mortgage permitted Banks to secure insurance for his benefit in behalf of Abbot, charging the premium to Abbot. If he had done so, then Abbot would have been entitled to have the insurance applied on the mortgage debt. But Banks could insure his interest independently of the clause in the mortgage, and there is no presumption that he acted under the mortgage clause. Banks cannot, however, have the insurance and collect the mortgage debt also. The Columbia Insurance Company will be subrogated to the mortgage and be entitled to enforce it. On somewhat doubtful grounds it is considered as a quasi surety for the mortgage debt.

Leyden v. Lawrence, 81 A. 121, 79 N. J. Eq. 113, Ann. Cas. 1913A, 1236.
Waring v. Loder, 53 N. Y. 581.

Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495, 501, 10 L. Ed. 1044.

For other cases see *Decennial Digests*, Insurance §115(5), 283(1), 581, 606(2).

SECTION 10.—LOSS BY FIRE

Q. 27. A lives on the second floor of a two-family house, the first floor of which is occupied by B. B puts in his furnace some coal which is not fitted for furnace fuel. The result is that the whole building, including A's apartment, is filled with dense black smoke. The draperies in A's apartment are badly damaged by the smoke. A fire starts in the basement from the overheated furnace. A, in fear of loss of his goods, removes them outdoors, and a valuable clock is stolen. The fire is extinguished before it reaches A's apartment. A's fire policy protects him from "all direct loss and damage by fire." May he recover for the injury to the draperies and for the loss of the clock?

A. A can probably recover for the lost clock, but not for the damaged draperies. The policy, in insuring against loss by fire, contemplates only what are termed "hostile" or "unfriendly" fires. As the smoke which caused the damage to A's draperies came from a fire confined to the furnace, the loss resulted from a friendly, and not from a hostile, fire. There is, however, contrary authority. The fire in the basement caused by the heated furnace was a hostile

fire. One of the natural consequences was that A would attempt to save his goods by removing them from the threatened building. If A acted reasonably in so doing, loss resulting therefrom would be held to be proximately caused by the fire, and A could recover under the policy for that.

Hansen v. Le Mars Mut. Ins. Ass'n, 186 N. W. 468, 193 Iowa, 1, 20 A. L. R. 964.

O'Connor v. Queen Ins. Co. of America, 122 N. W. 1038, 1122, 140 Wis. 388, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118.

Case v. Hartford Fire Ins. Co., 13 Ill. 676.

See *The Meaning of Fire in an Insurance Policy against Loss or Damage by Fire*, Edwin H. Abbot, Jr., 24 Harv. Law Rev. 119.

For other cases see *Decennial Digests, Insurance* ¶421.

SECTION 11.—SUBROGATION

Q. 28. Adams sells an automobile to Byer, but reserves title in himself until it is paid for. Contemporaneously the conditional sales contract is assigned by Adams to the Commercial Bank. Adams guarantees the payment of the purchase price by Byer to the bank. Byer is required to take out insurance against theft, including the conversion of the car by Byer himself. The insurance, which is in the Equitable Insurance Company, is made payable to the Commercial Bank. Byer converts the car by selling it to one who removes it from the country. The Equitable Insurance Company has paid the insurance to the Commercial Bank, and now claims to be entitled to (1) the right of action of the bank against Byer for the conversion; and (2) to collect the purchase price from Adams on account of his guaranty. What are its rights?

A. The Equitable Insurance Company is entitled to recover from Byer for his wrongful conversion, but it is doubtful if it has any right against Adams. The insurer was only secondarily liable for the loss of the car. On the principle that the loss should be borne by him who is primarily responsible for it, the Equitable Insurance Company is subrogated to the Commercial Bank's rights against Byer. The English doctrine goes further, and, on the principle that the insured is entitled to no more than indemnity, subrogates the insurer to every right, whether in contract or tort, whereby the insured might reduce or recoup his loss. Under this doctrine, the Equitable Insurance Company could collect from Adams. The doctrine is not followed in the United States, however. In the present case, Adams was not responsible for the loss of the car, and there seems no reason for placing the liability for its

loss on him, rather than on the insurer, who for a consideration contracted to be responsible for that very risk.

Hart v. Western Railroad Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719.

Castellain v. Preston (1883) L. R. 11 Q. B. D. 380.

American Central Ins. Co. v. Weller, 212 P. 803, 106 Or. 494.

See Conditional Sale, Insurance against Conversion by Vendee, Edward H. Decker, 2 Or. Law Rev. 189.

See, also, 37 Harv. Law Rev. 901.

For other cases see Decennial Digests, Insurance ⇨606(1).

SECTION 12.—MEASURE OF RECOVERY

Q. 29. John Adams, the lessee in the twenty-year ground lease, built a store building at 100 Main street, the leased premises. The lease provided that at its expiration the building should become the property of the lessor. One year before the expiration of the lease, Adams insured the building against loss by fire. The provision of the policy, which was in the standard form, was that the company insured "John Adams and legal representatives, to the extent of the actual cash value of the property at the time of the loss, * * * against all direct loss and damage by fire to an amount not exceeding \$10,000 to the following described property, * * * to wit: One-story brick store building at 100 Main street." The building was totally destroyed by fire ten days before Adams' lease expired. The intrinsic value of the building was \$8,000; the value of Adams' use in it at the time the policy was issued was \$1,000, and at the time of the fire \$20. What is the measure of Adams' recovery?

A. In absence of statute, Adams by the weight of authority may recover \$8,000. By the terms of the policy it is clear that recovery cannot be more than the cash value of the property. There is a conflict whether Adams should recover the value of the property, or only of his interest therein. The terms of the policy are ambiguous. In favor of recovering the full value, it can be argued that it was on the entire sum that Adams paid insurance premiums, and, since Adams had an insurable interest, which prevents the contract from being a wager, the company should pay the amount for which they received premiums. On the other hand, the principle of insurance is indemnity, and recovery should be restricted to such sum as will indemnify Adams. This would be \$20. In many states there are "valued policy" statutes, which, in absence of fraudulent overvaluation, make the amount stated in the policy conclusive in

case of total loss. As no fraud appears here, Adams would recover under such a statute \$10,000.

Merrett v. Farmers' Ins. Co., 42 Iowa, 11.

Tabbutt v. American Ins. Co., 70 N. E. 430, 185 Mass. 419, 102 Am. St. Rep. 353.

Farber v. American Automobile Ins. Co., 177 S. W. 675, 191 Mo. App. 307.

See *Insurance of Limited Interests against Fire*, Emlin McClain, 11 Harv. Law Rev. 512.

For other cases see *Decennial Digests, Insurance* ¶500, 502, 503.

SECTION 13.—PROOFS OF LOSS

Q. 30. A had insured his buildings against loss by fire in the B Insurance Company. The policy, which was in the standard form, contained the following provisions: "The insured shall within 60 days after the fire, unless such time is extended in writing by this company, render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: [Here follow detailed provisions concerning the insured property, nature and cause of the fire, value of destroyed goods, etc.] No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, unless all the requirements of this policy shall have been complied with." A loss occurred. When B was notified thereof, it denied liability on the ground that the policy had been canceled. A did not make proofs of loss, but took steps to collect by legal proceedings. B then denied liability on the ground that A had not filed proofs of loss. At this time more than 60 days had expired since the fire. A immediately made and tendered proofs to B, which B refused to receive. Assuming that B cannot prove cancellation of the policy, has it a good defense on account of A's failure to file proofs of loss within 60 days?

A. No; by refusing to pay the insurance on the ground of cancellation of the policy, B indicated that it was useless for A to file proofs of loss, and therefore waived that requirement. Also there is considerable authority to the effect that failure to file proof within the time limit does not avoid the policy, but only suspends it, and, if proof is filed within reasonable time, the insured may recover.

Talloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187.

Southern Fire Ins. Co. v. Knight, 36 S. E. 821, 111 Ga. 622, 52 L. R. A. 70, 78 Am. St. Rep. 216.

For other cases see *Decennial Digests, Insurance* ¶539(5), 559(1).

MORTGAGES

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Section

1. Title and Lien Theories.
2. Equitable Mortgage.
3. Absolute Deed as Mortgage.
4. Conditional Sale.
5. Chattel Mortgage on Fixtures.
6. The Obligation Secured.
7. Position and Remedies of Mortgagee.
8. Right to Possession.
9. Receipt of Rents and Profits.
10. Accountability of Mortgagee in Possession.
11. Mortgagor in Possession.
12. Redemption.
13. Transfer of the Mortgaged Interest.
14. Priority among Incumbrancers.
15. Marshaling.

SECTION 1.—TITLE AND LIEN THEORIES

Q. 1. M, as security for a loan from E, gave to E a deed of M's farm, Blackacre, with a stipulation in the deed that it was to be void if M repaid the loan on a certain date. M failed to pay at the specified time, but a month later made a proper tender of the amount due, which E refused, claiming that the farm now was his absolutely. May M recover his farm from E?

A. Yes; there are, broadly, two theories of the legal effect of mortgages, the common-law or title theory, and the lien theory. The early common-law mortgage was in the form of a deed conveying title to the mortgagee, subject to a condition subsequent, namely, the payment of the debt at a specified time, called the law day. If the condition was not performed, the mortgagee's title, at law, became absolute. Equity, rightly looking on the transaction as one in which the mortgagor was the real owner and the mortgagee a mere security holder, early intervened to prevent forfeiture and allow the mortgagor to redeem by paying, even after the law day. The lien theory, in general, carries out in legal rules the view which equity had superimposed upon the common-law mortgage. Though the mortgage be in the form of a deed conveying title, the mortgagor retains legal title, and the mortgagee gets only a legal lien, not dependent upon possession. In a lien theory jurisdiction, it has been held that not only payment, but tender, after the law day discharges ipso facto the lien, even though the tender is not kept good. The holding on the last point is open to crit-

icism, and probably would be followed only where the refusal of tender was willful. Of course, in no case does tender extinguish the debt.

Phelps v. Sage, 2 Day (Conn.) 151.

Crain v. McGoon, 86 Ill. 431, 29 Am. Rep. 37.

See Perkins v. Dibble, 10 Ohio, 434, 440, 36 Am. Dec. 97.

Caruthers v. Humphrey, 12 Mich. 270.

For other cases see *Decennial Digests, Mortgages* ⇨ 137, 298(4), 301, 302; *Tender* ⇨ 18, 24.

Q. 2. M conveyed land to E, "and to his successors and assigns forever," as security for a debt. E is dead, and the debt is overdue and unpaid. May X, the administrator of E's estate, foreclose the mortgage?

A. Since the word "heirs" was not used, under technical common-law rules, E got only a life interest as security, and consequently, on E's death, there was no mortgage left for X to foreclose. In some title states, the omission of technical words of inheritance is regarded as immaterial, if the intention is to transfer a fee. In lien jurisdictions, such words of inheritance are unnecessary.

Allendorff v. Gaugengigl, 16 N. E. 283, 146 Mass. 542.

Brown v. National Bank, 6 N. E. 648, 44 Ohio St. 269.

Bredenberg v. Landrum, 10 S. E. 956, 32 S. C. 215.

For other cases see *Decennial Digests, Mortgages* ⇨ 47, 137; *Husband and Wife* ⇨ 169(5).

Q. 3. E conveyed Blackacre to M, who had no other property, in consideration of M promising to pay a certain price to E. M then gave a mortgage of Blackacre to E as security for the payment of the price. Nothing was said about possession of the land, but it was orally agreed that M would make his payment out of the income he would derive from Blackacre. Before default by M, could E successfully maintain ejectment?

A. No. In title theory states a mortgagee has title and the right to immediate possession of the mortgaged property, both before and after default; the mortgagor, if he is left in possession, is treated as no better than a tenant at sufferance. In lien states there is a divergence. Where the lien theory is carried through logically all the way, the mortgagor, having title, is entitled to possession, although, with the exception of a few jurisdictions, he could make a valid agreement that the mortgagee should have possession. In some states there is an intermediate view that the mortgagor has the right to possession until default, and then the right to possession, at least, passes to the mortgagee. But even in title states, if the mortgagee makes either an oral or written agreement that

the mortgagor may stay in possession, he cannot maintain ejectment. And such an agreement may be inferred from the circumstances of the case. So here E cannot maintain ejectment, where M was to pay out of the profits of the mortgaged property, since he must have possession to receive an income. *Note*

Doe ex dem. Shute v. Grimes, 7 Blackf. (Ind.) 1.

Wales v. Mellen, 1 Gray (Mass.) 512.

Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623.

Bradfield v. Hale, 65 N. E. 1008, 67 Ohio St. 316.

For other cases see Decennial Digests, Mortgages ⇨ 144, 188, 390.

Q. 4. In a jurisdiction where the lien theory is applied to mortgages of real estate, M mortgaged a chattel to E to secure payment of a debt. M defaulted, and E brought an action of replevin to obtain possession of the mortgaged property. May he recover?

Answer in Ore + Yes
A. Yes. In title jurisdictions the rules governing the right to possession of mortgaged property apply alike to real estate and to personalty; but in lien theory states the courts, with the exception of some seven or eight states, follow the title theory when personal property is involved, with the consequence that the mortgagee has the right to possession.

Randall v. Persons, 60 N. W. 898, 42 Neb. 608.

Noyes v. Wyckoff, 30 Hun (N. Y.) 466.

For other cases see Decennial Digests, Chattel Mortgages ⇨ 162, 238.

SECTION 2.—EQUITABLE MORTGAGE

Q. 5. M borrowed money from E, and at the time executed what purported to be a mortgage conveyance of Blackacre to secure E. The conveyance was defective, because of the lack of witnesses and a seal. Has E any security interest in Blackacre?

A. An agreement to mortgage real property gives rise almost everywhere to an equitable mortgage, as a consequence of the right to specific performance, or possibly some broader ground of fairness and justice. On the familiar doctrine that a defective deed may be construed as an agreement to convey, the case put would be held to be an agreement to give a mortgage, which would create an equitable mortgage on Blackacre. *Agree*

Bullock v. Whipp, 2 A. 309, 15 R. I. 195.

Bryce v. Massey, 14 S. E. 768, 35 S. C. 127.

For other cases see Decennial Digests, Mortgages ⇨ 28.

Q. 6. M borrowed money from E, and deposited with him the title deeds to his farm; it being intended that the deposit should be for E's security. Has E an equitable mortgage? *No - in U.S.*

A. No. In England the deposit of title deeds to land is held to be evidence of an agreement to create a mortgage, not, as might be supposed, of the deeds, but of the land itself, and is sufficient part performance to take the agreement out of the statute of frauds. The result is an equitable mortgage in the depositary. The only justification of this doctrine is the importance of such documents in England. In the United States that reason is not present, and the courts generally hold that, even though an agreement might be inferred, it would be in violation of the statute of frauds, or contrary to the policy of the recording acts to enforce it.

Ex parte Whitbread, 19 Ves. 209.

Bloomfield State Bank v. Miller, 75 N. W. 569, 55 Neb. 243, 251, 44 L. R. A. 387, 70 Am. St. Rep. 381.

In re Assignment of Snyder, 114 N. W. 615, 138 Iowa, 554, 555, 19 L. R. A. (N. S.) 206.

For other cases see Decennial Digests, Mortgages ⇨30.

Q. 7. M, being indebted to E, executed and delivered a writing in which he stated it was his intention that certain named real estate should "stand as security" for the payment of the obligation. On nonperformance by M, E brings an action to foreclose the mortgage, which he claims was created by this writing. Will he succeed?

A. Yes; as a general rule such an agreement, which does not contemplate a legal mortgage being given in the future, and which, in title states, at least, falls short of the present creation of a legal mortgage, will be upheld in equity as creating a present equitable mortgage. In lien theory states, any properly executed instrument which indicates an intention that property shall stand as security might well be held to create a legal mortgage.

Thomas v. Wisner, 180 P. 744, 66 Colo. 243.

Davis v. Clay, 2 Mo. 161.

Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

For other cases see Decennial Digests, Mortgages ⇨28.

Q. 8. M borrowed money from E, and to secure its repayment executed an instrument which purported to give a mortgage on certain property then owned by M, and also on "all cows acquired by M at any time during the continuation of the indebtedness." This instrument was recorded. M later acquired some cows, one of which was attached by C, a creditor of M, and another of which was sold by M to a purchaser P, for value without notice. What are E's rights to the cows as against C and P?

A. Most courts would hold that E acquired an equitable mortgage on the cows as soon as M acquired them, the description be-

ing sufficiently definite. The theory adopted by these courts is that the mortgage, though inoperative as a conveyance, is operative as an executory agreement to mortgage, which attaches to the property when acquired. That mere inclusion of after-acquired property in the granting clause of the mortgage imports an agreement to give a mortgage on it, when acquired, seems doubtful. A few courts have attempted to place their decisions upon estoppel, an obviously fallacious ground, since there was no misrepresentation. An extension of the reasoning in question No. 7, *supra*, would seem to be a more satisfactory basis. Regardless of recordation, most courts (there are several states *contra*) hold that the equitable mortgage so created is valid against attaching creditors although not against bona fide purchasers. Recording before acquisition of the property is not notice, and it is at least questionable whether recording after acquisition would be. In the principal case, E will prevail over C, but not P.

Holroyd v. Marshall, 10 H. L. Cas. 191.

Hickson Lumber Co. v. Gay Lumber Co., 63 S. E. 1045, 150 N. C. 282, 21 L. R. A. (N. S.) 843.

Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 63 F. 891, 896, 12 C. C. A. 350, 497.

Chase v. Denny, 130 Mass. 566.

Chick v. Nute, 57 N. E. 219, 176 Mass. 57.

For other cases see *Decennial Digests, Assignments for Benefit of Creditors* ¶335(2); *Chattel Mortgages* ¶18, 124, 196, 198; *Insolvency* ¶62; *Mortgages* ¶13, 131, 151(2); *Vendor and Purchaser* ¶231(17), 239(4).

Q. 9. M borrowed some money from E, and agreed in writing to sell, on or before the maturity of the debt, certain described chattels and to repay the loan to E out of the proceeds. The instrument was recorded. Is a mortgage created?

A. There should be no doubt that an equitable mortgage of the proceeds of the chattels would be created if the property were sold. Further, in order to insure that there will be proceeds (e. g., to prevent a gift), it seems that E ought to have some present equitable interest in the property itself. However, the courts appear reluctant to create such an interest, at least as against third parties. The case put is distinguishable from an agreement to pay or secure a creditor out of the proceeds of certain property, if the debtor should sell it.

Britt v. Harrell, 10 S. E. 902, 105 N. O. 10.

Cf. *Riccard v. Prichard*, 1 Jur. (N. S.) 750.

For other cases see *Decennial Digests, Chattel Mortgages* ¶5.

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notes

Note

Q. 10. M, a debtor, gave his creditor, E, a power of attorney to sell and convey certain specific real property owned by M, in the event that the debt was not paid within a fixed time. Was a mortgage created on the property?

Met 2
A. Giving a creditor power to take and hold possession and to receive the rents and profits until his debt is paid evinces an intention that the property shall be security, and an equitable mortgage is created. So E should have an equitable lien in the case stated.

Reed v. Welsh, 11 Bush (Ky.) 450.

Spooner v. Sandilands, 1 Y. & C. C. C. 390.

Brown v. Brown, 2 N. E. 233, 103 Ind. 23.

For other cases see Decennial Digests, Mortgages ¶8, 27, 28.

SECTION 3.—ABSOLUTE DEED AS MORTGAGE

Q. 11. M, being indebted to E, executed to him a deed of land, absolute on its face, which, it was orally agreed, should secure the payment of his indebtedness. M, offering to pay what he owed E, brings a bill to redeem the land. May he succeed?

Or 40 115
A. Yes; in a few jurisdictions parol evidence to prove that a deed absolute on its face was intended as a mortgage will be admitted only on a showing of fraud, duress, mistake, or the like. The overwhelming weight of authority, however, imposes no such restriction on its introduction. Most courts say that the parol evidence rule is not violated, and give various reasons, the most usual of which is that the evidence is admitted, not to vary the writing, "but to show facts dehors the instrument creating an equity superior to its terms." Logically a conveyance on oral trust should be enforced on a parity of reasoning, but the courts balk at this. Some courts say there is a square exception to the parol evidence rule, justified in mortgage cases because of the danger that lenders, by reason of their strong economic position, might force such conveyances from necessitous borrowers and so deprive them of property they once had. The first part of this reason would differentiate the oral trust case. Practically all courts hold that the statute of frauds is not violated; the reasons given being either that there is no transfer of any interest, but only a retention by the grantor of one, or that relief is being granted on a theory of restitutio in integrum. The grantor has the burden of proof, and most authorities require that he establish his case by clear and convinc-

ing evidence, some even requiring that there be no reasonable doubt left, although a few demand only a preponderance of the evidence.

Pierce v. Robinson, 13 Cal. 116.

Williamson v. Rabon, 98 S. E. 830, 177 N. C. 302.

Woods v. Jensen, 62 P. 473, 130 Cal. 200, 203.

Rinkel v. Lubke, 152 S. W. 81, 246 Mo. 377.

Bennett v. Harrison, 132 N. W. 309, 115 Minn. 342, 344, 37 L. R. A. (N. S.) 521.

Annotation, L. R. A. 1916B, 18 et seq.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 129(3); Mortgages $\S$ 28, 36, 37(2), 38(2), 608½.

Q. 12. A, desiring to purchase certain land from C, entered into an oral agreement with B, by which the latter paid the purchase price to C by way of loan to A. Conveyance by a deed absolute on its face was made by C to B, the oral understanding between A and B being that B should hold the title as security for the repayment of the loan. A, having tendered the amount due according to the oral agreement, and B refusing to accept the tender or convey title, A now brings a bill to redeem the property. May A succeed?

A. Yes; if A with his own money had bought the land and had it conveyed to B, there would have been a resulting trust to A, the raising of which would not violate the statute of frauds, because it is created by operation of law. In substance here A is paying the purchase price with the borrowed money. If the jurisdiction where the land was located had abolished resulting trusts, A ought to fail. In such a case A would not be losing something he once had, but rather attempting to compel specific performance of an oral agreement for the conveyance of real property, and thus acquire an interest he never had before. This would violate the statute of frauds, there being no sufficient part performance to take the agreement out of the statute.

Logue's Appeal, 104 Pa. 136.

Bennett v. Harrison, 132 N. W. 309, 115 Minn. 342, 37 L. R. A. (N. S.) 521, *semble*.

Cf. Widmayer v. Warner, 182 N. Y. S. 629, 192 App. Div. 499, *semble*.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 129(3); Mortgages $\S$ 28, 34, 37(3); Trusts $\S$ 63¾.

Q. 13. M, being indebted to E for \$1,000, conveyed Blackacre to E; it being agreed in writing that the land should be satisfaction of the obligation. At the same time they entered into a separate written agreement that M might repurchase Blackacre at some time within a year for \$1,100. In this agreement it was stated that time was of the essence, and unless it was performed within the time

fixed M should lose all rights under it. M failed to repurchase within the year, but two years later made a proper tender, which E refused. M now brings a bill to redeem Blackacre. May he succeed?

A. Yes; if the transaction is a mortgage, the right to redemption exists until cut off by foreclosure, and there is a continuing personal liability on M. If the agreement is really a sale with an agreement for repurchase, there is no redemption right after the time fixed for payment, and neither is there any continuing personal liability. Whether it is one or the other depends fundamentally upon the intention of the parties. If there is an enforceable obligation upon M to repurchase, then most courts conclusively presume it to be a mortgage. If there is no such obligation, but only an option to repurchase, then, on the theory that, unless there is a debt to be secured, there can be no mortgage, such an agreement is generally held to be a conditional sale, although there are some authorities contra. Whether such a debt exists may appear in the written agreement. If not, it may be shown by parol evidence and the surrounding circumstances. In the latter case the burden of proof is generally held to be upon the one seeking to establish a mortgage.

L. R. A. 1916B, 132 et seq. and 207 et seq.

Earp v. Boothe; 24 Grat. (Va.) 368.

Cf. Matthews v. Sheehan, 69 N. Y. 585.

Morton v. Allen, 60 So. 866, 180 Ala. 279, L. R. A. 1916B, 11.

For other cases see Decennial Digests, Mortgages ⇨ 5, 6, 37(1).

SECTION 4.—CONDITIONAL SALE

Q. 14. B, desiring to buy an automobile, but having no available funds, entered into a transaction with S as follows: B was given possession of the automobile and promised to pay the purchase price at a future date. S in the meantime retained legal title and the right to retake possession on default by B, but promised to convey title if B paid. B defaulted. S then brought an action for the purchase price, and later retook possession of the automobile. B now brings an action of trover against S for conversion of the automobile. Should he recover?

A. A conditional sale of a chattel is, in its essence, like a transfer of title to a buyer with a chattel mortgage back to the seller to secure the purchase price. Logically, therefore, the seller ought to be allowed to sue for the purchase price, and also enforce his security interest by retaking the property, or retake the chattel and later sue

for the purchase money. But the courts generally have departed from the mortgage analogy, and hold that doing one of these things is an election which bars him from pursuing the other alternative. Some jurisdictions have, however, recognized the correct theory, and it is embodied also in the Uniform Conditional Sales Act, which has been enacted in some states. In these latter jurisdictions, recovery would be denied; in the former, it would be allowed. *Oreg*

Bailey v. Hervey, 135 Mass. 172.

Sawyer v. Pringle, 20 Ont. 111.

Cf. *semble*, Bridgford v. Crocker, 60 N. Y. 627.

For other cases see Decennial Digests, Sales $\S$ 340, 477(4).

SECTION 5.—CHATTEL MORTGAGE ON FIXTURES

Q. 15. M owned some real estate with a factory upon it. He bought some machinery from S, giving back a chattel mortgage of the machinery to secure payment of the purchase price. The mortgage was recorded. M then attached the machinery to the property, so as to make it a fixture. He then sold the factory to P, who paid value and had no actual knowledge of the chattel mortgage. M having left for parts unknown, S now wants to recover the machinery from P. May he do so? *Not in Ore.*

A. If the owner of land affixes a chattel to it agreeing with the chattel's owner that it shall retain its character as personalty, the courts hold such an agreement to be effective, although the better view is that it gives only a right to recover what is legally part of the real estate. The courts also generally say that a chattel mortgage or conditional sale inferentially amounts to such an agreement. If so, and P had notice of S's rights, he would take subject to them. There is a split in the authorities as to whether recording, as in the principal case, puts a purchaser on constructive notice of a chattel mortgage on fixtures. Where it does not, S's ability to recover ought to depend on whether he knew, or as a reasonable person should know, that it would be annexed to real estate, and that some one might purchase the property relying on its being such property; i. e., on whether S could be estopped. *Look*

Davenport v. Shants, 43 Vt. 546.

For other cases see Decennial Digests, Fixtures $\S$ 20.

SECTION 6.—THE OBLIGATION SECURED

Q. 16. M contracted with E to support E during his natural life and to give him a decent burial at his death. M conveyed to E a certain farm to secure the performance of his promise. M defaulted,

and E brought a bill to foreclose what he claimed was a mortgage of the property to him. May he succeed?

A. Yes; a mortgage cannot exist, except as security for the performance of some obligation. Originally a money debt was deemed necessary. To-day it is clear that any legal obligation, even a contingent one, which can be reduced to some money equivalent, may be secured by a mortgage, as in the principal case.

Cook v. Bartholomew, 22 A. 444, 60 Conn. 24, 13 L. R. A. 452.
For other cases see Decennial Digests, Mortgages ⇨404.

Q. 17. M mortgaged real estate to B to secure a prior loan, and also such sums as might be loaned by B in the future. This mortgage was recorded. M then gave a second mortgage on the same land to secure a present advance by C. This mortgage also was recorded. B subsequently advanced more money to M. The question now is raised whether B has priority over C as to this subsequent advance made by him. *Wt - only if 2nd gave note to 1st. Or*

A. Yes; it is agreed that a mortgage securing future advances is valid, as against subsequent purchasers and incumbrancers with notice thereof, to the amount which the mortgagee may have made advances before acquiring notice of the rights of such third persons. It is also well established that recording the first mortgage gave notice to the subsequent purchasers or incumbrancers. The weight of authority, however, is that recording of the subsequent transaction does not charge the first mortgagee with notice of the rights acquired under it. Therefore, in the absence of actual notice of C's rights, B would prevail as to the later advance, as well as the original loan.

Tapia v. Demartini, 19 P. 641, 77 Cal. 383, 11 Am. St. Rep. 288.
For other cases see Decennial Digests, Mortgages ⇨112, 151(2).

Q. 18. M gave a mortgage to B to secure a present loan, and also future loans which B promised to make. The mortgage was recorded. Later M mortgaged the same property to C to secure a loan then made, and also any future loan which C might make. Under this later mortgage C subsequently did make further advances. After this B, who had actual knowledge of all of M's dealings with C, made another loan to M. Has B priority over C as to this subsequent advance?

A. Yes; if the first mortgagee is under no duty to make advances, and has actual knowledge of the later incumbrancer's original and subsequent advances, the later incumbrancer prevails. This is

the sound rule, for otherwise the mortgagor, although unable to demand advances from B, could not borrow from any one else, since no one would willingly take the chance of being postponed to later advances which might be made by B. For the same reason it would make it more difficult for the mortgagor to sell the property. Where, however, as here, B is bound to make further advances, he is protected in making them, regardless of notice of intervening rights, on the theory that he could not refuse to make the advance, even though he had such notice.

Hopkinson v. Rolt, 9 H. L. Cas. 514.

Savings & Loan Society v. Burnett, 39 P. 922, 106 Cal. 514.

West v. Williams, 1 Ch. 488.

Gerrity v. Wareham Sav. Bank, 88 N. E. 1084, 202 Mass. 214.

Hyman v. Hauff, 33 N. E. 738, 138 N. Y. 48.

For other cases see Decennial Digests, Mortgages ¶151(2), 178.

SECTION 7.—POSITION AND REMEDIES OF MORTGAGEE

Q. 19. E, holding M's promissory note, secured by a mortgage of Blackacre, brought an action at law on the note, and at the same time brought a bill in equity to foreclose the mortgage. M seeks to have one or the other of these proceedings stayed. May he do so?

A. No; it has usually been held that a mortgage creditor can enforce his different rights concurrently. Thus he can sue at law on the personal obligation of the mortgagor, and at the same time enforce the mortgage in equity by foreclosure proceedings. The only limitation on his rights is that he must not get more than a single satisfaction of his claim. In some jurisdictions, however, it is held that, since the creditor can get a deficiency judgment in the foreclosure proceedings, he should not be allowed to bring a separate action at law while foreclosure proceedings are in progress. Further, by statute, many states have imposed severe restrictions on the right to pursue both remedies independently.

Morris v. Fidelity Mortgage Bond Co., 65 So. 810, 187 Ala. 262.

Hodgen v. Roy, 169 P. 1143, 102 Kan. 197.

Cf. Anderson v. Pilgram, 9 S. E. 587, 30 S. C. 499, 14 Am. St. Rep. 917.

For other cases see Decennial Digests, Mortgages ¶218, 390, 411.

Q. 20. E held a mortgage on M's property to secure a loan. The statute of limitations had run on the debt so secured. May E succeed in an action to foreclose the mortgage? *Yes, 442*

A. Yes; a mortgage is security for a debt, and, in general, so long as the debt exists, even though the ordinary remedies to enforce it are ended, the mortgage itself may be enforced. That is true in the case of

a debt discharged by bankruptcy proceedings; and it is true also here, where the mortgage secures a debt barred by the statute of limitations. By statute, in some jurisdictions, it is provided that the running of the statute of limitations on the obligation extinguishes the mortgage.

Thayer v. Mann, 19 Pick. (Mass.) 535.

Shaw v. Silloway, 14 N. E. 783, 145 Mass. 503.

Begein v. Brehm, 23 N. E. 496, 123 Ind. 160.

Kern Valley Bank v. Koehn, 107 P. 111, 157 Cal. 237.

For other cases see *Decennial Digests, Limitation of Actions* ⇨66(2), 167(2); *Mortgages* ⇨298(3).

Q. 21. M gave his promissory note indorsed by X and secured by a mortgage of certain chattels to E. E's wife, who had separated from him, had taken the mortgaged chattels with her and refused to give them up. E demanded payment of the note. M made a counter demand for a return of the chattels, and, when E said he could not turn them over, refused to pay on the sole ground that they were not produced. E then sued X, the indorser. May he recover?

A. No; the maker of the note, M, has a right to receive back the chattel security as a condition precedent to paying the note, and therefore the indorser is not liable. It might be noted here that, in spite of a note secured by a mortgage being subject to such a condition precedent, the great weight of authority holds that it is nevertheless negotiable.

Ocean Nat. Bank v. Fant, 50 N. Y. 474.

Chicago Railroad Equipment Co. v. Merchants' Nat. Bank, 10 S. Ct. 999, 136 U. S. 268, 34 L. Ed. 349.

For other cases see *Decennial Digests, Bills and Notes* ⇨168, 405.

Q. 22. M had borrowed \$1,000 from E, and gave his promissory note, payable on a certain date, for the amount, together with a mortgage on Blackacre securing it. When the note came due, by agreement with E, the original note was destroyed, and M gave E a demand note for the same amount. E later demanded payment, and on default seeks to enforce the mortgage. May he do so?

A. Yes; the promissory note or bond usually given for the amount of the debt is generally regarded either as evidence of it or as collateral security for it. Therefore a change in such an instrument would not affect the debt itself, nor, consequently, the mortgage securing it. This is true, even in states where a promissory note given for a prior debt is presumed to extinguish it; and, where-

ever possible, the courts will hold that the original obligation continues, even though the substituted note is different in its terms from the original one.

Newhall v. Hatch, 66 P. 266, 134 Cal. 269, 55 L. R. A. 673.

Buck v. Wood, 27 A. 103, 85 Me. 204.

For other cases see Decennial Digests, Mortgages ☞ 114, 305.

Q. 23. M mortgaged real estate to E. The city in which the land was located took the land by eminent domain proceedings, joining both M and E in the proceedings, and then paying the money into court. E now brings an action to foreclose, and claims he is entitled to the proceeds in substitution for the land. Is his contention correct?

A. Yes; property taken by eminent domain is freed from the mortgage. The proceeds simply take the place of the original mortgaged property. Where the debt is not yet mature, there is difficulty in deciding to whom the money should be paid. The possibilities are: (1) Give it to the mortgagee, either to apply on the debt, if he wishes, or to hold or invest; (2) give it to the mortgagor, to hold subject to the mortgage; or (3) pay it into court. There are obvious objections to any one of these. But where, as in the principal case, the debt is mature, the mortgagee is clearly entitled to reach the proceeds as a substitute for the property. If the city had paid M, it would, in the absence of some grounds for estoppel against E, have been liable still to E.

Boutelle v. Minneapolis City, 61 N. W. 554, 59 Minn. 493.

Bright v. Platt, 32 N. J. Eq. 362.

For other cases see Decennial Digests, Eminent Domain ☞ 154.

Q. 24. R mortgaged real estate to E, agreeing to effect insurance, "loss, if any, payable to E," and to deliver the policy to E. R took out a policy, payable to himself, and retained it. The building burned. Is E or R entitled to the proceeds?

A. E is entitled. Unless special circumstances indicate the contrary, insurance effected by the mortgagor will redound only to his benefit. If R had done his duty, and insured in E's name, E would have been entitled to receive the money; but he would have had to hold it as security. If R wanted to use it to rebuild, E ought not to be allowed to object. Where R violates his agreement, as in the principal case, although the insurance company, in the absence of knowledge of E's rights, may pay R, nevertheless, in equity, the

money belongs to E, and E will have an equitable lien on the proceeds to the extent of his interest in the property.

Wheeler v. Factors' & T. Ins. Co., 101 U. S. 439, 25 L. Ed. 1055.

Gordon v. Ware Savings Bank, 115 Mass. 588.

For other cases see *Decennial Digests*, Insurance ⇨580(2), 581; Mortgages ⇨298(1).

Q. 25. M mortgaged Blackacre to E, and later gave a second mortgage on it to D. M remained in possession. T came onto the property and cut and carried away some trees before default by M. D brings an action on the case against T. May he recover?

A. In title jurisdictions the first mortgagee, being the owner at law, has a right to recover damages for tortious injury done to the property by third parties. There is, however, a divergence in the cases whether he should recover the full amount of the damage done, or be limited to the amount his security is impaired. Where the plaintiff is a second mortgagee, the courts, being uninfluenced by the technical consideration present when the first mortgagee is suing, namely, that the plaintiff has legal title, more generally follow the second rule as to the measure of recovery. (Such is the rule, also, in lien jurisdictions, whether the one suing be a first or subsequent mortgagee.) Whether the mortgage security is impaired does not depend on the solvency of the mortgagor.

Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425.

Turrell v. Jackson, 39 N. J. Law, 329.

Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563, contra.

Clark v. Reyburn, 1 Kan. 281.

For other cases see *Decennial Digests*, Mortgages ⇨216, 217, 271.

Q. 26. M mortgaged his farm, Blackacre, worth \$5,000, to E to secure a note for \$3,000. When the note came due, E sued on it, got judgment, and levied execution upon Blackacre. C, learning of the entire transaction and desiring to bid at the execution sale, wants to know what interest, if any, he would get, and how much he should bid. What advice should C be given?

A. Originally a mortgagor's interest, being purely equitable after default, could not be levied upon at law. Practically everywhere today, either by statute or by decision, the mortgagor's interest is subject to execution. In lien theory states, of course, there was never any doubt about the matter, since the mortgagor had legal title. That the creditor is the mortgagee is apparently immaterial, if he is not suing on the mortgage debt. If, however, as in the case under discussion, the execution is to enforce a judgment on the mortgage claim itself, there is dispute and doubt among the author-

ities, whether the proceeding will be allowed at all, or, if it is, what its effect will be. By some authorities such execution sale may be enjoined, or will be treated as void. Others allow it, and treat it variously. Some of these latter courts have regarded it as in effect a foreclosure proceeding, the purchaser getting full title. Others take the view that the mortgagor's redemption interest, subject to the mortgage debt, is all that passes. Under this last theory the only satisfactory solution of the problem of who is entitled to payment of the mortgage debt is to say that the mortgagor is subrogated to the rights of the mortgagee in so far as the proceeds of the sale have satisfied the mortgage debt. A still different doctrine is that the purchaser takes free and clear of the mortgage debt to the extent his payment has discharged the mortgage debt. Whether C should refrain from bidding, bid only the value of the redemption interest, or bid the fair value of the property, depends, of course, which of the above views obtains in the particular jurisdiction. Because of the uncertainty of what interest would pass, few persons other than the mortgage creditor will bid at such sales. Since this is so, the wisest rule would seem to be that which prevents such sales.

Burden v. Kennedy, 3 Atk. 739.

Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623.

Wilkins v. Johnson (Tenn. Ch. App.) 54 S. W. 1001.

Mayo v. Staton, 50 S. E. 331, 137 N. C. 670.

Tice v. Annin, 2 Johns. Ch. (N. Y.) 125.

Goring's Ex'r v. Shreve, 7 Dana (37 Ky.) 64.

Crooker v. Frazier, 52 Me. 406.

For other cases see *Decennial Digests*, Execution ⚡38; Mortgages ⚡218, 267, 499.

Q. 27. M, a corporation, owned and operated a steel plant, which it had mortgaged to B. Later M consolidated with N, the owner of mining property, forming the M & N Co. This consolidated company bound itself to pay B's mortgage, and afterwards gave a mortgage on the consolidated properties to C. B's mortgage is now due, and he is seeking to foreclose. C asks that this foreclosure be delayed until his mortgage becomes due, and then have all the properties sold together. Should C's petition be granted?

A. If a subsequent incumbrancer seeks to foreclose, it is clear that the prior incumbrancer is not even a proper party to the suit, if the foreclosure is asked subject to the first mortgage. There is some dispute whether a subsequent incumbrancer can have the property sold free of a prior mortgage; i. e., really compel the first mortgagee to foreclose. It is generally considered sufficient protection to the second mortgagee that he can get rid of the first mortgage by paying

it off and be subrogated to the first mortgagee's rights. In the case put, however, in which the second mortgagee is trying to delay foreclosure by a first mortgagee of a part of a consolidated business organization, it has been held that he cannot do so, chiefly on the ground that the mortgagee has a right to buy in on a foreclosure sale just that part of the property on which he took a mortgage. That reason seems unsound. Sometimes the second mortgagee might be sufficiently protected by his right to pay off the first mortgagee and so prevent foreclosure. However, C's request seems a reasonable one, and should be granted, unless B can show that he will be prejudiced, as by an undue delay.

Garrett v. Peirce, 74 Ill. App. 225.

Olyphant v. St. Louis Ore & Steel Co. (C. C.) 23 F. 465.

For other cases see Decennial Digests, Mortgages ⇨417, 418.

Q. 28. A and B were cotenants of Blackacre. A mortgaged his interest to E. Can A, B, or E have partition?

A. E got as security an undivided one-half interest in Blackacre, and cannot be compelled by A to accept as security a divided one-half. On the other hand, E cannot have partition, because he cannot compel A on redemption to receive back a divided interest, instead of the undivided one he gave as security. B, however, can have partition. By mortgaging his interest, one cotenant cannot prevent the other from having partition.

Fuller v. Bradley, 23 Pick. (Mass.) 8, note.

For other cases see Decennial Digests, Mortgages ⇨315(1); Partition ⇨9(1).

Q. 29. M mortgaged his automobile to E as security for a debt; E taking possession of it. After default by M, C, one of E's creditors, sued him, got judgment, and, though he had notice of the mortgage, had the sheriff, S, levy upon the automobile. M sues S for conversion. May he recover?

A. Yes; to-day, even under the title theory of mortgage, the mortgagee is regarded, not only in equity, but at law, as holding his interest in the property as mere security, and his creditors cannot reach it as part of his assets. The remedy of the mortgagee's creditor is to garnish, levy equitable execution upon, or, where the debt is represented by a specialty, levy legal execution upon, the debt owed to the mortgagee. Having reached the obligation, the security follows the debt, at least in equity, and, in lien states, at law.

Prout v. Root, 116 Mass. 410.

For other cases see Decennial Digests, Attachment ⇨53.

SECTION 8.—RIGHT TO POSSESSION

Q. 30. M mortgaged lands in a lien jurisdiction to E. E in good faith purchased and took possession of the mortgaged property under a void foreclosure. The statute of limitations has run on the debt and the right to foreclose. M now brings ejectment against E. May he recover?

A. No; the great weight of authority is that a mortgagee, even in a lien state, who has obtained possession under the circumstances outlined, may retain it until the mortgage debt is paid, although the debt and the right to foreclose be barred. The reasons given for this result are not satisfying. One is that the mortgagee keeps the property as a pledge, distinct from his rights under the mortgage; but a pledge of land is an anomaly, and generally, as in the case of possession under a void foreclosure, there is no evidence of intention on the part of the mortgagor to create such a right. Another is that, where equitable defenses can be pleaded at law, the mortgagee ought to be allowed to assert the existence and nonpayment of the mortgage debt; but this assumes that in a lien jurisdiction a mortgagee in equity has a right to possession of the land, which is not true. Another explanation is that it prevents litigation, in that, if the mortgagee could be dispossessed, he would have to bring a separate action to foreclose; but, if this were true, it would not apply where the mortgagee had lost his right to foreclose. Possibly the doctrine represents a partial reversion to the title theory to evade the operation of the statute of limitations. It has been said that the mortgagee must have obtained possession, either with the mortgagor's consent or under circumstances not inconsistent with the relative rights under the mortgage. Thus a mortgagee who takes possession under a lease from the mortgagor cannot hold possession after the end of the term. But the possession taken as purchaser under a void foreclosure does not answer this test, and some cases expressly repudiate it.

Cf. *Howell v. Leavitt*, 95 N. Y. 617.

Barson v. Mulligan, 84 N. E. 75, 191 N. Y. 306, 16 L. R. A. (N. S.) 151.

Stouffer v. Harlan, 74 P. 610, 68 Kan. 135, 64 L. R. A. 320, 104 Am. St. Rep. 396.

Burns v. Hiatt, 87 P. 196, 149 Cal. 621, 117 Am. St. Rep. 157.

For other cases see *Decennial Digests*, Ejectment ¶23; Mortgages ¶191, 538.

SECTION 9.—RECEIPT OF RENTS AND PROFITS

Q. 31. M mortgaged Blackacre to E on January 1. On February 1 M leased to L for one year, with the rent to be paid in monthly in-

stallments at the end of each month. On February 28, L paid the first month's rent to M. The next month's rent L failed to pay. In the middle of April, E demanded of L that L pay to him the rent for February and March, and also, as each month's rent came due thereafter, to pay it to him. M at the same time demanded that L pay him the March rent, and also the fair value of the use and occupation of the land for the first half of April. L wants to know what his obligations are to M and E under these circumstances.

A. In a title theory state, although a mortgagor left in possession may lease the property, the mortgagee, since he could have ousted the mortgagor at any time, may also eject any lessee of the mortgagor. As to all rent, paid or unpaid, which has become due before the mortgagee asserts his right to take possession, the mortgagor is entitled, and therefore L was right in paying the February rent to M, and ought also to pay the March rent to him. For the first half of April M has no rights against L on the lease, because rent is not apportionable. However, although the authorities are opposed to such a recovery, M, if he had not deliberately brought on E's action, or deceived L originally by making him think M was owner, ought to have an enforceable claim for fair value of the use and occupation of the property for that period. E was a stranger to the lease, and so has no right to demand either that L pay him any rent that has come due under the lease previous to notice or that L continue in possession as lessee. It is said, frequently, that a tenant may escape eviction by the mortgagee, and acquire a defense to the mortgagor's claim for rent by "attorning" to the mortgagee; i. e., by recognizing him as his landlord. The true effect of such an "attornment," if accepted by the mortgagee, is to create a new tenancy, with the mortgagee as landlord, on terms similar to the old; but it ought not to affect any rights of the mortgagor to rent which became due before the mortgagee made his demand. (In a lien theory state, the mortgagee, since he has no title or right to possession, would have no valid claim against the tenant, L, at all.

Keech v. Hall, 1 Doug. 21.

Clarke v. Curtis, 1 Grat. (Va.) 289.

See Comer v. Sheehan, 74 Ala. 452, 457.

For other cases see Decennial Digests, Landlord and Tenant ¶205; Mortgages ¶199(1).

Q. 32. M, owner of Blackacre, leased it on January 1 to L for one year, with the rent payable monthly. On February 1 L paid the January rent to M. On March 1, when the February rent was due, L failed to pay it. On March 15 M mortgaged Blackacre to E. On

April 1 the March rent fell due. E wants to know what rights he has to the rent.

A. In a title jurisdiction, when a lease has been made before a mortgage is given, the mortgagee is a transferee of the reversion, and, as such, becomes assignee of the lease, which runs with the land. Since the statute of 4 Anne, c. 16, § 9, which dispensed with the necessity of attornment by the lessee, such assignee may demand that any due and unpaid rent be paid to him. Before such demand is made, L, even though he has notice of the mortgage, may pay to M, and M may keep it. The reason given for this rule is that there is an implied authority to the mortgagor to receive the rent, which authority is not revoked until demand is made by the mortgagee. Of course, all rent which has come due, even though unpaid, before the mortgage is given, belongs to the mortgagor. (The reason is that rent not paid when due becomes a debt, regarded as unconnected with the lease, and does not pass to a transferee of the reversion.) Although the problem is not raised by the case put, it should be noted that if, after a mortgage, a tenant pays rent to M before it is due, and prior to notice of the mortgage or demand by E, he is nevertheless liable to E, if E makes demand before the rent is due. There is no implied authority to M to receive rent before it is due. (In a lien jurisdiction, the mortgagee gets no rights at all in the lease.) Orege

Comer v. Sheehan, 74 Ala. 452.

King v. Housatonic R. Co., 45 Conn. 226.

Kimball v. Lockwood, 6 R. I. 138.

Mirick v. Hoppin, 118 Mass. 582.

Harris v. Foster, 32 P. 246, 97 Cal. 292, 33 Am. St. Rep. 187.

Contra: Stone v. Patterson, 19 Pick. (Mass.) 476, 31 Am. Dec. 156.

For other cases see Decennial Digests, Landlord and Tenant ¶15, 205; Mortgages ¶199(1, 3), 549.

SECTION 10.—ACCOUNTABILITY OF MORTGAGEE IN POSSESSION

Q. 33. M mortgaged his two farms, Blackacre and Whiteacre, to E, who went into possession. E made some effort to rent Blackacre, but, failing, he let it stay vacant and unused. He occupied Whiteacre, farming it, but his account books showed a loss at the end of the year, although previously the farm had yielded a good profit. The year was a normal one for farmers. M now asks for an accounting from E. For what should he be held accountable?

A. If a mortgagee goes into possession of mortgaged premises, whether it be by agreement with the mortgagor in a lien state, or by exercising his right to do so in a title theory state, he must account

to the mortgagor, and in either case substantially the same rules of accountability apply. The language of the earlier cases was that he would not be liable for what he might have made out of the property, but for his willful neglect; e. g., by turning out a good tenant, or refusing to rent to one. The standard ordinarily imposed to-day, however, is that of a provident owner. If he does not do all that such a hypothetical person would do to rent the property, then he is held, nevertheless, for its fair rental value. Assuming that he did do all that such a standard requires, and he has the burden of proving this, he is not liable for the rental of buildings; but it has been held that, even though he cannot rent a farm, he himself must till the fields, or, failing to do so, be liable for the fair rental value. This rule would apply to Whiteacre. Where he does work the farm, there are divers views. If there is evidence of fraud or concealment by the mortgagee, it is clear he will be held liable for all net profits but in no case less than the fair rental value. Where there is no such evidence, it is argued that, since the mortgagee ordinarily must account for all profits, he should be able to charge the mortgagor for any losses; but, even here, it has been held that the mortgagee will be held for the rental value, regardless of an actual loss. The basis for such a holding is the difficulty the mortgagor would have in proving fraud or errors by the mortgagee, since all affairs are in his hands. Some courts adopt a flat rule that the mortgagee shall pay only the fair rental value, whether he makes more or less than that.

Anonymous, 1 Vern. 45.

Shaeffer v. Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211.

Sanders v. Wilson, 34 Vt. 318.

Engleman Transportation Co. v. Longwell (C. C.) 48 F. 129.

For other cases see Decennial Digests, Mortgages ¶199(3), 489.

Q. 34. M mortgaged his farm, Blackacre, to E, who went into possession and worked it. In the course of his occupancy he spent a considerable amount of money in repairing the fences, in building a new hog pen, and in constructing a small house, which he rented. Some of the outlying parts of the farm had been rented, and E personally collected these rents, entering a charge in his books against the mortgagor for the time so spent. During E's occupancy there was an earthquake, which wrenched the main farm building in such a way that, although it could be braced easily and put in a safe condition, yet, if not fixed, it would collapse. E knew this, yet allowed it to fall in ruins. M brought a bill for an accounting by E. For what should E be charged, and for what credited, among the above items?

A. A mortgagee in possession may make necessary repairs and charge the mortgagor for them, but the law rightly limits the mortgagee to necessary repairs, on the ground that otherwise he might very easily do what the courts aptly have called "improving the mortgagor out of his equity of redemption." He may also make improvements, if they are necessary for the proper enjoyment of the use of the premises, as distinct from just making them more salable. If the improvements made fall outside of this test, although he cannot charge the mortgagor for them, the mortgagee is entitled for the duration of the mortgage to the increased rent resulting from the improvements. Further, if the circumstances are such that an owner would be reasonable in employing some one to collect the rents, then the mortgagee in possession may hire it done, and charge the expense up to the mortgagor. However, even though the situation is such that the mortgagee could have hired some one else, he cannot do the job himself and charge the mortgagor. The rule is analogous to that in the law of trusts, and the reason seems to be that the courts do not want the mortgage relation to exist, with the mortgagee having a selfish interest adverse to that of the mortgagor. The interest of the mortgagor is in having the work done for as little as possible; the interest of the mortgagee, as employee, is in getting paid as much as possible. The duty of the mortgagee to make repairs does not cover ordinary depreciation, but it does involve an obligation to act in emergencies, where great damage will probably be done if repairs are not made. Applying these principles, it would appear that the mortgagee probably could charge the mortgagor for repairing the fences and possibly for the new hog pen; he could not charge the mortgagor for the house, but could keep the rent from it accruing during his possession; his claim for services rendered in collecting rent would be disallowed; and he ought to be liable for the damage resulting from his failure to repair the shaken building.

Robertson v. Read, 14 S. W. 387, 52 Ark. 381, 20 Am. St. Rep. 188.

Fletcher v. Bass River Sav. Bank, 64 N. E. 207, 182 Mass. 5, 94 Am. St. Rep. 632.

Godfrey v. Watson, 3 Atk. 517.

Wells v. Van Dyke, 109 Pa. 330.

For other cases see Decennial Digests, Mortgages ⇨202, 203; Vendor and Purchaser ⇨212.

SECTION 11.—MORTGAGOR IN POSSESSION

Q. 35. M mortgaged real estate to E, remaining in possession of it. A storm badly damaged the mortgaged premises. E brings a

bill in equity to compel M to repair the damage done. Should E be given the relief he asks for?

A. No. A mortgagee may enjoin a mortgagor in possession from committing any damage which will impair the security; i. e., reduce its value, so that there is danger it will not be ample, if the mortgagee has to resort to it. However, if the property is injured without the fault of the mortgagor, there is no duty on him to make repairs, even though the security is impaired, except, possibly, in an emergency, to prevent greater damage. Apparently the solvency or insolvency of the mortgagor has no bearing on the problem. One reason for the original framing of the rule was that the mortgagee could take possession and make repairs. In a lien jurisdiction that is not true, and the mortgagee therefore must run the risk that, although at the time of damage the security is not impaired, later circumstances may make the damaged security inadequate, whereas the security as he originally received it would have been sufficient. Such a danger probably is not sufficient to change the rule.

Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 534.

Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148.

For other cases see Decennial Digests, Mortgages ⇨202, 205.

Q. 36. M mortgaged Blackacre to E, and E went into possession. After default by M, and while E was in possession, but before foreclosure, D cut down some valuable shade trees on the property. M desires to know whether he has an action at law against D.

A. Yes; in a title jurisdiction, if a mortgagor is left in possession, he has, even after default, all the rights of an owner against others than the mortgagee. Even though the mortgagee goes into possession, the mortgagor, before default, has a legal interest which enables him to maintain an action on the case against third persons, who do injury to the mortgaged property. After default, the mortgagor has only an equitable right to redeem, and, if out of possession, technically should be given no legal remedies. The equitable right, however, actually is recognized at law, and the mortgagor may recover for the damage done to his reversionary interest. A fortiori, in a lien jurisdiction, since the mortgagor has legal title, he would have an action.

Frankenthal v. Mayer, 54 Ill. App. 160.

Logan v. Wabash Western Ry. Co., 43 Mo. App. 71.

Sparhawk v. Bagg, 16 Gray (82 Mass.) 583.

For other cases see Decennial Digests, Mortgages ⇨217.

Q. 37. M mortgaged Blackacre to E, remaining in possession. Taxes on Blackacre coming due and not being paid, the property

was sold by the state for taxes. Could either M or E buy in the property at the tax sale free and clear of the mortgage?

A. No; a mortgagor in possession has the duty of paying taxes. The mortgagee, in such a case, may pay them and be subrogated to the tax lien of the state on the land; but the mortgagee has no duty to pay the taxes. If the mortgagor fails to perform his duty, and then buys in the property at the tax sale, the great weight of authority is that he will not take free and clear of the mortgage. In equity, at least, the purchase will be considered as payment of the taxes, on the theory that it would be unconscionable for the mortgagor to gain such an advantage by violating his duty. The same reason does not apply to the mortgagee, since he has no duty to pay the taxes. Several explanations have been advanced why the mortgagee should not be allowed to acquire a paramount title by purchase at the tax sale, most of them being open to criticism. The most plausible one is that, since the state is interested in having taxes paid promptly, and since the mortgagee is sufficiently protected by his power to pay when they are due, the rule is framed to discourage failure to exercise this power.

Price v. Salisbury, 138 P. 1024, 41 Okl. 416, L. R. A. 1917D, 520.

Kezer v. Clifford, 59 N. H. 208.

For other cases see Decennial Digests, Mortgages $\S$ 144, 200(1).

SECTION 12.—REDEMPTION

Q. 38. M mortgaged property to E, a tea broker; the mortgage deed containing the stipulation that M would not exercise his right of redemption, except within two years from the date on which the mortgage debt fell due. There was also a covenant by the mortgagor, purporting to charge the mortgaged premises, to whomsoever they might come, that during the continuance of the mortgage he would not allow any tea to be sold on the premises, except such as was purchased from E. Are these provisions of the mortgage valid?

A. The first one is invalid; the second is valid. The courts of equity, having first established that the mortgagor could redeem, even though he had not paid on the law day, went further and struck down all provisions put in the mortgage agreement which would clog or cut short the redemption right, other than the methods provided by law; e. g., foreclosure, or the running of the statute of limitations. Further, the courts looked with suspicion upon any agreements, made at the time of the mortgage, providing for collateral advantage to the mortgagee over and above the payment of the principal and interest. Thus the mortgagor could not be held

liable on his promise to pay a large bonus if he did not pay the debt on the law day. It is rather difficult to distinguish such a case from one in which there is a collateral advantage which is a condition precedent to redemption in any event. Possibly the former plays upon the optimism of the mortgagor while the latter does not. Unless there will result some violation of a usury statute, or unless there is an overreaching of the mortgagor, it is difficult to see why the latter kind of agreement should be bad. A fortiori, if the collateral advantage is not a condition precedent to redemption, and is not to outlast redemption, there is no objection to it.

Uhlfelder & Co. v. Carter's Adm'r, 64 Ala. 527.

Batty v. Snook, 5 Mich. 231.

See Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775.

Biggs v. Hodinott, [1898] 2 Ch. Div. 307.

Cf. Cleveland & Sandusky Brewing Co. v. Demko, 29 Ohio Cir. Ct. R. 102.

For other cases see Decennial Digests, Mortgages Ⓒ20, 33(2), 294; Usury Ⓒ34.

Q. 39. M, a retail grocer, gave a mortgage of his grocery store to E, a wholesale grocer; the mortgage in the usual form providing that, on repayment by M of all sums due, the mortgaged premises should be reconveyed. There was a further stipulation, so phrased that it would run with the land, that, whether any money should or should not be owing on the security, all groceries sold upon the premises should be bought of E. Is this stipulation valid?

A. No; although there is no restriction upon redemption in this case, after redemption the mortgagor does not get back his land in the same condition it was before he mortgaged it. Even where the obligation is not directly upon the land, but is a personal obligation on the mortgagor concerning the land or business, which would outlast redemption, it is held bad, although this seems a questionable decision. But where the collateral advantage attaches to the land, and sticks to it after redemption, it is clearly invalid as a clog on the redemption.

Noakes & Co., Ltd., v. Rice, [1902] A. C. 24.

Kreglinger v. New Patagonia Co., Ltd., [1914] A. C. 25.

For other cases see Decennial Digests, Mortgages Ⓒ20.

Q. 40. M successively mortgaged land to E-1 and to E-2. W, his wife, joined in the first mortgage to release her dower and homestead interests. A, a creditor of M, levied an attachment upon the land. C is a general creditor of M. Both mortgages were promptly recorded and are now overdue. Who may redeem the land from the first mortgage? From the second?

A, M, W, A, and E-2 may redeem from the first mortgage; M and A may redeem from the second. The general principle is that the mortgagor, or any other person having an interest in the land, and who is in privity with and claims under the mortgagor, and who would be prejudiced by the enforcement of the mortgage, may redeem from it. All the persons named fall within this test as to the first mortgage. A general creditor, such as C, does not. Neither W, who has not joined in the second mortgage, nor E-1, the senior incumbrancer, would be prejudiced by the enforcement of the second mortgage, and therefore cannot redeem from it.

Dawson v. Overmyer, 40 N. E. 1065, 141 Ind. 438.

For other cases see Decennial Digests, Mortgages ⇨594(1, 5).

Q. 41. M mortgaged property to E to secure a debt of \$500, by a deed absolute on its face. By statute such mortgages were invalid, unless a separate defeasance was given and recorded. This was not done. E wrongfully sold the property to P, a bona fide purchaser, before the law day. The property was worth and brought \$1,000 on the sale, but when the time for redemption came it was worth \$3,000. What are M's rights against E?

A. The sale to P cut off M's interest in the property. However, M could bring a quasi contractual action against E to recover the amount received from the sale. Moreover, by a bill in equity to redeem, M will be allowed to hold E either for the amount of money received from the sale, treating it as a substitute for the mortgaged res, or for the value of the property at the time of redemption.

Mooney v. Byrne, 57 N. E. 163, 163 N. Y. 86.

For other cases see Decennial Digests, Mortgages ⇨6, 595.

Q. 42. M mortgaged property worth \$100,000 to E to secure a debt of \$50,000. M, being a widow in indigent circumstances, was unable to redeem when the debt came due. E, knowing M's poverty and the value of the redemption interest, made successive offers of \$4,000, \$10,000, and finally \$15,000 to M for it. M sold to E at the last-named price. M now brings a bill to redeem the property. What decision?

A. After a mortgage has been created, the mortgagor is the owner of the redemption interest, and it is difficult to find any very substantial reason why he should be protected in his disposal of it to any one, including the mortgagee, more than any other vendor of a property interest. Nevertheless most courts watch subsequent transactions between mortgagor and mortgagee with a suspicious eye, and seem to think that there exists some sort of semifiduciary

relation between them. If the conveyance is without consideration, the original indebtedness still existing, the courts hold, and doubtless rightly, that the transaction is intended to give the mortgagee additional security, but that the mortgage situation still exists. Where the mortgagee gives inadequate consideration, as in the case under discussion, there is a conflict in the authorities, even where the inadequacy is very great. The better view seems to be that the transfer will not be upset unless the mortgagee appears to have been guilty of fraud, undue influence, or oppression in obtaining it, and that inadequacy of consideration is merely some evidence of these things.

Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775.

Villa v. Rodriguez, 12 Wall. 323, 20 L. Ed. 406.

De Martin v. Phelen, 47 P. 356, 115 Cal. 538, 56 Am. St. Rep. 115.

West v. Reed, 55 Ill. 242.

For other cases see *Decennial Digests*, Mortgages ⚡32(5), 294, 297.

SECTION 13.—TRANSFER OF THE MORTGAGED INTEREST

Q. 43. M mortgaged Blackacre to E. M then sold and conveyed by deed his interest in the property to P, who orally assumed the payment of the mortgage debt. The mortgage matured two years after this sale, and the mortgagee collected the amount of the debt from M. M now sues E for breach of his promise to pay the mortgage debt. May he recover?

A. Yes; it has been held that the assumption of a mortgage debt is not within that provision of the statute of frauds covering promises to answer for the debt or default of another. The reasons usually given are that the promise is to pay the transferee's own debt, or that the promise is not to the mortgagee, but to the mortgagor. Unless taken out by some doctrine of part performance, it would seem that such a promise would be under that section of the statute of frauds relating to contracts not to be performed within a year; the cases, however, have not considered the point. Moreover, the oral agreement is held admissible under the parol evidence rule, on the ground that the deed was not meant to cover the question whether the transferee did or did not assume the mortgage debt. The latter is considered a separate agreement for the purpose of setting forth the true consideration of the conveyance.

Herrin v. Abbe, 46 So. 183, 55 Fla. 769, 18 L. R. A. (N. S.) 907.

Neiswanger v. McClellan, 26 P. 18, 45 Kan. 599.

Strohauer v. Voltz, 4 N. W. 161, 42 Mich. 444.

For other cases see *Decennial Digests*, Covenants ⚡119; Evidence ⚡419(4); Frauds, Statute of ⚡18(3); Mortgages ⚡292(2); Vendor and Purchaser ⚡324.

Q. 44. M mortgaged Blackacre to E to secure the repayment of a debt. M then sold and conveyed his interest to P-1, who did not assume payment of the mortgage debt. P-1 then sold and conveyed to P-2, who expressly promised P-1 that he would pay off the mortgage debt. E wishes to know whether he has any direct right against P-2. Has he? *No in Oreg*

A. By the better view E should have no right. There are, however, cases both ways. The right of a mortgagee to have a direct action against a transferee of a mortgagor has been based upon one or another of three theories. The one most prevalent in the cases is that a third party beneficiary of a contract may sue upon it. *Oreg* Before such a person may sue, it is generally stated that there must have been an intention to benefit him. Since it seems difficult to believe that P-1 and P-2 entered into this contract to benefit E, recovery, logically, should be denied on this theory. The other two solutions are worked out on the theory that the mortgagee is the creditor of the promisee. One is that the promisee becomes a surety for the payment of the debt and a creditor is entitled to be subrogated to any security the surety has for his indemnity; in this case, the right against the transferee. The other, and most satisfactory theory, is that the relief granted is merely the application towards the payment of the debt of property belonging to the debtor, consisting, in this case, of a promise to him by the transferee.

See Williston, Contracts, § 384 et seq.

Ward v. De Oca, 52 P. 130, 120 Cal. 102.

Marble Sav. Bank v. Mesarvey, 70 N. W. 198, 101 Iowa, 285.

For other cases see Decennial Digests, Mortgages ⇨ 282(1), 292(1).

Q. 45. M mortgaged Blackacre to E. M then sold and conveyed his interest to P. Nothing was said, either about P assuming the mortgage debt or taking "subject to" it; but the purchase price was reduced by reason of the mortgage. The debt coming due, E collected it from M. What are M's rights against P?

A. When the mortgagor transfers "subject to" the mortgage, what is meant is that, as between the mortgagor and his transferee, the land shall be primarily liable for the payment of the debt, and the mortgagor shall be surety only. For this situation to exist it is not necessary that the transfer be expressly "subject to" the mortgage. Whether it is or not depends upon all the circumstances of the case. A circumstance which ordinarily controls is whether there was a reduction in the sale price because of the mortgage. Thus, in the principal case, it would be held that P took "subject to" the mortgage. Since that is so, on paying E, M clearly could

be subrogated to E's rights as mortgagee. Most states hold that M has no personal claim to indemnification against a transferee who has taken "subject to" the mortgage; and this seems correct. One who merely takes "subject to" the mortgage is under no personal duty to pay the debt, and ought not, therefore, to be under any personal duty to repay the one who does have to pay the debt.

Fuller v. Hunt, 48 Iowa, 163.

Johnson v. Zink, 51 N. Y. 333.

McArthur v. Goodwin, 160 P. 679, 173 Cal. 499.

Chaffee v. Hawkins, 154 P. 143, 157 P. 35, 89 Wash. 130.

Faulkner v. McHenry, 83 A. 827, 235 Pa. 298, Ann. Cas. 1913D, 1151.

For other cases see Decennial Digests, Mortgages $\Leftrightarrow$ 275, 278, 292(1), 556, 558.

Q. 46. M mortgaged Blackacre to E to secure a debt. M sold and conveyed the land to P-1, who did not assume the mortgage debt nor take "subject to" it. P-1 then sold and conveyed the land to P-2, who in express terms took it "subject to" the mortgage. E having collected the debt from M, the latter now claims that the land in the hands of P-2 had the primary duty to pay, and therefore he should have reimbursement out of it. Should he?

A. No; whether or not land in the hands of a transferee, P-2, is primarily liable for the payment of a mortgage debt, depends on whether it was so liable in the hands of the transferor, P-1. The stipulation probably was put in by the parties, P-1 and P-2, to guard against a supposed, though nonexistent, liability of the land in grantor's hands, not for the benefit of M.

Jumel v. Jumel, 7 Paige (N. Y.) 591, and note.

Cf. Boice v. Coffeen, 138 N. W. 857, 158 Iowa, 705.

Merritt v. Byers, 48 N. W. 417, 46 Minn. 74, contra.

For other cases see Decennial Digests, Estoppel $\Leftrightarrow$ 23; Husband and Wife $\Leftrightarrow$ 148; Mortgages $\Leftrightarrow$ 283(1), 291, 491.

Q. 47. M mortgaged Blackacre to E, his creditor, to secure a debt. M then sold and conveyed his interest in Blackacre to P, who assumed the mortgage debt. Later M, for valuable consideration, released P from his assumption of the debt. The question arises whether E nevertheless may hold P for the debt. What decision?

A. The cases are at variance on this point. Probably most courts would hold that M might release P at any time before E has in some way accepted the benefit of the agreement. If E's right is based upon the theory that the third party beneficiary of a contract gets a legal right to sue on the contract, it is difficult to see how E's right against P can be discharged at any time after the contract is made without his concurrence. If E's rights are based upon the

theory of subrogation to the right of a surety, or on the doctrine that P's promise is an asset which M's creditor, E, should be able to reach in equity, there seems no reason why, unless it is proscribed as a fraudulent conveyance, M should not be able to release P at any time.

Gifford v. Corrigan, 22 N. E. 756, 117 N. Y. 257, 6 L. R. A. 610, 15 Am. St. Rep. 508.

Biddel v. Brizzolara, 30 P. 609, 64 Cal. 354.

See Williston, *Contracts*, § 384 et seq.

For other cases see *Decennial Digests*, *Mortgages* ¶285.

Q. 48. M mortgaged Blackacre to E to secure an obligation obtained from M by E's fraud. The mortgage was in the form of a deed absolute on its face. E transferred Blackacre to P, who knew of the mortgage, and as consideration paid the amount of the mortgage debt. The conveyance from E to P made no express mention of the mortgage debt. The debt being due and unpaid, P now brings a bill against M to foreclose the mortgage. Should his bill be allowed?

A. No; the general rule in both title and lien jurisdictions is that an attempted transfer of the mortgaged property without reference to the mortgage debt is nugatory. If the mortgage is by a deed absolute on its face, apparently an exception is made, and a conveyance in terms of the land is assumed to pass the mortgage debt, with the land as security. On principle the inquiry should be in all cases whether the conveyance, construed in the light of the surrounding circumstances, evidenced an intention on the part of the mortgagee to assign the debt. But, granting that P became a transferee of the debt and the mortgage security, the question still remains whether he took free of M's defense against E that the debt was obtained by fraud. The general rule is clear that even a bona fide purchaser of a negotiable note after maturity, or of a nonnegotiable chose in action at any time, takes it subject to all equities and defenses in favor of the debtor, although not to equities in favor of third parties, or defenses based on "collateral" matter. So in the principal case M could set up E's fraud in P's action to foreclose.

Hawkins v. Elston, 146 P. 254, 58 Colo. 400.

Gooch v. Phillips, 148 P. 135, 46 Okl. 145.

Davis v. Beckstein, 69 N. Y. 440, 25 Am. Rep. 218.

Briggs v. Crawford, 121 P. 381, 162 Cal. 124.

For other cases see *Decennial Digests*, *Mortgages* ¶226, 256, 257.

Q. 49. M mortgaged Blackacre to E to secure the payment of a negotiable promissory note, which note and mortgage were obtained from M by E's fraud. The mortgage was by deed absolute on its

face. The note contained no reference to the mortgage. E then sold the note to P-1, a purchaser for value without notice of E's fraud. After this E forged what purported to be a negotiable promissory note, running from M to E and reciting in it that it was secured by a mortgage of Blackacre. This note E sold to P-2, a bona fide purchaser, and gave him a deed of Blackacre. Who has the right to enforce the mortgage on Blackacre, P-1 or P-2?

A. P-1 has. By the weight of authority a bona fide purchaser before maturity of a negotiable note takes it free of equities. Since he takes the chose in action free and clear of equities, and since the security is a mere accessory to the debt, following it in equity in title theory states, and at law in lien states, the mortgage may be enforced free of equities to the same extent as the note. A few states take the view that, though the claim may be assigned free and clear of equities, the mortgage is not negotiable, and a transferee can enforce it only to the extent that the original mortgagee could have. In either case P-1 has a superior claim to the chose in action, and can show by parol evidence that it was secured by the conveyance of Blackacre. P-2 cannot claim as a bona fide purchaser of Blackacre, because he took it, not believing that E had absolute title, but as mortgaged property, securing a claim to which he acquired no right, at least as against P-1.

Paige v. Chapman, 58 N. H. 333.

Paulsen v. Koon, 88 N. W. 760, 85 Minn. 240.

For other cases see Decennial Digests, Mortgages ☞ 256, 258.

Q. 50. M mortgaged Blackacre to E to secure the payment of a debt. E first assigned the debt and mortgage to P-1, who paid value for it. Later E purported to assign the debt and mortgage to P-2, who paid value and had no notice of the prior assignment to P-1. As between P-1 and P-2, who has priority in the mortgage of Blackacre?

A. Where there are conflicting assignments of a debt secured by a mortgage, there are, apart from recording acts, two different rules. The one applied in the majority of jurisdictions is that the assignees rank in the order of assignment. The minority rule is that they rank according to the time when each assignee has given notice to the mortgagor of the assignment. Almost everywhere, however, recording acts cover such situations. (Generally, under such statutes, the one who first records his assignment will be given priority, if at the time of getting the assignment he had no notice of conflicting claims.) Recording, of course, puts subsequent assignees on constructive notice of the recorded assignment. Ordi-

narily such statutes cover only assignments in terms of the mortgage, and do not apply to assignments of the mortgage debt without reference to the mortgage.

Thayer v. Daniels, 113 Mass. 129.

Dearle v. Hall, 3 Russ. 48.

Central Trust Co. v. West India Imp. Co., 62 N. E. 387, 169 N. Y. 323.

Day v. Munson, 14 Ohio St. 488.

Hoag v. Sayre, 33 N. J. Eq. 552.

Bunker v. International Harvester Co., 127 N. W. 1016, 148 Iowa, 708.

Murphy v. Barnard, 38 N. E. 29, 162 Mass. 72, 44 Am. St. Rep. 340.

For other cases see Decennial Digests, Assignments ⇨57; Chattel Mortgages ⇨138(1, 2), 155; Mortgages ⇨244(1, 2), 254.

SECTION 14.—PRIORITY AMONG INCUMBRANCERS

Q. 51. M mortgaged Blackacre to E to secure three debts, evidenced by nonnegotiable notes, each one maturing at a different time. No one of the notes mentioned the others. For value M assigned the note which matured last to P-1. Later he assigned to P-2, for value, the one which matured second, and the one which matured first to P-3. The debt assigned to P-3 is now due, and M is insolvent. Blackacre is not worth enough to pay all three debts. Who should have priority in enforcing the mortgage?

A. The courts usually follow one or the other of two different rules. One is that the assignees shall be given priority according to the maturity of their claims. This rule fallaciously assumes that the right to foreclose on maturity of the debt carries with it a right to priority in the proceeds. It is perfectly possible for the foreclosure sale to be made subject to payment of the obligations which are not yet due, or, if the property is sold free of the whole indebtedness, to order the application of the proceeds as seems most just. The other and majority rule is that the different debts are secured by one mortgage intended to secure one debt to the same extent as the others; therefore the different assignees should be entitled to share in the mortgaged property or its proceeds in proportion to the amounts of their respective claims, without reference to the time either of their maturity or of their assignment.

Penzel v. Brookmire, 10 S. W. 15, 51 Ark. 105, 14 Am. St. Rep. 23.

Jennings v. Moore, 47 N. W. 127, 83 Mich. 231, 21 Am. St. Rep. 601.

Parkhurst v. Watertown Steam Engine Co., 8 N. E. 635, 107 Ind. 594.

See dissenting opinion, Donley v. Hays, 17 Serg. & R. (Pa.) 400.

For other cases see Decennial Digests, Mortgages ⇨236, 244(1), 566.

SECTION 15.—MARSHALING

Q. 52. M mortgaged Blackacre and Whiteacre to E to secure a debt. M then sold Whiteacre to A, who paid the full value of the property. M is now insolvent, and E's claim is due. What are A's rights?

A. M, having been paid full value by A, is the principal obligor as between the two, and therefore A has a right to exoneration or reimbursement, as the case may be. In asserting either of these rights, however, A would rank with M's general creditors. On the other hand, if E should foreclose on Blackacre, instead of Whiteacre, A could keep Whiteacre and thus come out whole. Equity will not permit the caprice of the doubly secured creditor, E, to determine whether or not A shall bear a loss. At A's request an equity court will compel E to foreclose on Blackacre, and thus leave Whiteacre to A. If Blackacre is not of sufficient value to pay E's whole claim, A might pay E and be subrogated to his rights, and thus save Whiteacre, or he could let both Blackacre and Whiteacre be sold and get a right in the proceeds to be paid out of them, after E is satisfied and before the general creditors of M are paid. In case A did not move quickly enough to be given any of the foregoing remedies, and E foreclosed on Whiteacre, A ought to be subrogated, *pro tanto*, to E's mortgage on Blackacre.

Brown v. Simons, 44 N. H. 475.

See 5 L. R. A. 280.

Ann. Cas. 1914A, 715.

Ann. Cas. 1916D, 1119.

For other cases see Decennial Digests, Mortgages ¶290.

Q. 53. M, who owed a debt to E, gave a mortgage of Blackacre on April 1 and a mortgage on Whiteacre on May 1 to secure it. Both mortgages were recorded at once, but neither referred to the other. On June 1 M sold and conveyed Blackacre to A, who paid its full value and recorded his conveyance. On July 1 M sold and conveyed Whiteacre to B, who paid its full value and recorded his conveyance. M is insolvent, and E's debt is now due. A brings a bill in equity, praying that E be compelled to enforce his security right in Whiteacre before going against Blackacre. Should his prayer be granted?

A. No; when A bought Blackacre, he got an equitable right to compel E to foreclose on Whiteacre first, it being immaterial that the mortgage on Whiteacre was given after that on Blackacre, or that A did or did not know of its existence. If B had bought White-

acre, knowing all the facts, he would take it subject to this equity. In other words, the rule as stated by most courts is that, if each grantee paid full value and each knew all of the facts, the land must be taken by the mortgagee in the inverse order of alienation. If B was a purchaser for value without notice, the foregoing rule would be inapplicable. Nor, in such a case, should the caprice of the mortgagee decide on whom the loss shall fall. The best solution in such a situation is to prorate the mortgage debt on the two lots, in proportion to the value of the lots. If the two mortgages had been given at the same time, and both recorded, the question would be raised whether B, who is charged with notice that Whiteacre is subject to a mortgage, is not also charged with notice that Blackacre is subject to the same mortgage, and, further, with notice of any recorded conveyances of Blackacre, which would create an equity against Whiteacre to have it taken first. There is a dispute on the point. However, B is under no duty to search through the records to see if other security had been given for the debt at a date prior to the mortgage of Whiteacre. Consequently, in the principal case, aside from showing actual notice by B, A's prayer should be denied. What equity should do, if asked, is to prorate E's claim between Blackacre and Whiteacre in accordance with their value. } Not

Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458.

La Farge Fire Ins. Co. v. Bell, 22 Barb. (N. Y.) 54.

See 5 L. R. A. 280.

Ann. Cas. 1914A, 715.

Ann. Cas. 1916D, 1119.

For other cases see Decennial Digests, Marshaling Assets and Securities
 ¶10; Mortgages ¶156, 168, 290.

Q. 54. M, who owed a debt to E, gave mortgages of Blackacre and Whiteacre to secure it. These mortgages were recorded. Later M gave a second mortgage on Blackacre to A, who recorded his mortgage. Still later M gave a second mortgage on Whiteacre to B, who had actual notice of A's mortgage on Blackacre. M is insolvent. A brings a bill in equity, praying that E be compelled to enforce his mortgage on Whiteacre before resorting to Blackacre. Should his prayer be granted?

A. Most courts would grant it. Where A is a transferee for full value, as in question 53, it is easy to see that, as between A and M, the lot remaining in M's hands is the principal, and the property sold is only secondarily liable, and consequently entitled to exoneration or subrogation. In other words, A should have a right to

Note { have the loss thrown upon Whiteacre, and that right would bind subsequent purchasers with notice. But it is difficult to see how a junior incumbrancer, who took his security on just this one parcel as it stood, should have any right to have the other property subject to the prior mortgage taken first. However, the courts generally fail to make any distinction between subsequent grantees and subsequent mortgagees, and follow the same principles set forth in question 53.

Sibley v. Baker, 23 Mich. 312.

Meek v. Thompson, 42 S. W. 685, 99 Tenn. 732.

Robeson's Appeal, 12 A. 51, 117 Pa. 628.

For other cases see Decennial Digests, Execution ⌘115; Marshaling Assets and Securities ⌘10; Mortgages ⌘513.

MUNICIPAL CORPORATIONS

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Section

1. Powers.
 - (a) Power of City to Act Beyond its Boundaries.
 - (b) Validity of Unreasonable Ordinances.
2. Public Easements.
 - (a) Dedication of Public Streets.
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4. Liability for Torts.
 - (a) Liability for Flooding Premises as Result of Change in Grade of Streets.
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 - (c) Liability of a City in a Governmental Capacity.
 - (d) Liability of a City in a Proprietary Capacity.
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SECTION 1.—POWERS

(a) *Power of City to Act Beyond its Boundaries*

Q. 1. A part of the city of X, bordering on the ocean, was organized into a municipal improvement district. The city was given power by statute to make improvements "within the district," and to issue bonds of the district for the purpose of supplying the funds with which to construct the improvements. Some of the improvements, which consisted of pleasure piers and rock jetties, were to lie partially within the corporate limits and partially on the ocean bed, while others were completely outside the city limits. A, a resident and taxpayer in the improvement district, seeks to enjoin the issuance and sale of bonds for such project. Should the injunction be granted?

A. Probably yes. The general principle is that a municipality cannot hold or purchase real estate beyond its boundaries, in the absence of statutory authority to do so. *Farwell v. City of Seattle*, 86 P. 217, 43 Wash. 141, 10 Ann. Cas. 130. So the taxing power of the city does not extend beyond the territorial limits of the city. *Gilchrist's Appeal*, 109 Pa. 600. In exceptional cases, it is recognized that a city, without special legislative grant, may purchase and hold extraterritorial lands, for such purposes as pest houses, cemeteries, parks, sewers, and similar municipal projects. *City of Champaign v. Harmon*, 98 Ill. 491. Likewise, when an express

power has been given to the city, it may, as an implied incident to that power, act beyond its boundaries when such is necessary or clearly desirable to carry out the project. *Cochran v. Village of Park Ridge*, 27 N. E. 939, 138 Ill. 295. Some courts have suggested that, while the city may not exercise its governmental powers beyond its limits, yet a business function of the city may be carried on outside its boundaries, providing that such function comes within the scope of the city's corporate authority. *Schneider v. City of Menasha*, 95 N. W. 94, 118 Wis. 298, 99 Am. St. Rep. 996. In a situation identical with the instant case, the Supreme Court of California was strict in its application of the rule that a city cannot act beyond its territorial limits, and held that the injunction should be granted. *Mulville v. City of San Diego*, 192 P. 702, 183 Cal. 734. See 9 Cal. Law Rev. 161; 19 Mich. Law Rev. 352; 30 Yale Law J. 304.

For other cases see *Decennial Digests, Municipal Corporations* ¶57, 277, 283, 966(2), 980(7).

(b) Validity of Unreasonable Ordinances

Q. 2. The city of X duly passed an ordinance for the paving of D street with asphalt pavement, the expense to be borne by the surrounding property owners. D street was only three blocks long, and had but a short time before the passage of this ordinance been satisfactorily macadamized. This pavement was still in good condition. A, who owns property on D street, refuses to pay the special assessment which had been levied to cover the cost of the improvement. Can the assessment lien on A's property be enforced?

A. Probably not. Generally the power to determine whether public necessity requires a public improvement, such as in the instant case, is committed to the discretion of the city council. The exercise of this discretion is presumptively valid, unless it is made to appear that the council's action is arbitrary or unreasonable. *Diamond v. City of Mankato*, 93 N. W. 911, 89 Minn. 48, 61 L. R. A. 448. The power of the courts to declare such ordinances invalid for unreasonableness, however, is exercised with great caution. *Clark v. City of Chicago*, 82 N. E. 370, 229 Ill. 363. The validity or invalidity of the ordinance depends upon the reasonableness of the same and the necessity of the improvement. In determining whether the improvement ordinance is reasonable, the courts will "take into consideration the object to be accomplished, the means for its accomplishment, and all existing conditions and circum-

stances." *City of Carbondale v. Reith*, 147 N. E. 422, 316 Ill. 538, 543. So, in a situation similar to the instant case, where an ordinance was passed to lay two blocks of asphalt pavement, which required the expense of tearing out a practically new macadam pavement in good condition, at a single street intersection, and of replacing it with asphalt, the cost to be borne by the property owners in the two blocks, the court held the ordinance to be unreasonable and void. *City of Chicago v. Brown*, 69 N. E. 65, 205 Ill. 568.

For other cases see *Decennial Digests, Municipal Corporations*, §278(1).

SECTION 2.—PUBLIC EASEMENTS

(a) *Dedication of Public Streets*

Q. 3. The owner of a tract of land within the city of X prepared detailed plans and a map, which divided the land into town lots, with streets at regular intersections. The map was filed and recorded, but the streets were never used by the public, nor did the council of the city accept the plans. Do these facts constitute a dedication to a public use?

A. No. In order to have a proper dedication of property to public use, three elements are necessary: (1) the dedication must be to a public use; (2) the offer must be made with an intent to dedicate by one legally capable of making such dedication; (3) there must be an acceptance of the property by the proper authorities. According to the doctrine of dedication, a private owner by an informal action is enabled to create a legal power in the public to vest in itself title to his land. This has usually been based upon the theory of estoppel, though text-writers have raised much opposition to this view on the ground that in many cases the general public has not altered its position in reliance on the offer. The important question is whether or not there has been an acceptance of the offer of dedication, since the great weight of authority requires that the public accept this offer. *City of Venice v. Madison County Ferry Co.*, 75 N. E. 105, 216 Ill. 345. Acceptance may be made in one of several ways: (1) A formal or express acceptance by the proper authorities; (2) an implied acceptance, or an acceptance by the acts of parties having the proper capacity to accept; and (3) an acceptance by public user. It is generally held that an offer of dedication before acceptance is revocable. However, when third persons have acquired rights which would be impaired by revocation, the offer is always irrevocable, regardless of

acceptance by the public. *Boise City v. Hon*, 94 P. 167, 14 Idaho, 272. So dedication may be established by the sale of lots with reference to the grantor's recorded map. Yet merely laying out streets or the filing of a map, without actually throwing them open to use, or without selling the lots with reference to the plat, will not generally constitute a dedication. *Hillmer Co. v. Behr*, 106 N. E. 481, 264 Ill. 568, 580. In the instant case, since the offer of dedication was never accepted by the city council, and the public failed to act upon the grantor's offer, there was no dedication. *Elliott v. McIntosh*, 183 P. 693, 41 Cal. App. 763. See 16 Mich. Law Rev. 447; 29 W. Va. Law Quart. 207.

For other cases see *Decennial Digests*, Dedication ¶19(1, 5), 31, 37, 38.

(b) Obstruction of Streets under License of the City

Q. 4. The city of X licensed A to erect ten newstands, four feet in width and eight feet long, to be used by A for the sale of newspapers and magazines. These stands were erected upon various streets in the business section of the city. Some time after their erection the state, on the relation of Y, a taxpayer and citizen of the city of X, instituted mandamus proceedings to have the stands removed. Should the writ be granted?

A. Yes. The public is entitled to the free and unobstructed use of the public streets. Any obstruction of the streets for private use interferes with this public right, and constitutes a nuisance. There are certain exceptions, however, to this general statement, such as the necessities of trade, the piling of building materials, watering troughs, and the like. These have been considered by the courts as temporary or necessary obstructions, and not amounting to a substantial interference with the purposes for which streets and highways are maintained. *Cohen v. Mayor of the City of New York*, 21 N. E. 700, 113 N. Y. 532, 4 L. R. A. 406, 10 Am. St. Rep. 506. Some courts, however, have been more strict in the application of the general rule, and have held that even such public conveniences as band stands and voting booths are unlawful obstructions of the public streets, when so situated as to interfere with traffic or the normal conduct of business. *Atterbury v. West*, 122 S. W. 1106, 139 Mo. App. 180; *Haberlil v. City of Boston*, 76 N. E. 907, 190 Mass. 358, 4 L. R. A. (N. S.) 571. A municipality has no power to make lawful by ordinance any obstructions in the public streets, which are unlawful in the absence of legislative enactment. *People v. Harris*, 67 N. E. 785, 203 Ill. 272, 96 Am. St. Rep. 304. On these general principles it has been held that the

city has no power to authorize the erection of fruit and newspaper stands. *People ex rel. Hofeller v. Buck*, 184 N. Y. S. 210, 193 App. Div. 262; *Costello v. State*, 18 So. 820, 108 Ala. 45, 35 L. R. A. 303. See 21 Col. Law Rev. 99; 34 Harv. Law Rev. 439.

For other cases see *Decennial Digests, Municipal Corporations* ⇨776, 682 (1), 693, 697(1).

SECTION 3.—CONTRACTUAL LIABILITIES

(a) *Right to Recover on a Void Contract*

Q. 5. The city of X contracted with A for the purchase of 1,000 voting machines. A delivered 200 of these machines, which the city accepted and paid for. There hundred more were later accepted. Thereupon the city was restrained in a taxpayers' suit from accepting any more machines. A statute provided that no contract shall be made without a prior appropriation therefor, and no appropriation had been made by the city council. A sues for the contract price. Can he recover?

A. No. Such statutes are generally considered mandatory, and not directory. *Roberts v. City of Fargo*, 86 N. W. 726, 10 N. D. 230. Therefore contracts made in violation thereof are void, and no recovery is allowed upon them. *Hurley v. Inhabitants of City of Trenton*, 49 A. 518, 66 N. J. Law, 538. A minority of jurisdictions, however, have allowed a recovery for the reasonable value of the materials furnished or services rendered, where the plaintiff has fully performed. Various grounds have been assigned by these minority jurisdictions for such recovery, for example, estoppel or quasi contract. Since such recovery defeats the purpose of the statutory command, the denial of recovery by the majority rule would seem to be correct. *Empire Voting Mach. Co. v. City of Chicago* (C. C. A.) 267 F. 162. In certain cases, as in the principal case, the denial of recovery is somewhat mitigated by allowing the plaintiff to regain in specie the goods or material, wherever possible. *La France Fire Engine Co. v. City of Syracuse*, 68 N. Y. S. 894, 897, 33 Misc. Rep. 516. See 9 Mich. Law Rev. 671.

For other cases see *Decennial Digests, Municipal Corporations* ⇨226, 248 (3), 249, 254, 288(2), 859, 868(1, 2).

(b) *Liability of a City on a Promissory Note—On Money Had and Received*

Q. 6. The city of X, in the state of Y, desired to build a new city hall. Money had been legally voted for the purchase of the necessary land, but not for the construction of the building. The plan

was to erect a building to cost \$100,000. A, a public-spirited citizen, offered to loan the city this amount without interest for three years. The offer was accepted, and a negotiable promissory note of the city was given to A by the city treasurer, after authorization by the city council. The land was purchased and the city hall was erected. Upon maturity, A presented the note for payment, but the city auditor refused to approve it. Can A recover (1) on the promissory note; or (2) on money had and received?

A. (1) No. Municipal corporations have only such powers as are granted to them by the state Constitution or by statute, either expressly or by necessary implication. It is generally held that the power to borrow money is not a necessary incident of municipal functions, and therefore does not exist, unless expressly given, or unless some duty is imposed upon the city. *Swackhamer v. Hackettstown*, 37 N. J. Law, 191. Although early cases expressed a contrary view, the more modern authorities hold that there is no implied authority to borrow money for municipal purposes. *Luther v. Wheeler*, 52 S. E. 874, 73 S. C. 83, 4 L. R. A. (N. S.) 746, 6 Ann. Cas. 754. Where an implied power to incur indebtedness has been found, this power does not extend to the issuance of negotiable promissory notes. *Reed v. City of Cedar Rapids*, 113 N. W. 773, 136 Iowa, 191. Nonnegotiable promissory notes may, where the express power to incur indebtedness exists, be issued because the purchaser would take subject to all equities in favor of the city. There are, however, a few decisions to the effect that power to incur indebtedness, conferred upon the city, includes, as an incident thereto, the power to execute a negotiable promissory note to evidence such debt. *Second Nat. Bank of New Albany v. Town of Danville*, 60 Ind. 504.

(2) The cases are not in harmony as to whether a quasi contractual recovery for money had and received will be allowed against the city, where no recovery is possible on the contract itself. One line of cases expresses the view that to allow a recovery for money had and received, while denying the power to corporate officers to make a valid contract to repay borrowed money, would be (1) to repudiate such a contract in the abstract, while ratifying and giving it full effect in the concrete; and (2) to raise an implied contract to repay, where there is no power to make an express contract. *Swackhamer v. Hackettstown*, *supra*; *Wells v. Town of Salina*, 23 N. E. 870, 119 N. Y. 280, 7 L. R. A. 759. Other well-considered decisions, which at the present time probably represent the weight of authority, allow such a recovery upon an ob-

ligation imposed for money had and received, which had been used by the city for legitimate corporate purposes, even though the municipality had no power to borrow the money and the note given therefor was void, provided, however, that there was no express prohibition against borrowing such money. *Luther v. Wheeler*, supra; *Allen v. Intendant and Councilmen of La Fayette*, 8 So. 30, 89 Ala. 641, 9 L. R. A. 497; *First Nat. Bank of Goodhue v. Village of Goodhue*, 139 N. W. 599, 120 Minn. 362, 43 L. R. A. (N. S.) 84. If the money was squandered, or used extravagantly, for municipal purposes, even under the latter view, there could be no recovery beyond the benefit received. See *Quasi Contracts*, Question 2.

For other cases see *Decennial Digests, Municipal Corporations* ¶249, 869, 908.

(c) *Liability of a City on Its Bonds—Estoppel by Recitals*

Q. 7. The Constitution of the state of Y provided that no municipal corporation "shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." The city of X, in the state of Y, issued bonds containing this recital: "This bond is issued by the council of the city of X, under and by virtue of, and in full conformity with, the laws of the state of Y, and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of these bonds. It is further certified that the total amount of this issue does not exceed the limit prescribed by the Constitution of the state of Y." As a matter of fact, when these bonds were issued, the constitutional limit had been greatly exceeded. A purchased \$5,000 of these bonds in the open market for the face value thereof, plus interest. Can he enforce them against the city?

A. Yes. It is desirable that municipalities shall be able to make necessary improvements, and to that end to issue the usual negotiable bonds over a period of years. If these bonds are to be attractive to the investor, they must have a high degree of stability and security. It is this practical consideration that has led the overwhelming majority of courts to lay down the principle that, if the bonds contain recitals made by the officers of a municipal corporation, who in fact had authority to make such representations, to the effect that all prescribed conditions precedent to the valid issuance of the bonds have been fully complied with, then the city

is estopped to set up irregularities as against a bona fide purchaser of the bonds. *Gunnison County v. E. H. Rollins & Sons*, 19 S. Ct. 390, 173 U. S. 255, 43 L. Ed. 689. Of course, if the municipal officers had no authority whatever to issue the bonds, this would always be a defense; of such want of authority, all cases agree, even the bona fide purchaser is charged with notice. *Webb v. Lafayette County*, 67 Mo. 353; *Ogden v. County of Daviess*, 102 U. S. 634, 26 L. Ed. 263. Likewise, if the Constitution or statute authorizing the bond issue does not leave it to the municipal officers to ascertain whether the condition precedent has been complied with, but refers to some definite public record as a test of this fact, the purchaser is put on notice that authority to act depends upon the existence of the requisite facts as shown by the record and that the municipal officers have no authority to determine its existence. *Farmers' Loan & Trust Co. of New York v. Wilcox County, Ga.* (C. C. A.) 287 F. 809. In the instant case, however, the recital that the bonds were issued according to and in conformity with certain statutes or the state Constitution is in effect a recital that all the requirements have been complied with, and where one of the requirements is that the bond issue shall not exceed a certain percent. of the taxable property of the municipality, the determination of which fact is expressly or impliedly imposed in the officers issuing such bonds, this recital is construed to amount to a statement that the bonds are within the debt limit, and the city is estopped to assert the contrary. *Presidio County v. Noel-Young Bond & Stock Co.*, 29 S. Ct. 237, 212 U. S. 58, 53 L. Ed. 402. Especially is this so where the recital, in addition to a reference to the statute, also expressly states that the bonds are within the debt limit. *City of Beatrice v. Edminson*, 117 F. 427, 54 C. C. A. 601. For a general discussion, see *Town of Aurora v. Gates*, 208 F. 101, 125 C. C. A. 329, L. R. A. 1915A, 910; 72 Univ. Pa. Law Rev. 196; 13 Col. Law Rev. 152.

For other cases see *Decennial Digests, Counties*, ¶18; *Estoppel* ¶62(3); *Municipal Corporations* ¶943(1, 2, 3, 4), 945, 948(2).

SECTION 4.—LIABILITY FOR TORTS

(a) *Liability for Flooding Premises as Result of Change in Grade of Streets*

Q. 8. Pursuant to an ordinance passed by the board of aldermen of the city of X, the grade of a certain street was raised about six inches and the street repaved. Due to the raise in the grade of the street, a large amount of surface water accumulated, which prior

to the repaving had seeped into the ground. The water overflowed the curb, flooding the cellar of A's factory, and thereby caused considerable damage to his goods stored there. Can A recover from the city for his loss?

A. Probably not. There is a conflict of authority on this subject. The distinction is generally made between an obstruction of a natural water course and the causing of the accumulation of surface waters upon the land of an abutting owner. In the former situation, the city is generally liable for damages resulting from causing such a stream to overflow on private property. *Conniff v. San Francisco*, 7 P. 41, 67 Cal. 451. *Winchell v. City of Waukesha*, 85 N. W. 668, 110 Wis. 101, 84 Am. St. Rep. 902. However, it is generally held that surface water is a "common enemy," and every property owner must get rid of it as best he can. Therefore, in the absence of negligence, the city is not liable for injuries resulting from the incidental interruption or change in the ordinary flow of surface water, caused by the grading or improvement of streets. *Chidsey v. City of Pascagoula*, 59 So. 879, 102 Miss. 709. *Thorpe v. City of Spokane*, 139 P. 221, 78 Wash. 488. Some authorities, on the other hand, hold that, regardless of negligence, the city is liable, where it changes the grade of the street, so as to cause water which would normally have flowed in another direction to accumulate upon one's land and cause damage thereto. *City of Eufaula v. Simmons*, 6 So. 47, 86 Ala. 515. See 20 Col. Law Rev. 619. Of course, if there is any actual negligence on the part of the city, or where any negligence can be imputed to it, the city is liable. The courts seem to be liberal in finding negligence whenever there is some positive act on the part of the city from which negligence can reasonably be inferred. *Stanford v. San Francisco*, 43 P. 605, 111 Cal. 198; *Town of North Judson v. Lightcap*, 84 N. E. 519, 41 Ind. App. 565. *Hume v. City of Des Moines*, 125 N. W. 846, 146 Iowa, 624, 29 L. R. A. (N. S.) 126, Ann. Cas. 1912B, 904. So, in the instant case, if there was negligence in the raising of the grade of the street, the city would be liable.

For other cases see *Decennial Digests, Municipal Corporations* ¶834, 835, 838, 845(7).

(b) *Liability of a City for Slippery Sidewalks*

Q. 9. After a heavy storm, ice and snow accumulated upon the sidewalks of a certain street in the city of X. This accumulation was allowed by the city to remain for nearly a week. A, without

fault on his part, was injured by a fall on the sidewalk when he slipped on the ice. He sues the city for damages. Can he recover?

A. Yes. Sidewalks are generally considered as a part of the public street. The city is under the duty to exercise reasonable care in making its streets and sidewalks safe for purposes of ordinary travel. To that end the city is under a duty to remove all dangerous obstructions which interfere with such travel. *City of Louisville v. Carr*, 263 S. W. 674, 204 Ky. 119. If the city negligently fails to remove obstruction or defects in the sidewalks, it becomes liable for injuries resulting therefrom, even though these defects were created by an abutting property owner or some other third party. *Beane v. City of St. Joseph*, 256 S. W. 1093, 215 Mo. App. 554. The liability of the city in such cases turns largely, in the absence of statute, upon the question of notice to the city of such defects or obstructions. Actual notice of the condition of the sidewalk is not necessary. Constructive notice is sufficient, where the condition has existed for a sufficiently long period of time, so that the city should have known of it. *Parks v. City of Des Moines*, 191 N. W. 728, 195 Iowa, 972. The courts differ widely as to just how long such obstructions may remain unremoved or unrepaired before the city will be charged with such constructive notice. One case has held that the falling of the snow is itself sufficient notice. *Foxworthy v. City of Hastings*, 41 N. W. 132, 25 Neb. 133. On the other hand, it has been held that the lapse of nearly a week was insufficient to charge the city with notice of accumulated ice and snow. *Corey v. City of Ann Arbor*, 96 N. W. 477, 134 Mich. 376. See 9 Va. Law Rev. 562.

For other cases see *Decennial Digests, Municipal Corporations* 762(2), 790, 791(2), 792.

(c) Liability of a City in a Governmental Capacity

Q. 10. A, without fault on his part, was run over and seriously injured by a fire truck owned by the city of X. At the time of the injury, the truck was being negligently operated by firemen in the employ of the city. A sues the city for damages. Is the city liable?

A. No. In discussing the liability of a municipal corporation for the torts committed by its agents, the courts distinguish between (1) governmental and (2) proprietary functions of the city. The principle, simply stated, is that a municipal corporation is not liable in a private action for injuries resulting from the exercise of a governmental function, but it is under a common-law liability for the

torts of its agents while performing proprietary duties. *Johnston v. City of Chicago*, 101 N. E. 960, 258 Ill. 494, 45 L. R. A. (N. S.) 1167, Ann. Cas. 1914B, 339. It is apparent, therefore, that in all such cases liability turns upon whether a particular function is governmental or proprietary. It is uniformly held that a city acts in its governmental capacity in the maintenance of its fire and police departments, and that the city is immune from liability for the tortious acts of its firemen and policemen. *Wilcox v. City of Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Stedman v. City and County of San Francisco*, 63 Cal. 193. Although this distinction between governmental and proprietary functions has been severely criticized, it has been seldom repudiated by the courts. 14 Cal. Law Rev. 292.

For other cases see Decennial Digests, *Municipal Corporations* ¶745½, 747(1, 3).

(d) *Liability of a City in a Proprietary Capacity*

Q. 11. The city of X owned and operated an electric lighting plant, used both for the purpose of lighting its streets and furnishing light to its inhabitants. A was walking along a path, and came in contact with a live wire of the city's electric plant, which was negligently allowed to lie across the path, and was severely injured. He sues the city for damages. Is the city liable?

A. Yes; municipal corporations possess a dual character, one governmental, and the other proprietary. When acting in the latter capacity, their liability arising out of tort is the same as that of natural persons or private corporations. There are numerous enterprises conducted by cities, concerning which courts greatly differ as to whether they are proprietary or governmental. However, waterworks, gas plants, and electric lighting plants are consistently held to be operated in a proprietary and private, and not in a governmental, capacity. *Bailey v. Mayor of New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Davoust v. City of Alameda*, 84 P. 760, 149 Cal. 69, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847. See 34 Yale Law J. 1, 129, 229.

For other cases see Decennial Digests, *Municipal Corporations* ¶733(3, 4).

SECTION 5.—RIGHTS AND REMEDIES OF CREDITORS

Q. 12. A entered into a valid contract with the city of Y. Upon breach of the contract by the city, A sued the city and recovered judgment. What are A's rights against the city?

A. Most states recognize the right of the creditor to levy execution on certain property of the municipality, but the property subject to execution is, indeed, very limited. Generally, the property of a city, which is held in a proprietary capacity, devoted to no use of a public character, and charged with no public trusts or uses, is subject to execution, unless some statutory or constitutional provision forbids it. Property held by a municipality for the purpose of exercising a governmental function, or to exercise functions which, even though proprietary in nature, as a waterworks, are held for the use of the public needs, are never subject to execution. *Marin Water & Power Co. v. Town of Sausalito*, 193 P. 294, 49 Cal. App. 78; *City of Monroe v. Johnson*, 30 So. 840, 106 La. 350. Except in New England, the creditors of the city cannot resort to the private property of the inhabitants. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197. A few jurisdictions adhere to the doctrine that judgments against the city cannot be enforced by ordinary writs of execution, and relegate the creditor to a remedy to compel the city to levy a tax to enforce payment. This latter method, which is generally recognized, is the most effectual procedure by which a money judgment may be enforced against a city. This remedy is enforced by a writ of mandamus, compelling the city, after judgment against it, or the return of execution unsatisfied, to levy and collect a tax sufficient to pay the judgment. *City of San Antonio v. Routledge*, 102 S. W. 756, 46 Tex. Civ. App. 196. In the absence of statute or constitutional provision, a writ of mandamus will not lie prior to a recovery of a judgment by the creditor. *Culberson County v. Groves Lumber Co.* (Tex. Civ. App.) 191 S. W. 165; 32 Yale Law J. 746.

For other cases see Decennial Digests, Mandamus ☞ 111, 114, 116; Municipal Corporations ☞ 1037, 1038.

NEGOTIABLE INSTRUMENTS¹

By WILLIAM E. BRITTON, Professor of Law in the University of Illinois

Section

1. Formal Requisites of Negotiability.
2. Negotiation.
3. Holder In Due Course.
4. Equities and Defenses.
5. Liability of Parties.
6. Discharge.

SECTION 1.—FORMAL REQUISITES OF NEGOTIABILITY

Q. 1. Is the following note negotiable?

I owe P one hundred dollars. [Signed] M.

A. No; while the negotiable character of an instrument is not affected by the fact that it is not dated, or that it does not specify the place where executed or where payable, it is rendered nonnegotiable if it does not contain a promise or an order to pay, and if it does not contain words of negotiability. The acknowledgment of a debt is not a promise.

Negotiable Instruments Law, § 1, par. 2, and section 6 pars. 1, 3.

Gay v. Rooke, 23 N. E. 835, 151 Mass. 115, 7 L. R. A. 392, 21 Am. St. Rep. 434.

For other cases see Decennial Digests, Bills and Notes ⇨41.

Q. 2. Is the following instrument negotiable?

The First National Bank.

Chicago, Illinois, Jan. 10, 1925.

This is to certify that P has deposited with this bank one thousand dollars (\$1,000.00), payable six months from date, with interest at three per cent. per annum upon return of this certificate properly indorsed.

M, Cashier.

A. Yes; while the law requires words of negotiability, and normally this requirement is met by the use of the words "or order," or "bearer," any words of similar import are sufficient. The use of the phrase "upon return of this certificate properly indorsed"

¹ In the preparation of these review questions on the Law of Negotiable Instruments, the compiler has had in mind primarily the common-law rules and the provisions of the Uniform Negotiable Instruments Law, which has now been enacted in all states. No account has been taken of the changes which have been made in the Uniform Act as adopted in some states.

sufficiently indicates an intention that the instrument should be payable to the depositor or his order.

Nelson v. Citizens' Bank, 180 N. Y. S. 747, 191 App. Div. 19.

For other cases see *Decennial Digests, Bills and Notes* ¶151.

Q. 3. An instrument read as follows: I promise to pay P or order, one hundred dollars (\$100.00) out of any money due me from the estate of A. This instrument was signed by M. Is it negotiable?

A. No; while the instrument contains a promise to pay a specified sum, it is conditional upon the existence of the fund specified. The entire credit of the maker does not support the promise; hence the instrument fails to comply with the rule that an instrument, to be negotiable, must contain an unconditional promise or order.

Negotiable Instruments Law, § 1, par. 2, and section 3.

Carlos v. Fancourt, 5 T. R. 482.

Q. 4. A bill of exchange, otherwise negotiable, directed payment by the drawee "on account of a contract this day executed by the drawer and the payee." Is it negotiable?

A. Yes. The reference to the contract is not so phrased as to expressly qualify the promise to pay, but merely indicates that the note arose out of the contract referred to. The promise is not therefore conditional.

Negotiable Instruments Law, § 3, par. 2; *First Nat. Bank of Hutchinson v. Lightner*, 88 P. 59, 74 Kan. 736, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, 11 Ann. Cas. 596.

For other cases see *Decennial Digests, Bills and Notes* ¶152.

Q. 5. Is a note negotiable which recites that it was given in payment of the purchase price of property bought by the maker from the payee, title to which was to remain in the payee until the note was paid?

A. At common law there was a conflict of authority on this question. This conflict continues under the Negotiable Instruments Law. Where an instrument contains a recital of the contract or other transaction out of which the instrument has arisen, the question presented is whether or not the promise or order to pay is to be controlled by any condition which appears in the recital of the underlying transaction. Where the promise to pay the note reads: "I promise to pay," etc., "subject to the performance of the following contract," there can be no question but that the promise is conditional, and the instrument accordingly nonnegotiable. Where, on the other hand, the promise reads, "I promise to pay," etc., and

there is added thereto no language whatsoever which would tend to qualify it, it is more difficult to determine whether or not a condition set forth in the accompanying contract is to be deemed in any way related to the promise to pay the note. Wherever the recited contract is in any degree executory, there will appear therein either express or implied conditions precedent to the duty of the obligor in such contract to perform.

It is believed that the better rule is that a promise or order will be rendered conditional only when there is language somewhere on the instrument which expressly qualifies the promise or order to pay the instrument, as distinguished from the simple contract obligation set forth in the recital of the underlying transaction. *Note*

Fleming v. Sherwood, 139 N. W. 101, 24 N. D. 144, 43 L. R. A. (N. S.) 945.
Welch v. Owenby, 175 P. 746, 73 Okl. 212.

Siegle Cooper Co. v. Chicago Trust & Savings Bank, 23 N. E. 417, 131 Ill. 569, 7 L. R. A. 537, 19 Am. St. Rep. 51.

8 Cal. Law Rev. 172, 174.

For other cases see Decennial Digests, Bills and Notes ¶163, 168.

Q. 6. A, B, and C are partners, and as such issue notes "payable only out of the assets of the business of the partnership." Are the notes negotiable?

A. No, because the instruments are payable out of a particular fund; i. e., the property embarked in the enterprise. The individual credit of the partners does not accompany the promise; therefore the promise is conditional. Where, however, bonds are issued by a joint-stock association, and the number of the members is large and the assets considerable, there is more reason for holding that such instruments are negotiable, although made payable exclusively out of the assets of the association. The difficulty in this theory, however, is that there is no readily workable rule for classifying such partnerships. By the strict rule such an instrument should be nonnegotiable, irrespective of the value of the assets made available for the payment of such obligations.

Hibbs v. Brown, 82 N. E. 1108, 190 N. Y. 167.

For other cases see Decennial Digests, Bills and Notes ¶339.

Q. 7. Is a note negotiable which recites that it is secured by mortgage, if the mortgage instrument contains stipulations which, if imported into the note, would destroy negotiability?

A. Yes; the fact that the note recites that it is secured by mortgage does not imply that the promise in the note is expressly qualified. If the note recited that its payment was subject to the terms and conditions of the mortgage, then, of course, the promise would be conditional; otherwise, not.

There is also here presented the question as to whether the note and mortgage, having been executed as a part of the same transaction, should be so construed together that the stipulations contained in the mortgage are to be imported into the note. While for some purposes instruments contemporaneously executed are construed together, for the purpose of ascertaining intention, this rule of construction does not apply to the facts of this case, for the reason that the two instruments, the note and mortgage, while parts of the same general transaction, are intended to be and do create distinct legal relations. There is, therefore, no sound reason for holding that as a matter of construction that the terms of the mortgage are to be read as though they appeared in the note.

Page v. Ford, 131 P. 1013, 65 Or. 450, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 104.

For other cases see Decennial Digests, Bills and Notes ⇨ 161, 167.

Q. 8. M executed a note, payable to the order of P, which contained the clause: "This note is payable when this year's crop is harvested." The note was delivered to P for a consideration, which subsequently failed. Before the crop matured, P negotiated the note to A for value, who took without notice of the breach of contract by P. After this crop matured, A sued M. May he recover?

A. No. If A were a holder in due course of a negotiable instrument, he could recover; but he is not the holder of a negotiable instrument, therefore the defense of breach of contract is available.

The note is nonnegotiable, for the reason that the requisite of certainty in the time of payment has not been complied with. While there are some cases that have applied this rule rather loosely, such as that of *Evans v. Underwood*, 1 Wils. 262, which held that a note was negotiable in which maturity was fixed as of the time when the maker received his wages from his majesty's ship, the more accurate application of the rule is illustrated by the case of *Joseph v. Catron*, 81 P. 439, 13 N. M. 202, 1 L. R. A. (N. S.) 1120, which held nonnegotiable a note which was payable upon the confirmation of a land grant by Congress. This general doctrine is codified in section 1, par. 3, which declares that "an instrument to be negotiable must be payable on demand, or at a fixed or determinable future time."

For other cases see Decennial Digests, Bills and Notes ⇨ 155.

Q. 9. M is the owner of a vested remainder in a tract of land of which A is the life tenant. M borrows money from P in anticipation of the estate, and gives his note to P, making it payable 60 days after the death of A. Is the note negotiable?

A. Yes; if the rule requiring certainty in the time of payment were literally applied, such a note would be nonnegotiable, but the courts have always held that an instrument payable at the death of a designated person, or at a specified time after the death of such person, was sufficiently certain. As now phrased in the Negotiable Instruments Law, (section 4, par. 3): "An instrument is payable at a determinable future time which is payable on or at a fixed period after the occurrence of a specified event which is certain to happen though the time of happening be uncertain." But this rule would not be carried so far as to render negotiable an instrument which was made to mature when the maker arrived at a certain age.

Kelley v. Hemmingway, 13 Ill. 604, 56 Am. Dec. 474.

For other cases see Decennial Digests, Bills and Notes ¶44.

Q. 10. Is an instrument negotiable which is payable at the option of the holder? *Yes - a demand note*

A. Yes. The need of trade and commerce for demand paper is a sufficient justification for holding such instruments negotiable. Moreover, while it is uncertain as to when demand for payment will be made, there is really no violation of the general rule requiring certainty in the time of payment, because the instrument is due from the time of delivery to the first holder. The statute of limitations then begins to run. The Negotiable Instruments Law now phrases the general rule as to certainty in the time of payment in two parts by declaring that "an instrument to be negotiable must be payable on demand or at a fixed or determinable future time."

Negotiable Instruments Law, § 1, par. 3.

Q. 11. An instrument otherwise negotiable provides, "This note shall be payable December 1," the year not being specified. Is it negotiable?

A. Probably not. While an instrument, such as the check as usually drawn, which expresses no time of payment, is deemed to be payable on demand, there is doubt as to whether this case would be governed by that rule. This was a case where the maker attempted to fix a date of maturity, but failed to do so. It should therefore be regarded as payable at an indeterminate future time, and therefore nonnegotiable.

United Ry. & Logging Supply Co. v. Siberian Commercial Co., 201 P. 21, 117 Wash. 347, 19 A. L. R. 506.

For other cases see Decennial Digests, Bills and Notes ¶155.

Q. 12. A note provides for payment "on or before 60 days after date." Is it negotiable?

A. There was some conflict on this question at common law, but Negotiable Instruments Law, § 4, par. 2, expressly provides that such an instrument shall be deemed payable at a determinable future time. Such a clause in a note clearly confers upon the maker the option of paying before the arrival of the fixed date, but there may be doubt as to whether such a clause should be construed as conferring an option upon the holder to demand payment before the arrival of the ultimate date of maturity. It was said in one case that, where the clause in the note did confer an option on the holder to demand payment before the fixed date arrived, section 4, par. 2, of the Negotiable Instruments Law rendered the instrument negotiable.

Mahoney v. Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502.

Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197.

Utah State Nat. Bank v. Smith, 179 P. 100, 180 Cal. 1.

For other cases see Decennial Digests, Bills and Notes ⇨155.

Q. 13. M gave his note to P in payment of a debt. There were deposited therewith certificates of stock as collateral to secure payment of the note. The note provided "that, if the collateral deposited to secure payment of this note depreciates in value, the maker shall deposit with the holder of the note additional collateral sufficient to cover the depreciation, and in default thereof this note shall mature at once." Is the note negotiable?

A. The answer depends upon whether the instrument is to be deemed payable at a fixed or determinable future time. The cases were in conflict at common law, and remain so under the Negotiable Instruments Law. The act makes no express provision for an instrument bearing a fixed maturity, subject to acceleration upon the happening of some event, except in so far as the clause making instruments negotiable which are payable on or before a specified time has application, and the clause which makes nonnegotiable an instrument payable upon a contingency. Section 2, par. 3, does provide that the sum payable is a sum certain, although it is to be paid by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due. This last-mentioned section does not expressly assert that the time of payment of an instrument subject to acceleration for nonpayment of interest is certain, but it would seem to be a fair inference that the framers of the act intended that it should be so regarded. There is therefore some indication in the Negotiable In-

struments Law that some instruments bearing a fixed maturity, but subject to acceleration, were intended to be negotiable. The real problem, therefore, is to determine what events may properly be employed to accelerate maturity without destroying negotiability. It is believed that, where the event which is to mature the instrument before the arrival of the fixed date is, for the most part, within the control of the maker, such as the nonpayment of interest, or the failure to deposit additional collateral to absorb a depreciation in that originally pledged as security, the instrument should be negotiable. There may be more doubt as to the negotiability of an instrument with a fixed maturity, but subject to earlier maturity on demand of the holder. But even here there is some reason for holding such an instrument negotiable. A demand instrument being certain, and an instrument with a fixed maturity being certain, the combination of the two should not create uncertainty within the meaning of the rule. (When this event is not within the control of either maker or holder, but is wholly extrinsic, it is believed that the instrument should be negotiable, if the clause in the note may properly be construed as conferring an option on the holder to demand payment, but that, if the clause is so worded that it must be construed only as causing an automatic acceleration into maturity, the instrument should be nonnegotiable.

Utah State Nat. Bank v. Smith, 179 P. 160, 180 Cal. 1.

Holliday State Bank v. Hoffman, 116 P. 239, 85 Kan. 71, 35 L. R. A. (N. S.) 390, Ann. Cas. 1912D, 1.

Finley v. Smith, 177 S. W. 262, 165 Ky. 445, L. R. A. 1915F, 777.

Puget Sound State Bank v. Washington Paving Co., 162 P. 870, 94 Wash. 504.

Nickell v. Bradshaw, 183 P. 12, 94 Or. 580, 11 A. L. R. 623.

State Bank of Halstad v. Bilstad, 136 N. W. 204, 144 N. W. 363, 162 Iowa, 433, 49 L. R. A. (N. S.) 132.

See Z. Chafee, 32 Harv. Law Rev. 747.

For other cases see Decennial Digests, Bills and Notes ¶155.

Q. 14. M and S make their joint and several note to the order of P. The note contains the following clause: "The sureties and indorsers of this note severally waive presentment for payment, notice of dishonor and protest, and agree that no extension of the time of payment shall release us from the obligation of payment." May the note be declared on as a negotiable instrument?

A. Yes. Assuming the presence of other requisites of negotiability, the consent to be bound in the event of an extension of time of payment does not render the note nonnegotiable. It must be admitted that many cases have reached a contrary result upon the assumption that the time of payment is thereby rendered uncertain. It is believed that this is not the sound view. The maturity fixed

in the note is the only maturity. The agreement to be bound if the time of payment is extended does not give the option to the maker to extend time of payment on his own note. The purpose of the clause in the note is to destroy the defense which a surety would have when the creditor or holder enters into a binding agreement to extend the time of payment to the principal debtor. There is always the possibility that a holder may extend time of payment. The presence of a clause in the instrument waiving a defense if the holder elects to extend time of payment in no way affects the maturity fixed in the instrument. (Of course, where the clause is so worded as to give an option to the maker to extend time of payment without the consent of the holder, the instrument is obviously not payable at a fixed or determinable time.)

National Bank of Commerce v. Kenney, 83 S. W. 368, 98 Tex. 293.

Union Stockyards Nat. Bank of South Omaha v. Bolan, 93 P. 508, 14 Idaho, 87, 125 Am. St. Rep. 146.

For other cases see Decennial Digests, Bills and Notes ⇐ 155.

Q. 15. Is an instrument negotiable which bears a fixed maturity, but contains a clause authorizing a confession of judgment at any time after date?

A. At common law such an instrument was usually held nonnegotiable, in part, but not exclusively, because it rendered the time of payment uncertain, and this rule has probably been codified in Negotiable Instruments Law, § 5, par. 2, which declares that "the negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes a confession of judgment if the instrument be not paid at maturity." The last eight words of this section were omitted in Illinois, thus preserving the common-law rule in that state, in which such an instrument was negotiable. *If Before - non-neg*

Overton v. Tyler, 3 Pa. 346, 45 Am. Dec. 645.

Gehlbach v. Carlinville Nat. Bank, 83 Ill. App. 129.

Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 91 N. W. 678, 115 Wis. 289.

For other cases see Decennial Digests, Bills and Notes ⇐ 28, 150(1), 155.

Q. 16. M executed and delivered his note for \$100, payable to the order of P in current funds. There was a failure of consideration, and the action is brought by a bona fide holder for value before maturity against the maker. Is the defense available?

A. The answer depends upon the negotiability of the instrument. The cases are in conflict. Some hold that the instrument is negotiable; others hold it to be nonnegotiable, because it is not pay-

able in money. One of the requisites to negotiability is that the instrument be payable in money. The conflict of authority is over the question as to what constitutes money, and has not been settled by the Negotiable Instruments Law. All courts are agreed that legal tender is money. (But legal tender includes only gold coins, silver dollars, and subsidiary coins up to a certain amount, gold certificates, greenbacks, and treasury notes.) Silver certificates, national bank notes, Federal Reserve notes, and Federal Reserve Bank notes are not legal tender, though they circulate at par with legal tender. There is also the further conflict over the meaning of the term "current funds." Some courts hold that it is synonymous with the term "legal tender." Other courts hold that it includes circulating media of exchange, other than legal tender. (It is believed that the better view is that the term "current funds" is broader than the term "legal tender." and that it includes circulating media of exchange other than legal tender, and that instruments payable in current funds should be regarded as payable in money.) The term "money," as employed in the law of negotiable paper, ought to include legal tender and all circulating media of exchange which circulate at par with legal tender; otherwise, the repeal of the legal tender acts would leave us without negotiable instruments. Moreover, such media of exchange are almost universally looked upon as money, and popular conception should give meaning to the term.

Hatch v. First Nat. Bank, 47 A. 908, 94 Me. 348, 80 Am. St. Rep. 401.
For other cases see Decennial Digests, Bills and Notes ¶162.

Q. 17. Bearer bonds of a corporation otherwise negotiable are made payable in gold coin. Before maturity a bond is stolen from the owner and sold to an innocent purchaser. May the owner recover the bond, or its value, from the purchaser?

A. No; the instrument is not rendered nonnegotiable by being payable in a particular kind of money, and this rule is codified in Negotiable Instruments Law, § 6, par. 5.

Q. 18. Is a note negotiable which is payable in the money of a foreign country?

A. Yes. If the money called for by the instrument were current at the place of payment, it could be regarded as negotiable for that reason; and, if not current at the place of payment, it is negotiable on the theory that the instrument calls for American money to an amount equal to the sum as expressed in the foreign money, and ascertainable by current rates of exchange. If the money called for

Note { was of some country which had no established standing in international trade, and there were no determinable rates of exchange, the instrument would probably be nonnegotiable.

Hogue v. Williamson, 22 S. W. 580, 85 Tex. 553, 20 L. R. A. 481, 34 Am. St. Rep. 823.

Brown v. Perera (App. Div.) 176 N. Y. S. 215.

Hebblethwaite v. Flint, 173 N. Y. S. 81, 185 App. Div. 249.

For other cases see Decennial Digests, Bills and Notes ¶162.

Q. 19. Is a bearer bond of a corporation negotiable, which contains a provision which confers upon the holder the election to convert the bond into preferred stock at maturity?

A. Yes; the fact that the holder has the privilege of demanding something other than money does not deprive the instrument of its negotiable character.

Pratt v. Higginson, 119 N. E. 661, 230 Mass. 256, 1 A. L. R. 714.

For other cases see Decennial Digests, Banks, ¶194; Bonds ¶74.

Q. 20. Bonds of a corporation, otherwise negotiable, contain the promise of the issuing corporation that during the life of the bonds the assets of the company will not be incumbered. Are the bonds negotiable?

Note { A. No; the rule is that a promise to do an act in addition to the payment of money is not negotiable. This rule is codified in section 5 of the Negotiable Instruments Law. The typical case is one where the promise imposes upon the maker a duty to perform an affirmative act, but the rule applies equally to a promise to refrain from acting, as is the case here.

Strickland v. National Salt Co., 81 A. 828, 79 N. J. Eq. 182.

For other cases see Decennial Digests, Bills and Notes ¶166.

Q. 21. Is the following note negotiable?

Chicago, Illinois, Jan. 10, 1925.

I promise to pay to the order of P one thousand dollars (\$1,000.00) one year from date, with exchange and interest at the rate of 6 per cent. per annum from date. If this note is not paid at maturity, it shall bear interest at the rate of 7 per cent. per annum from maturity until paid, and costs of collection and reasonable attorney fees.

[Signed] M.

A. Yes; the note is negotiable under the Negotiable Instruments Law, although at common law in many jurisdictions the note would have been held nonnegotiable, because of the uncertainty in the sum payable. The element of certainty runs through all the rules governing negotiability; hence the rule that the sum must be cer-

tain. An instrument payable with exchange was, in a few states, deemed uncertain; but the act (section 2, par. 4) now expressly provides that "the sum payable is a sum certain, although it is to be paid with exchange, whether at a fixed rate or at the current rate."

There was also a conflict as to whether an instrument payable with attorney fees was negotiable. Negotiable Instruments Law, § 2, par. 5, adopts the rule that the sum is certain, although payable with costs of collection or an attorney's fee, in case payment shall not be made at maturity." With respect to the effect of a stipulation for an increased interest after maturity, or a reduction in the interest rate if paid at maturity, there was a similar conflict.

The Negotiable Instruments Law does not expressly deal with the problem of the effect of increased interest rates after maturity, but the spirit of the attorney's fee provision would indicate that such a stipulation should not destroy negotiability and it has been so held.

Hastings v. Thompson, 55 N. W. 968, 54 Minn. 184, 21 L. R. A. 178, 40 Am. St. Rep. 315.

Jones v. Radatz, 6 N. W. 800, 27 Minn. 240.

Dorsey v. Wolff, 32 N. E. 495, 142 Ill. 589, 18 L. R. A. 428, 34 Am. St. Rep. 99.

Smith v. Crane, 22 N. W. 633, 33 Minn. 144, 53 Am. Rep. 20.

Altman v. Rittershofer, 36 N. W. 74, 68 Mich. 287, 13 Am. St. Rep. 341.

Chandler v. Kennedy, 65 N. W. 439, 8 S. D. 56.

Union Nat. Bank of Massillon, Ohio, v. Mayfield, 174 P. 1034, 71 Okl. 22, 2 A. L. R. 135.

For other cases see Decennial Digests, Bills and Notes ¶33, 158, 160.

Q. 22. Is an instrument negotiable which is payable to the order of some impersonal payee, such as to "bills payable" or to "cash?"

A. Yes; an instrument expressly payable to bearer has always been held negotiable. The payee is sufficiently designated, because he may be any one who has possession of the instrument. Where an instrument is payable to the order of "cash," obviously no person is referred to. Hence the courts have held that, where an instrument is made so payable, it is to be construed as though it had been made expressly payable to bearer. Hence, the rule that an instrument made payable to the order of an impersonal payee is to be deemed payable to bearer, or, as section 9, par. 4, of the Negotiable Instruments Law phrases it, "The instrument is payable to bearer when the name of the payee does not purport to be the name of any person." In Gordon v. Lansing State Sav. Bank, 94 N. W. 741, 133 Mich. 143, the court held, however, that an instrument

payable to the order of was not payable to an impersonal payee.

For other cases see Decennial Digests, Bills and Notes ⇨60.

Q. 23. Is an instrument negotiable which is made payable to the order of A or B?

A. The general rule at common law was that such an instrument was nonnegotiable, because the payee was deemed to be uncertain. But this rule has been changed by section 8, par. 5, of the Negotiable Instruments Law, which provides that an instrument may be drawn payable to the order of one or some of several payees.

Blankenhagen v. Blundell, 2 Barn. & Ald. 417.

Page v. Ford, 131 P. 1013, 65 Or. 450, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915A, 1048.

For other cases see Decennial Digests, Bills and Notes ⇨170.

Q. 24. What is the status of an instrument in which the drawer and drawee are the same person?

A. The rule is that the holder may at his option treat the instrument either as a bill of exchange or as a note. This rule is codified in section 130 of the Negotiable Instruments Law. Section 17, par. 5, also states that, "where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election."

SECTION 2.—NEGOTIATION

Q. 25. P sold an automobile to M. M executed his negotiable note, payable to P for the purchase price; but, some dispute between the parties having arisen over the terms, M refused to deliver the note, but did take the car, promising to pay the price. M left the note on the desk, and, unknown to M, P picked it up and after maturity sued M thereon. M filed a plea alleging that the note had not been delivered, to which P demurred. Judgment for whom?

A. The demurrer should be overruled, and judgment entered for M, because one of the requisites to the existence of a negotiable contract, the act of delivery, was wanting. A negotiable instrument is a commercial speciality. Like a deed, it must be delivered before the contract is deemed to be in existence as regards a holder other than a holder in due course. This rule is codified in section 16 of the Negotiable Instruments Law.

2 Page, Contracts, § 1186.

Q. 26. P, a salesman, in the effort to induce M to purchase 10 shares of stock in a certain corporation, told M that, if he would buy the stock and give his note for the purchase price, he, P, would see to it that the note, which he intended to discount at the bank, would be renewed from time to time for a period of two years, and that if, at that time, M could not pay it, he need not keep the stock. M thereupon bought the stock and delivered his note to P. At the end of two years the last renewal note had not been paid. P sued M on the note. M, among other defenses, filed a plea setting out the above facts, alleging that the note had been conditionally delivered, that the condition had not happened, and that he was not liable on the note. P demurred to the plea. Judgment for whom?

A. Judgment for P. While the law requires delivery of a negotiable instrument, it allows the obligor who has in fact delivered the instrument to prove in defense that it was delivered upon a condition which has not happened. Proof of such facts does not contravene the parol evidence rule. Where, however, the instrument is delivered, and the attendant circumstances show that it was intended to be an enforceable contract, but that upon the happening of some condition subsequent it was to be regarded as discharged, proof of the condition cannot be made. The language of section 16 of the Negotiable Instruments Law, that "the delivery may be shown to have been conditional," therefore means that evidence of the nonfulfillment of a condition precedent is admissible, and will defeat an action upon an instrument delivered in fact, but evidence of the happening of the condition, which, if operative, would discharge an existing contract, is not admissible. In this case the condition would seem to be subsequent rather than precedent to the existence of the instrument as a contract.

Paulson v. Boyd, 118 N. W. 841, 137 Wis. 241.

Sayre v. Leonard, 140 P. 196, 57 Colo. 116.

Jamestown Business College Ass'n v. Allen, 64 N. E. 952, 172 N. Y. 291, 92 Am. St. Rep. 740.

Smith v. Dotterweich, 93 N. E. 985, 200 N. Y. 299, 33 L. R. A. (N. S.) 892.

For other cases see Decennial Digests, Bills and Notes ¶64, 338; Evidence ¶444(6).

Q. 27. M drew his check on the D Bank, payable to the order of P, for \$100, and delivered it to P for value. P lost it. A found it, and presented it to the D Bank for payment. The teller did not notice the absence of an indorsement by P, and paid A the amount called for by the check. May the bank debit M's account?

A. No. M directed that payment should be made to P's order. It was not paid upon the order of P; therefore the drawee's remedy, if he has one, is against A. It cannot charge M. An instrument payable to the order of a designated payee can be negotiated only by the indorsement of the payee. This rule is codified in section 30 of the Negotiable Instruments Law. While the transfer to a drawee bank is not a negotiation, because it is not a sale of the instrument, the payment to A is nevertheless unauthorized, because not made in accordance with the order of the drawer.

Q. 28. M drew his check on the D Bank, payable to P or bearer, and delivered the same to P, who lost it. A found it, forged P's indorsement, and transferred the check to B, an innocent purchaser. P notified M of the loss, and M stopped payment. On dishonor by D, B sued M. May he recover?

A. Yes. An instrument payable to a designated person or bearer is payable to bearer. A bearer instrument may be negotiated by delivery alone. The indorsement of the holder is not necessary. The wrongful indorsement of P's name by A did not arrest the transfer of title. (Equities of ownership are cut off by negotiation to a holder in due course.) B is such a holder. Therefore he may recover.

Negotiable Instruments Law, §§ 30, 57.

Q. 29. M drew his check upon the D Bank, payable to the order of P, and delivered the same to P for value. P indorsed the instrument in blank, and while in this form it was taken from him by robbery. The instrument was subsequently negotiated to an innocent purchaser, A, who sued M on the check after dishonor by D. May A recover?

A. Yes; the effect of the blank indorsement was to convert the instrument into bearer paper, and it thereby became negotiable by delivery. Negotiable Instruments Law, § 34. A therefore had title, and, being an innocent purchaser, took free from outstanding equities.

Q. 30. P was payee and holder of a negotiable note payable to his order, which he delivered to A in payment of a debt due A. He neglected to indorse the instrument, and on being notified by A of this fact wrote A a letter, in which he said: "I intended to indorse the note in blank to you. You may regard this letter as such an indorsement." A attached this letter to the note. The note and

letter were stolen from A and transferred to B, an innocent purchaser. B sues the maker of the note. May he recover?

A. No; because B is not the holder of the note. The instrument was payable to the order of P, and was not indorsed by him. The letter cannot operate as an indorsement, because of the rule that an indorsement must be on the instrument. While section 31 of the Negotiable Instruments Law provides that an indorsement may be written on a paper attached to the instrument, this rule has no application to this case, because this section is construed as having codified the common-law rule, under which an indorsement, to be effective, must have been placed upon the instrument, except that, where the back of the instrument was filled up with indorsements, an additional indorsement might then be written upon a separate paper attached thereto, but not otherwise.

Young v. Glover, 3 Jur. (N. S.) 637.

Clark v. Thompson, 69 So. 925, 194 Ala. 504.

For other cases see Decennial Digests, Bills and Notes ⇐183.

Q. 31. M was the maker of a negotiable note payable to the order of P. The signature of A appeared in the lower left-hand corner of the instrument. A was sued by an indorsee of the note as a comaker. A's defense was that he was an accommodation indorser, and was discharged because of the failure of the holder to make a due presentment. Is he liable?

A. Probably so. While an indorsement is normally on the back of the instrument, it may be placed on the face. Where the signature of one who appears from the instrument to have been a holder is on the face thereof, it is fairly clear that he intended to be an indorser; but, where a signature on the face of the instrument is of one other than a holder, the signer may have intended to sign either as a comaker or as an indorser. Section 17, par. 6, of the Negotiable Instruments Law provides that "where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign he is deemed an indorser." In the above case the most reasonable inference from the location of the signature is that it was that of a comaker. The doubt as to the intention of the signer is not sufficiently strong to make this section applicable. Not ?

Bank of California v. Starrett, 188 P. 410, 110 Wash. 231, 9 A. L. R. 177.

For other cases see Decennial Digests, Bills and Notes ⇐495.

Q. 32. A, a special indorsee of a note, wrote on the back thereof: "I hereby assign the within note to B. [Signed] A." B sued the

maker thereon, and declared upon the instrument as an indorsee. May he recover?

A. Yes; though there are some cases contra. The question is whether the language used, coupled with the signature of A, is a special indorsement, or whether the legal effect of the writing is the same as that of a transfer by A without indorsement. The use of the word "assign" has led some courts to hold that the signer intended a mere assignment of his rights, as distinguished from a negotiation of the instrument. Other courts have held, and it is believed with better reason, that the use of the language of assignment does not prevent the transaction from being a true negotiation. The same conflict existed where the holder at the time of transfer added to his signature such words as "without recourse," or "I hereby guarantee payment." The Negotiable Instruments Law does not expressly settle this conflict, although section 38, by providing that a qualified indorsement "does not impair the negotiable character of the instrument," would seem to mean that the transferee under a qualified indorsement was an indorsee, and not merely an assignee. This section would lend some weight to the argument that the use of words of assignment or of guaranty, accompanied by the signature of the holder, would not prevent the transfer from operating as a negotiation of the instrument.

Farnsworth v. Burdick, 147 P. 863, 94 Kan. 749.

Gale v. Mayhew, 125 N. W. 781, 161 Mich. 96, 29 L. R. A. (N. S.) 648.

Schmidt v. Pegg, 137 N. W. 524, 172 Mich. 159.

Mangold & Glandt Bank v. Utterback, 160 P. 713, 54 Okl. 655, L. R. A. 1917B, 364.

For other cases see Decennial Digests, Bills and Notes §§ 190, 267, 293, 330, 443(3).

Q. 33. M drew his check on the D Bank, payable to the order of P, and delivered to P for value. P indorsed the instrument in blank to A for value. A indorsed specially to B for value. F forged B's indorsement, and sold the check to C, an innocent purchaser. M stopped payment, and C sues M. May he recover?

A. A common law C could have recovered, but under the Negotiable Instruments Law he cannot recover, because he does not have title to the instrument. At common law the theory was that, when an instrument was payable to bearer, either because on its face it was made expressly payable to bearer, or because it became payable to bearer by virtue of a blank indorsement, the character of the instrument could not be controlled by subsequent special indorsements; that is, once bearer paper, always bearer paper. Under this rule the forged indorsement of the special indorsee, B, would

not arrest the transfer of title. C could strike out this indorsement, and claim under the blank indorsement.

This rule has been changed by section 9, par. 5, of the Negotiable Instruments Law, which provides that ("an instrument is payable to bearer when the only or last indorsement is an indorsement in blank.") This means that the last indorsement is controlling. Hence a blank indorsement would be controlled by a subsequent special indorsement. The indorsement of such special indorsee would be essential to a further negotiation of the instrument. C cannot gain title through such a forged indorsement, hence is not the holder and cannot recover. This result under the Negotiable Instruments Law, is however, somewhat complicated by the section involved in the next question.

Smith v. Clarke, Peake, 295.

Q. 34. M drew his check on the D Bank, payable to P, or bearer, and delivered to P for value. P indorsed specially to A. F forged A's indorsement and sold the check to B, an innocent purchaser. B obtained payment from the drawee bank, D. May D properly debit M's account for the amount of the check?

A. Yes. At common law this would have been so, for the reason stated in the answer to the preceding question. The same result follows under the Negotiable Instruments Law, because section 9, par. 5, probably does not apply to this case. Section 40 of the Negotiable Instruments Law governs this case. This section provides: ("Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery.") Applying this section to the facts, the special indorsement of P did not control the character of the paper. The forged indorsement of the special indorsee was not essential to a further negotiation of the instrument. B, therefore, took title, not through the indorsements, but by virtue of the provision on the face of the instrument.

The results presented in these two cases are believed to be sound. The doubt that can be thrown upon them arises from the fact that it is possible to regard section 40 as applying, not only to the case of an instrument payable to bearer on its face, but also to an instrument payable to order on its face, which becomes payable to bearer by virtue of a blank indorsement. If this be the construction, then section 40 is in conflict with section 9, par. 5, and the problem would be to determine which of the two should control. Where two sections of an act are in conflict, and one construction enables both to stand, it is believed that this construction is the more reasonable one. This problem has not been passed upon by the courts.

Q. 35. C was a special indorsee of a note originally payable to P's order, executed by M. P had indorsed in blank to A, and A had indorsed specially to B, and B indorsed specially to C. On presentment by C, M dishonored the note. The necessary proceedings on dishonor were duly taken. C demanded and received payment from the indorser, B, but did not indorse to him. B sues M, and declares upon the instrument as an indorsee, after having stricken out the indorsement to C. May he recover?

A. Yes. If section 9, par. 5, governed this case, B would not be an indorsee but would be a mere transferee of unindorsed paper payable to the order of his transferor, C. But section 9, par. 5, should not govern this case, because the retransfer to B is not a true negotiation of the instrument. This transaction was a presentation for payment. This situation makes it desirable that a reacquirer should be privileged to strike out all indorsements below the first one to himself, and thus to repossess the title which he formerly held. This was allowed at common law, and section 48 of the Negotiable Instruments Law now provides that the holder may at any time strike out any indorsement which is not necessary, to his title. This construction of section 48, and its limitation to the case of the reacquirer, is not entirely free from doubt. Section 48 may have a bearing on the solution of the two preceding problems, although it is believed that it does not have, because the question of the application of section 48 cannot arise until it is first decided that a particular indorsement is not necessary to the plaintiff's title, and that is the sole issue presented in the two questions referred to. When an indorser is compelled to take up the instrument, he takes it, not as a purchaser, but as an evidence of payment. It puts no strain upon legal principles to say the indorsement of the holder, who compelled him to pay, was not necessary to the payor's title. Section 48 then applies, and he may sue as a holder.

Bond v. Storrs, 13 Conn. 412.

Jerman v. Edwards, 29 App. D. C. 535.

For other cases see Decennial Digests, Bills and Notes ¶193.

Q. 36. M sent his note to a married woman, payable to her in her maiden name. She indorsed it to A in the name of her husband, prefixing thereto the abbreviation "Mrs." A declares upon the instrument as an indorsee. May he recover?

A. Yes. The payee was the owner of the paper. She did indorse, intending thereby to transfer title. The title, therefore, must be in A, who took through the indorsement. Section 43 of the Ne-

gotiable Instruments Law permits a payee or indorsee to indorse the instrument as he is described in the instrument, although this description is not the name by which he is commonly known. This section would hardly be construed as depriving the owner of the privilege to indorse in his true name, but confers upon him merely the privilege of indorsing in the name by which he was designated by the party from whom he acquired title, if he cares to do so. Handwritten: Know

Taylor v. Strickland, 37 Ala. 642.

For other cases see Decennial Digests, Bills and Notes ¶456.

Q. 37. M drew his note payable to the order of P, and delivered to P for value. P indorsed in blank and delivered to A for value. A wrote above the blank indorsement of P the words "Pay A." A lost the note. F found it, and negotiated to B, an innocent purchaser, without indorsing it. May A recover the note from B?

A. Yes; because B is not the holder. The law permits a holder to convert a blank indorsement into a special indorsement. Such a conversion is not a material alteration, but the indorsement as changed becomes effective as a special indorsement. This rule is codified in section 35 of the Negotiable Instruments Law. It owes its origin to the fact that originally all indorsements were special. Later it became the custom for the holder merely to sign his name on the back of the instrument. This was deemed to confer power upon the transferee to insert his own name, which insertion had to be made before suit could be maintained by the holder. Gradually it became unnecessary for the indorsee to insert his name; the result being that any one holding under the blank indorsement could sue thereon, because he was the bearer of it.

Gillham v. State Bank of Ill., 2 Scan. (3 Ill.) 246, 35 Am. Dec. 105.

Day v. Lyon, 6 Har. & J. (Md.) 140.

Clark v. Walker, 6 Blackf. (Ind.) 82.

For other cases see Decennial Digests, Bills and Notes ¶188.

Q. 38. P was the holder of a check payable to his order, signed by M, and drawn upon the D Bank. In payment of the purchase price of an automobile, which he had contracted for with A, P indorsed the check to A as follows: "Pay A, upon the delivery to me of one 1925 model Buick Sedan. [Signed] P." Title to the car had not passed at the date of this negotiation. The car was never delivered. D paid the amount of the check to A. May the drawee, D, debit M's account?

Note { A. At common law the debit would have been unauthorized. The indorsement was conditional. The privilege of the payor to pay was dependent upon the fulfillment of the condition. This rule has been changed by section 39 of the Negotiable Instruments Law, which provides that the payor may disregard the condition and make payment to the conditional indorsee, but provides that the proceeds shall be held subject to the rights of the conditional indorser.

Robertson v. Kensington, 4 Taunt. 30.

Q. 39. P, the payee of a check payable to his order, drawn by M upon the D Bank, negotiated it to the A Bank under a blank indorsement. The amount of the check was credited to P's account. The A Bank indorsed the check, "Pay B for collection," and transferred it to the B Bank. The B Bank transferred the check under a like indorsement to the C Bank. The B Bank became insolvent, and the C Bank credited the proceeds of the check on a debt which B owed C. The A Bank sues C for the amount. May A recover?

A. Yes. The check was restrictively indorsed by A. Any indorsement which by its language shows that the indorser intends that the instrument is not to be negotiated by his indorsee, as, for example, "Pay A only," or any indorsement which indicates that the indorsee took the instrument as an agent of the indorser, or which puts the title in the indorser in trust for a third party, is called a restrictive indorsement. The indorsement, "Pay B for collection," is an indorsement of the second class. The effect of a restrictive indorsement of the first and second class above referred to is to confer a right to receive payment, to bring any action thereon which the restrictive indorser could bring, and in the second and third class of indorsements to transfer these rights to his indorsee; that is, the important effect of a restrictive indorsement is to separate the beneficial interest in the instrument from the bare legal title, the restrictive indorsee holding it in trust for the first restrictive indorser, or the party designated as the beneficial owner. These rules are now expressed in sections 36 and 37 of the Negotiable Instruments Law. At common law there was a conflict as to whether the restrictive indorsee could maintain an action on the instrument in his own name. Under section 37 of the Negotiable Instruments Law the restrictive indorsee may sue in his own name, except in so far as this right is deemed con-

trolled by real party in interest statutes. In the above case, therefore, the beneficial interest in the check was in the first restrictive indorser, the A Bank. C had no right to credit the proceeds upon the debt against B. Therefore A may recover from C.

Power v. Finnie, 4 Call (8 Va.) 411.

Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429.

Hook v. Pratt, 78 N. Y. 371, 34 Am. Rep. 539.

Haskell v. Avery, 63 N. E. 15, 181 Mass. 106, 92 Am. St. Rep. 401.

Security Bank of Minn. v. Northwestern Fuel Co., 59 N. W. 987, 58 Minn. 141.

Smith v. Bayer, 79 P. 497, 46 Or. 143, 114 Am. St. Rep. 858.

For other cases see Decennial Digests, Banks and Banking ¶127; Bills and Notes ¶171, 199, 200, 292, 330, 352, 443(4).

Q. 40. M drew a bill of exchange on D for the price of a carload of cotton sold to him. The bill was payable to the order of M, indorsed by him in blank to A, a bank which discounted the bill. The A Bank indorsed the bill, "Pay any bank or banker." and negotiated the check to the B Bank, instructing the B Bank to collect and remit. The B Bank negotiated to the C Bank, which took the bill in payment of a debt due from B to C. The bill was dishonored on presentment, and the C Bank sued the A Bank. May it recover?

A. Probably so, though the cases are in conflict, and in many states the point has not been passed upon. The question is whether or not the indorsement, "Pay any bank or banker," is restrictive. If it is, then C could gain no rights of its own with respect to the instrument. If it is not restrictive, then C is a holder in due course, and could recover free from the restrictions placed upon the transfer by A to B. It is believed that the indorsement is not restrictive. The language, "Pay any bank or banker," does not indicate with certainty that a beneficial interest is intended to be reserved by the indorser.

National Bank of Commerce v. Bossemeyer, 162 N. W. 503, 101 Neb. 96, L. R. A. 1917E, 374.

Bank of Indian Territory v. First Nat. Bank of Buchanan Co., 83 S. W. 537, 109 Mo. App. 665.

For other cases see Decennial Digests, Bills and Notes ¶190, 200.

Q. 41. M bought a tractor from the implement house of P, and drew his check on the D Bank for the purchase price. Not knowing P's name, he left the name of the payee blank, and delivered the check in this form to P's clerk. The next day P was adjudicated bankrupt, and two weeks later his trustee, T, was appointed. T filled in the name of P, and presented the check to D for

payment, but D dishonored. The necessary proceedings of dishonor being duly taken, T sued M. May he recover?

A. Yes. The law allows a transferee of negotiable paper which is wanting in any material particular to fill up the blanks therein, and the transfer of such an instrument operates to confer upon the transferee prima facie authority to fill up the blanks; but they must be filled up strictly in accordance with the authority given and within a reasonable time after transfer. P therefore had authority to insert his name as payee. Under the Bankruptcy Act, powers which the bankrupt might have exercised in his own behalf pass to his trustee; T, therefore, had power to insert P's name as payee. This power would be extinguished upon the lapse of an unreasonable time. If it had elapsed, a court of equity could compel M to insert P's name. The trustee takes title to the bankrupt's property, and therefore may sue upon the instrument, and, under the facts here, recover.

Brummel v. Enders, 18 Grat. (59 Va.) 873.

Kramer v. Schnitzer, 109 N. E. 695, 268 Ill. 603.

Bank of Huston v. Day, 122 S. W. 756, 145 Mo. App. 410.

✓ Simpson v. First Nat. Bank of Roseburg, 185 P. 913, 94 Or. 147.

Farmers' Loan & Trust Co. v. Brown, 165 N. W. 70, 182 Iowa, 1044.

For other cases see Decennial Digests, Bills and Notes ¶60, 368, 378.

Q. 42. Section 51 of the Negotiable Instruments Law provides that "the holder of a negotiable instrument may sue thereon in his own name." What effect does this section have upon a common-law rule, or upon a statute which requires actions to be brought in the name of the real party in interest?

A. Where the common-law rule existed that an agent for collection, or other party in possession, who was not the beneficial owner, could not sue in their own names, section 51 would change this rule. Section 37 would also change such rule, in so far as the party in possession was a holder under a restrictive indorsement. If the holder may sue, and a holder is defined by section 191 as "the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof," ownership of the beneficial interest is clearly not essential. Where, however, a section in the general Practice Act requires that all actions be prosecuted in the name of the real party in interest, the question is whether the subsequent enactment of the Negotiable Instruments Law repeals by implication this section of the Practice Act in so far as it theretofore applied to actions on bills and notes. On this question the courts are in conflict. It is believed that there exist special reasons for allowing nonbeneficial holders of

the legal title to negotiable instruments to sue thereon, and that therefore the Negotiable Instruments Law should control.

First Nat. Bank v. McCullough, 93 P. 366, 50 Or. 508, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758.

Clark v. Dada, 171 N. Y. S. 205, 183 App. Div. 253.

McGowan v. People's Bank, 213 S. W. 579, 185 Ky. 20.

Dawsey v. Kirven, 83 So. 338, 203 Ala. 446, 7 A. L. R. 1658.

For other cases see Decennial Digests, Bills and Notes ¶443(1, 3), 516.

Q. 43. A, the holder of a bearer instrument, brings an action thereon in his own name against the maker. A plea is filed by defendant, alleging that A stole the instrument. A demurs to the plea. What result?

A. The demurrer should be overruled. While the thief of a bearer instrument is a holder, because a bearer is a holder, and a bearer is defined in section 191 as "a person in possession of a bill or note which is payable to bearer," such a bearer can be denied the right to sue upon the instrument, not because he is not the holder, because he is, but because the courts may refuse to aid a person who has acquired a legal title in violation of the law. *Note*

Brigham v. Gurney, 1 Mich. 349.

Towne v. Wason, 128 Mass. 517.

Hays v. Hathorn, 74 N. Y. 486.

For other cases see Decennial Digests, Bills and Notes ¶443(1, 4), 452(2).

Q. 44. The payee of a negotiable note payable to his order indorses it, "Pay A or B," and delivers to A. A indorses to C, who sued the maker. The maker defends by alleging that C did not have title. Should C recover?

A. Yes; because an indorsement to indorseees in the alternative creates in each indorsee a power to negotiate, and such a negotiation divests, not only the indorser, but also the other indorsee, of all rights with respect to the instrument. *Ind m 2/10 O.K.*

Voris v. Schoonover, 138 P. 607, 91 Kan. 530, 50 L. R. A. (N. S.) 1097.

For other cases see Decennial Digests, Bills and Notes ¶340.

SECTION 3.—HOLDER IN DUE COURSE

Q. 45. Under what circumstances, in general, must a holder of a negotiable instrument acquire title, in order to recover from a prior party thereto free from defenses and equities?

A. Where a party to a negotiable bill or note is sued by a holder of the instrument, he may successfully set up defenses and equities to the same extent as though the action were brought upon an ordi-

nary nonnegotiable obligation, except where such holder is a holder in due course, or, as the phrase in general use is, a bona fide purchaser for value without notice. This principle, which protects the innocent purchaser is perhaps the most important characteristic of the law of negotiable paper. The principle is not confined to the law of negotiable paper, but is a specialized application of a broad equitable doctrine.

In order to constitute one a purchaser for value without notice, or, as he is now called in the Negotiable Instruments Law, a holder in due course, the holder must have acquired title (1) for value, (2) before maturity, and (3) in good faith, or if he does not fulfill all or any of these conditions then he must have acquired title from or through some holder who did fulfill these conditions. These principles are codified in sections 52-59 of the Negotiable Instruments Law.

See *Purchase for Value and Estoppel*, 6 Minn. Law Rev. 87.

Q. 46. The payee of a negotiable instrument obtains it by fraud from the maker, and negotiates it to his creditor as collateral security for an antecedent debt. May the creditor recover from the maker, free from the defense of fraud?

A. The answer depends upon whether the plaintiff is a holder in due course. Assuming that he is a holder before maturity and in good faith, is he a holder for value? At common law most of the cases held that an indorsee of a negotiable instrument, either in payment of or as collateral security for the antecedent debt of the indorser, was deemed a holder for value, but many cases held otherwise. Section 25 of the Negotiable Instruments Law provides that "an antecedent or pre-existing debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time." This section adopts the rule that an indorsee of an instrument in payment of an antecedent debt is a holder for value, but it is not so certain that an indorsee by way of collateral security is a holder for value. However, the New York Court of Appeals has declared, in a strong dictum in *Kelso v. Ellis*, 121 N. E. 364, 224 N. Y. 528, that the New York rule has been changed, so that it is probable that in both instances such a holder will now be deemed a holder for value.

Brooklyn City & N. R. Co. v. Nat. Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61.

Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268.

Griswold v. Morrison, 200 P. 62, 53 Cal. App. 93.

For other cases see *Decennial Digests, Bills and Notes* 338, 358, 359.

Q. 47. The payee of a negotiable note for \$1,000 negotiates it to his creditor as collateral security for a debt of \$700. How much may the indorsee recover? *All.*

A. If the payee could have recovered \$1,000, the pledgee may likewise recover \$1,000; but he would hold \$300 in trust for the payee, because the pledgee is deemed to be a holder for value only to the extent of his lien. If the maker had a defense good against the payee, then the pledgee could recover \$700 only. In other words, the pledgee will recover the full amount only when some prior party could have recovered this amount, in which case the pledgee holds in trust for such party the amount in excess of the sum secured by the instrument.

Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40.

Fowler v. Strickland, 107 Mass. 552.

Negotiable Instruments Law, § 27.

For other cases see Decennial Digests, Bills and Notes ⇨255, 357.

Q. 48. Is an indorsee of a negotiable instrument a holder for value by merely promising to pay for it at a future time, or by crediting the amount to the account of the indorser? *No. Present val. Val. not 497*

A. No; the promise to pay value is not the equivalent of an actual parting with value. This brings out a distinction between consideration and value. Consideration is a requisite to contractual liability. Value is one of the elements necessary to constitute a holder a holder in due course. Consideration and value, while in many respects identical, are not in all respects convertible terms, at least they were not so at common law. The definitions of "value" in sections 191 and 25 of the Negotiable Instruments Law, if literally interpreted, come near to giving the same meaning to these two terms; but no case has been found where they have been so construed. Such an indorsee, therefore, could not be a holder in due course, because he is not a holder for value.

Clayton v. Bank of East Chattanooga, 85 So. 291, 204 Ala. 64.

Citizens' State Bank v. Cowles, 73 N. E. 33, 180 N. Y. 346, 105 Am. St. Rep. 765.

For other cases see Decennial Digests, Bills and Notes ⇨356.

Q. 49. If P has on deposit \$100 in bank A, and then deposits a check for \$100, and draws out \$100, is the bank a holder for value?

A. No; the usually accepted theory is that the first debits are to be charged against the first credits, or, as sometimes stated, "the first money in is the first money out." If a check is drawn against a fund containing trust funds and private funds of the drawer, the

presumption is that the private funds will be drawn out first, irrespective of the time of deposit.

Merchants' Nat. Bank v. Santa Maria Sugar Co., 147 N. Y. S. 498, 162 App. Div. 248; affirmed 116 N. E. 1061, 220 N. Y. 732.

Knatchbull v. Hallett, L. R. 13 Ch. Div. 696.

For other cases see *Decennial Digests, Bills and Notes* ¶356.

Q. 50. In an action against the maker by an indorsee for value and before maturity of a negotiable note, which had been obtained from the maker by fraud of the payee, the court instructed the jury that, "if you find from the evidence that the plaintiff purchased this note in suit from the payee under such suspicious circumstances as would have put a reasonable man on inquiry, and if you find that the note was obtained from the maker by fraud, you shall find for the defendant." There was a judgment for defendant, and the plaintiff appealed. What should the judgment on appeal be?

A. Judgment should be reversed, and the cause remanded for new trial, because the instruction given constitutes reversible error. At one time the law was that a purchaser of a negotiable instrument, who bought the same under suspicious circumstances, could not be a holder in due course. (There were also cases which held that a purchaser, who bought under such circumstances that he could be deemed grossly negligent in not learning of the defendant's defense, could not be a holder in due course.) Both holdings are wrong today, and by the better view were erroneous, even before the passage of the Negotiable Instruments Law. Under sections 52 and 56 of the Negotiable Instruments Law, the rule is that a purchaser to be a holder in due course must be a purchaser in good faith, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. To constitute notice, "the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." One may buy an instrument under suspicious circumstances, or even be grossly negligent in not learning of the defense, and still not be a bad-faith purchaser. It is probable, therefore, that one might be a holder in due course of a negotiable instrument under circumstances where he would not be a bona fide purchaser under the general equity doctrine, because under the latter doctrine the rule as to constructive notice seems to require greater diligence of a purchaser of a legal title to land, or of a converted nonnegotiable trust res, for example, than it does of a purchaser of a negotiable instrument. Just what facts fall short of actual knowledge, but do amount to

bad faith, is difficult to determine, for in great measure the question is one of fact.

Gill v. Cubit, 3 B. & C. 466.

Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934.

Unaka Nat. Bank v. Butler, 83 S. W. 655, 113 Tenn. 574.

For other cases see Decennial Digests, Bills and Notes ¶340, 346.

Q. 51. P by fraud sold M a block of stock in a corporation, and took in payment therefor M's negotiable note for the purchase price of \$5,000. P immediately deposited the note in the A Bank, where he received credit for \$4,800. P checked against this credit, and checks to the amount of \$960 were paid by the A bank. M learned where the note was, and, having discovered the fraud, reported these facts to the A Bank. Subsequently the A Bank paid out the balance of the credit on checks drawn by P. M refused to pay the note, and the A Bank sued M. May it recover? *Is M an H.O.C.?*

A. The A Bank is entitled to recover \$960, because section 54 of the Negotiable Instruments Law provides that, where a holder receives notice of the defense before he has paid the full amount agreed to be paid, he will be deemed "a holder in due course only to the extent of the amount theretofore paid by him." This is somewhat unjust to A, because it deprives him of a part of his bargain. He agreed to pay \$4,800 for a claim of \$5,000, or \$960 for each \$1,000 claim. Having paid \$960 he should be allowed to recover \$1,000, but under this section as worded he cannot do so. *Note*

Q. 52. M entered into a written contract with P for the purchase of a tract of land. M executed and delivered to P his negotiable note, payable in three months, for the amount of the purchase price. The written contract called for the delivery of a warranty deed on payment of the note. P discounted the note at the A Bank, which paid value therefor, and deposited the written contract with the bank. P failed to convey, and M refused to pay the note. The A Bank sued M. May it recover?

A. Yes. Knowledge on the part of an indorsee that the instrument was given in payment of an obligation to be performed in the future by the payee does not make the holder a holder in bad faith. There is, however, some authority to the contrary, just as there is with respect to the somewhat analogous question as to the negotiability of an instrument which sets forth in the body of the instrument an executory contract out of which the instrument arose. A purchase with knowledge of an existing breach of contract by the payee at the time the indorsee acquires title raises a *K w. note not*

different question. In such case the holder would not be a holder in due course.

Jennings v. Todd, 24 S. W. 148, 118 Mo. 296, 40 Am. St. Rep. 373.

Todd v. State Bank of Edgewood, 165 N. W. 593, 182 Iowa, 276, 3 A. L. R. 971.

See question 5, *supra*.

For other cases see Decennial Digests, Bills and Notes ⇨339, 343.

Q. 53. When an indorsee brings an action against a prior party to a bill or note, and seeks to recover from the defendant, free from a defense which the defendant had as against the party with whom he dealt, upon whom rests the burden of proof?

A. The plaintiff, by introducing the instrument in evidence and proving the defendant's signature, makes out a prima facie case for recovery. The burden of proving the defense rests upon the defendant, and he must establish this by a preponderance of the evidence. When this has been done, the prima facie case of the plaintiff is destroyed. In order for him to recover in this state of the proof, the plaintiff must establish by preponderance of evidence the fact that he is a holder in due course. The cases at common law are not entirely harmonious on questions of burden of proof, but these rules, as above indicated, seem now to have been established by section 59 of the Negotiable Instruments Law.

Gebby v. Carrillo, 177 P. 894, 25 N. M. 120.

Downs v. Horton, 230 S. W. 103, 287 Mo. 414.

For other cases see Decennial Digests, Bills and Notes ⇨497 (2, 5).

Q. 54. M drew a check on the D Bank, payable to the order of the P Co. A, an agent of the P Co., had authority to indorse the P Co.'s name on commercial paper. A indorsed the check in question to B in payment of his own debt to B. On learning of the facts, the P Co. sued B for the amount of the check, B having collected from the drawee bank. May the P Co. recover?

A. Yes; because B was not a holder in due course, and did not therefore take free from the P Co.'s equity of ownership. (The rule is that, where a payee or indorsee takes an instrument in payment of or as collateral security for a debt of the transferor, and the face of the instrument or the indorsements, or both, disclose the fact that the ownership of the paper is in another person, the indorsee will be deemed a bad faith purchaser, and will take subject to the rights of the owner.) The rule applies to the facts of this case.

Third Nat. Bank v. Marine Lumber Co., 46 N. W. 145, 44 Minn. 65.

Cheever v. Pittsburg S. & L. E. R. Co., 44 N. E. 701, 150 N. Y. 59, 34 L. R. A. 69, 55 Am. St. Rep. 646.

For other cases see Decennial Digests, Bills and Notes ⇨340; Corporations ⇨430.

Q. 55. M drew his check, payable to the order of P, upon the D Bank, leaving the amount blank, and delivered the check to his agent, A, and instructed him to deliver the check to P in payment of an automobile tire which A was instructed to purchase. A bought the tire, and also certain other articles for himself, and in the presence of P filled in the amount of all of his purchases. P obtained payment of the check from the drawee. M sued P for the difference between the amount of the check and the price of the tire. May he recover?

A. Yes; because P was not a holder in due course. While P may be a holder in due course, he was not such in this case, because he took an instrument with knowledge that it was issued in blank by the drawer. This was the English common-law rule, but most of the cases in the United States at common law held that the taking of an instrument with knowledge that it had been issued in blank did not make the transferee a bad faith purchaser. Section 14 of the Negotiable Instruments Law, adopted the English rule, by declaring that, "if any such instrument after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." If the instrument is taken before or during the process of completion, section 14 by inference declares that such a taker could not be a holder in due course. Moreover, section 52, par. 1, provides that, to be a holder in due course, the holder must have taken the instrument when it was "complete and regular on its face." This rule is not a separate requisite for one's being a holder in due course, but is merely a restatement of the general rule as to the effect of a purchase in bad faith, in those cases where the notice appears on the instrument itself. The question is essentially the same in both types of cases—i. e., where the evidence of the bad faith of the holder lies in extrinsic circumstances, or on the instrument—except that in the former there is a question of fact for the jury while in the latter it is a question of construction and of law for the court. } Note

Awde v. Dixon, 6 Exch. 869.

Hartington Nat. Bank v. Breslin, 128 N. W. 659, 88 Neb. 47, 31 L. R. A. (N. S.) 130, Ann. Cas. 1912B, 1008.

For other cases see *Decennial Digests, Bills and Notes* ¶60.

Q. 56. M delivered to P his negotiable note, payable on demand, to the order of P, in payment of the price of certain property to be delivered to M by P. P broke his contract, and four months after

delivery of the note negotiated it to A, an innocent purchaser for value. May A recover from M?

Note A. Probably so. The defense is personal, and is cut off if the instrument is in the hands of a holder in due course. A is a holder in due course, if he took before maturity, the other requisites being obviously met. While, for purposes of suit and the running of the statute of limitations, a demand instrument is due at the moment of delivery, it is not then overdue, within the meaning of the rule that a holder, to be a holder in due course, must have purchased it before maturity. A demand instrument is intended to circulate for some period. Section 53 of the Negotiable Instruments Law, codifying substantially the common-law rule, provides that, "where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." And section 193 declares that, "in determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments and the facts of the particular case." This rule indicates that the period of time as to demand notes and demand bills and checks may not be identical. In general, the period would be longer with respect to a note than to a check. The custom of banks, where sufficiently general, is material; also the facts of the particular case, such as a provision for interest and notations of interest payments, must be taken into consideration. It has been held that a check taken 24 days after issue was not overdue, that a demand note taken 3 months after issue was not overdue, but that a demand note taken 4 months and 23 days after issue was overdue. Though this does not imply that a demand note could not circulate more than 4 months, or even longer, nor that a 3-month period might not be in some cases an unreasonable time.

Brown v. Davies, 3 T. R. 80.

Le Due v. First Nat. Bank of Kasson, 16 N. W. 426, 31 Minn. 33.

Weber v. Hirsch, 163 N. Y. S. 1086.

Anderson v. Elem, 208 P. 573, 111 Kan. 713, 23 A. L. R. 1202.

For other cases see *Decennial Digests, Bills and Notes*, §§338, 348.

Q. 57. A note bearing a fixed maturity contains a clause accelerating maturity if the maker fails to deposit with the holder collateral sufficient to absorb the depreciation in the collateral originally pledged to secure payment. In a jurisdiction which holds that such clause does not deprive the instrument of its negotiable character, the plaintiff buys the instrument after the maker has defaulted in putting up additional collateral, but before the arrival of the fixed

date. The plaintiff sues the defendant maker, who pleads failure of consideration. May the holder recover free from this defense?

A. The cases are in conflict. Some cases protect the holder upon the ground that the clause merely confers an option upon him to declare the note due, and if this event has not occurred the holder is really not a holder after maturity. But it would seem quite possible to protect the holder, even if the clause be construed as causing an automatic acceleration upon default. It is believed that this is the sounder rule, both from the standpoint of commercial needs and legal principle. It has always been held that, where a bill of exchange has been dishonored by nonacceptance and the holder negotiates the bill to an innocent purchaser after such dishonor and before the arrival of the time for presentment for payment, the holder is deemed a purchaser before maturity if he did not know of the previous dishonor. This rule has been codified in Negotiable Instruments Law, § 52, par. 2, by declaring that a holder will be a holder in due course if he "become the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact." While this section covers only the case of a dishonor by nonacceptance, the principle embodied in it may properly be invoked to protect any holder who purchased after the instrument had been matured by the operation of some acceleration clause, but without knowledge of such fact and before the arrival of the fixed date of maturity.

Dunn v. O'Keefe, 5 M. & S. 282.

Hodge v. Wallace, 108 N. W. 212, 129 Wis. 84, 116 Am. St. Rep. 938.

Gillette v. Hodge, 170 F. 313, 95 C. C. A. 205.

For other cases see Decennial Digests, Bills and Notes ⇨ 173, 348.

Note

Q. 58. M drew his check on the D Bank, payable to the order of P, and delivered the same to A his agent, with instructions to deliver the check to P in payment of M's debt to P. The amount was left blank; A being told to insert the amount after learning how much M owed P. The debt was \$100. A, before calling on P, filled up the check, making it payable for \$200, and delivered the same to P, who did not know that the check had been issued in blank. M's debt was paid, and P handed to A \$100 in cash. P later collected \$200 from the drawee, D. M sued P for \$100. May he recover?

A. No; because P was a holder in due course. A holder is defined as "the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Negotiable Instruments Law, § 191. A holder in due course is defined as a holder who takes for value, before maturity, and without notice of defenses. Therefore, as far

as general definitions go, the payee may be a holder in due course, if he fulfills these three requisites. Sections 14 and 16 of the Negotiable Instruments Law contain some language, however, which casts some doubt upon the soundness of this conclusion, but most of the cases have held that those sections were not intended to make it impossible for a payee to be a holder in due course. Normally the payee will not be a holder in due course, because he has dealt directly with the maker or drawer, and will therefore have knowledge of defenses. But where the instrument is first delivered to a person, not a party to the instrument, such as an agent for the maker or drawer, the payee will not have knowledge of the conditions placed upon the delivery by the maker or drawer. There is but little dissent in the cases now from the holding that the payee may be a holder in due course. *Orig. Likely accord.*

Vander Ploeg v. Van Zuuk, 112 N. W. 807, 135 Iowa, 350, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275.

Ex parte Goldberg & Lewis, 67 So. 839, 191 Ala. 356, L. R. A. 1915F, 1157.

Liberty Trust Co. v. Tilton, 105 N. E. 605, 217 Mass. 462, L. R. A. 1915B, 144.

For other cases see Decennial Digests, Bills and Notes ⇨60, 338.

Q. 59. P obtains M's negotiable note by fraud, and negotiates to A, a holder in due course. A indorses the note after maturity to B by way of gift. B had knowledge of the fraud by which P obtained the note from the maker, M. B sues M. May he recover?

A. Yes; because B is a holder in due course. True, he takes after maturity, is a donee, and has knowledge of the fraud, any one of which is sufficient to prevent B's being a holder in due course in his own right: but, having derived title from a holder in due course, he acquires all the rights of his predecessor in title, and therefore is a holder in due course. The rule follows logically from the holding that the first transfer to a bona fide purchaser cuts off the equities and defenses of prior parties. It also follows from the desire to give to the first bona fide purchaser the full fruits of his purchase; i. e., the privilege of sale or gift to any person. This rule is codified by Negotiable Instruments Law, § 58.

Inhabitants of Township of Montclair v. Ramsdell, 2 S. Ct. 391, 107 U. S. 147, 27 L. Ed. 431.

Miles v. Dodson, 144 S. W. 908, 102 Ark. 422, 50 L. R. A. (N. S.) 83.

For other cases see Decennial Digests, Bills and Notes ⇨362, 497(5).

Q. 60. P obtains M's negotiable note by fraud, and negotiates to A, who has notice of the fraud. A negotiates to B, a holder in due

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course, and after the note passes through the hands of several purchasers, it is taken up by A after maturity. May A recover from M?

A. At common law he could not do so, either on the theory that a reacquirer did not get a new title, but simply regained his old title—that is, was remitted to his former rights—for on the theory that the fact that the maker had an equity against him at the time he first had title made it inequitable for the reacquirer to enforce his new title, acquired through a holder in due course.) The latter is the better theory, because, under it, other holders, who at the time they first held title, were not holders in due course because they were donees, would be holders in due course, if they reacquired through a holder in due course.

Under section 58, apparently all reacquirers, other than the payee, if they derived title through a holder in due course, would be holders in due course. But this language is in conflict to some extent with that of section 121, which declares that, “where the instrument is paid by a party secondarily liable thereon, it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties.” The effect of these two sections upon the rights of the reacquirer has not yet been worked out in the decisions. It is believed that section 58 states the sounder policy, and that section 121 can be subordinated to and controlled by the major principle, as expressed in the earlier section.

Dollarhide v. Hopkins, 72 Ill. App. 509.

Aragon Coffee Co. v. Rogers, 52 S. E. 843, 105 Va. 51, 8 Ann. Cas. 623.

Ratcliff v. Costello, 85 S. E. 469, 117 Va. 563.

Comstock v. Buckley, 124 N. W. 414, 141 Wis. 228, 135 Am. St. Rep. 34.

Lill v. Gleason, 142 P. 287, 92 Kan. 754.

For other cases see Decennial Digests, Bills and Notes ⇨262, 362.

Q. 61. M executed and delivered to P his negotiable note, payable to the order of P, which P procured by fraud. P transferred the note to A, for value, before maturity; A taking without notice of the fraud. P did not indorse the instrument. Subsequently A learned of the fraud, and, failing to get the indorsement of P, filed a bill in equity to compel the indorsement. Is he entitled to an indorsement? If he should obtain the indorsement, could he recover from the maker?

A. A is entitled to the indorsement, and a court may order P to indorse, and, in the absence of other evidence, A is entitled to an unqualified indorsement. However, A, having had notice of the fraud before procuring the indorsement would not be a holder in due course, because the indorsement does not relate back to the time of

transfer. These results follow from the application of section 49 of the Negotiable Instruments Law.

Simpson v. First Nat. Bank of Roseburg, 185 P. 913, 94 Or. 147.

Goshen Nat. Bank v. Bingham, 23 N. E. 180, 118 N. Y. 349, 7 L. R. A. 595, 16 Am. St. Rep. 765.

For other cases see Decennial Digests, Banks and Banking ⇨ 145; Bills and Notes ⇨ 313, 330.

Q. 62. A is a special indorsee and holder in due course of a negotiable note, obtained by fraud from the maker by the payee. A transfers without indorsement to B, an innocent purchaser for value before maturity. May B recover from M?

A. Yes. While B is not a holder in due course, he derives his title from a holder in due course, and under section 49 would have the right to recover from M, free from the defense of fraud. Section 58, which gives to a holder, who derives his title through a holder in due course all the rights of the former holder, does not apply, because B is not a holder; but section 49, which gives the transferor of an unindorsed instrument the title of the transferor, would operate to give B the right to recover free from defenses and equities. B would have to prove affirmatively, however, that he purchased the instrument. There would be no presumption that he was the owner of it, as would be true if he were a holder.

Smith v. Nelson Land & Cattle Co., 212 F. 56, 128 C. C. A. 512.

For other cases see Decennial Digests, Bills and Notes ⇨ 362.

SECTION 4.—EQUITIES AND DEFENSES

Q. 63. M executes a negotiable note, payable to the order of P, the payee, in satisfaction of an obligation arising out of an illegal contract. May a subsequent holder in due course recover from the maker free from the defense of illegality?

A. Yes. At common law and under the Negotiable Instruments Law, illegality is treated as a personal defense. When the holder in due course fails to recover from a prior party, it is because he does not have title to the paper sued upon, or because the instrument was not executed or delivered by the defendant, or because some positive rule of law has, upon considerations of public policy, vitiated the paper for all purposes. Ordinary illegality is not a defense against an innocent person.

Q. 64. A statute is in force in a certain state which makes void all gambling contracts. Subsequently the Negotiable Instruments Law is adopted in this jurisdiction. A negotiable instrument is ex-

executed and delivered in satisfaction of a gambling debt. This instrument is negotiated to a holder in due course. May he recover from the party who executed such instrument, free from the defense of illegality?

A. At common law the question was whether or not the particular statute involved really vitiated the paper for all purposes, or whether it merely made such a contract voidable. If the statute was construed as having actually vitiated the paper for all purposes, the holder in due course could not recover. The reason was that, in contemplation of law, there was no contract. A void contract is the substantial equivalent of a nonexistent contract. If, however, the statute were construed as having made such contract voidable, there was a real contract in existence, and the privilege of the obligor of avoiding it was lost upon transfer to a holder in due course.

Under the Negotiable Instruments Law, the problem is precisely the same, with this additional element: Usually the Negotiable Instruments Law has been adopted subsequent to the passage of a statute which makes void certain kinds of contracts. There is nothing in the Negotiable Instruments Law which directly deals with contracts made void by statute. As far as the Negotiable Instruments Law is concerned, a contract made void by statute could be classified with contracts unenforceable because of ordinary illegality. The new point presented, therefore, is whether or not the Negotiable Instruments Law repeals by implication the statute which makes the particular contract void. There is a conflict of authority on this question. Inasmuch as repeals by implication are not favored, it is believed that the enactment of the Negotiable Instruments Law should not be deemed to repeal a prior statute, which made certain contracts void.

Wirt v. Stubblefield, 17 App. D. C. 283.

Sabine v. Paine, 119 N. E. 849, 223 N. Y. 401, 5 A. L. R. 1444.

For other cases see Decennial Digests, Bills and Notes $\S$ 375, 376.

Q. 65. Does a person who is under a disability to contract, such as an infant, or a married woman at common law, possess the defense against a holder in due course? *Yes.*

A. Yes; wherever the law gives the infant and married woman the privilege of disaffirming their obligations on contracts, they are given it out of a desire to afford protection to these special classes of persons. This being so, there is just as much reason for protecting the one under disability from an action brought by a holder in due course as there is to protect them in action brought by the par-

ties with whom they dealt. There is nothing in the Negotiable Instruments Law which changes this rule. Incapacity, therefore, is a real defense.

Murray v. Thompson, 188 S. W. 578, 136 Tenn. 118, L. R. A. 1917B, 1172.
For other cases see Decennial Digests, Infants ¶52, 58(1).

Q. 66. Does an indorsee of a negotiable instrument from a holder who is under a disability to contract derive title to the instrument?

A. The cases at common law were not in harmony on this question. It was possible to say that the indorsement was absolutely void. If so, no title would pass and the transferee thereunder could not sue any prior party as an indorsee. If such an indorsement were treated as voidable only, then the transferee did acquire a title, which, until it had been avoided, would enable him to sue the prior party. Section 22 of the Negotiable Instruments Law settles this conflict of authority by declaring that "the indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon." This statute does not impose any liability upon the person lacking this capacity; it merely gives to the holder who derives title through such an indorsement the right to recover from all prior parties other than the one under disability. Such prior party, therefore, could not set up in defense the incapacity of some indorser subsequent to his indorsement. The right of a person under disability to defend, and to recover his instrument from a subsequent indorsee, is not taken away by this section.

Murray v. Thompson, 188 S. W. 578, 136 Tenn. 118, L. R. A. 1917B, 1172.
For other cases see Decennial Digests, Infants ¶52, 58(1).

Q. 67. M's name is forged as the maker of a negotiable note, payable to the order of the payee, P. At the time of negotiation by P to A, some doubt having arisen as to the genuineness of M's signature, A presented the note to M, and, upon inquiring from M as to whether the signature was his was told by M that the signature was genuine, whereupon A bought the note from P. A sues M. May he recover?

A. Yes. It is perfectly obvious that a person whose name is forged to a negotiable instrument should not be held liable upon it, even by a holder in due course. The reason is that the instrument sued on is not the defendant's contract. Hence forgery is spoken of as a real defense. However, it is possible for one to be held liable on such an instrument, because circumstances have arisen which

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would make it unjust to allow him to deny the genuineness of his signature. In other words, there is such a thing as an estoppel to deny forgery. In the above case, all of the elements of an estoppel are present, and the maker would accordingly be liable. Section 23 of the Negotiable Instruments Law codifies these rules, by declaring that forged signatures are wholly inoperative, unless the party sued is precluded from setting up the forgery or want of authority.

Gluckman v. Darling, 89 A. 1016, 85 N. J. Law, 457.

For other cases see Decennial Digests, Estoppel §87.

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Q. 68. P induces M to sign an instrument which M thinks is a contract appointing him as an agent to sell certain goods. M is induced to believe this by statements made to him by P. M is unable to read. It is discovered later that the instrument signed by M was a negotiable note, which had been negotiated by the payee to a holder in due course. May the plaintiff recover?

A. Probably not. The prevailing rule is that, where a person is induced by fraudulent representations to sign a negotiable instrument under circumstances where the signer did not know that he was signing an instrument calling for the payment of money, but thought he was signing a substantially different kind of instrument, such as a receipt, or a contract appointing him as an agent to sell goods on commission, and if, in addition to his ignorance, his signature was affixed under such circumstances as would not charge him with negligence in not ascertaining the true character of the paper, his signature is inoperative, and he cannot be held liable, even by a holder in due course. Technically his signature is not a forgery, but it is given the legal effect of a forgery. He has not executed the paper, because execution means, not only the physical act of signing one's name, but also a knowledge of the circumstances surrounding that act. In a case where it is established that the signer did not know what he signed, the difficult question to decide is: What constitutes negligence in not ascertaining the facts? If he did not know, and was negligent, he will be liable to the holder in due course. If he did not know, and was not negligent, he will not be liable to the holder in due course. While there is some little conflict in the cases, the courts generally hold that, if a person cannot read, either because of illiteracy or of defective vision, he will not be deemed negligent. If he could read, and simply failed to do so, the fact that he did not know what he signed will not exempt him from liability to the holder in due course. The courts also hold that, although a person cannot read, he will be

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he signs.*

deemed negligent, if there was any person present or readily available, other than the party with whom he was dealing who could have been called upon by the signer to read; that is, the law declares there is a duty upon a person to read what he signs. If he cannot read, there is a duty upon him to ask some one to read for him. If he does not do so, he is liable to a holder in due course.

Sometimes this species of fraud is called "fraud in the inception," to distinguish it from that kind of fraud in which a person is induced to sign an instrument, knowing what he signs, but being under a mistake induced by fraudulent representations, sometimes called "fraud in the inducement." There is nothing in the Negotiable Instruments Law which expressly deals with this type of case. There have been few cases under the act, but in them there is no intimation that the act has changed these common-law rules. It is possible to derive these rules from the section dealing with forgery, so that the same results will be possible under the Negotiable Instruments Law.

First Nat. Bank of Shenandoah v. Hall, 151 N. W. 120, 169 Iowa, 218.
Foster v. Mackinnon, 4 C. P. 704.

For other cases see Decennial Digests, Bills and Notes $\S$ 101.

Q. 69. At a time when M was signing a receipt to be handed to P, by trick P obtains M's genuine signature upon a check, by the use of carbon paper concealed under the paper upon which the receipt was written. May a holder in due course recover from the drawer?

A. Probably not. Assuming that M signed without negligence, his signature, while in a sense genuine, would, under the rules discussed in the answer to the above question, be given the legal effect of a forgery.

Maurmair v. National Bank of Commerce of Tulsa, 165 P. 413, 63 Okl. 283.
For other cases see Decennial Digests, Banks and Banking $\S$ 148(1).

Q. 70. M draws a check payable to the order of P for \$100 upon the D Bank. The check was subsequently raised by parties unknown, by erasing the words and figures and inserting in lieu thereof the amount of \$975. Upon presentment, the bank dishonored because of the insufficiency of M's account. The instrument was then in the hands of a holder in due course who sued the drawer. May he recover?

A. At common law, the fraudulent and the material alteration of a negotiable instrument avoided it. There could be no recovery upon it in its altered form, nor in its original form. This defense was good, even as against a holder in due course. Moreover, there

Alteration

could be no recovery upon the underlying debt. Where the instrument had been innocently and materially altered, some courts did allow recovery upon the instrument in its original form. Other courts denied the right to recover upon the instrument in its original form, but did allow a recovery upon the underlying debt. The Negotiable Instruments Law has changed some of the above rules by enacting that, "when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Under the act, then, whether the instrument was fraudulently or innocently altered, the holder in due course is allowed to recover upon it as it was prior to its alteration.

Note

In America, at common law, an alteration by a stranger, one who did not appear in the chain of title, did not avoid the paper. This was sometimes called "spoliation." In England, alteration by a stranger did avoid the paper. Inasmuch as section 124 of the Negotiable Instruments Law speaks only of material alteration, without indicating whether that term should or should not include the act of alteration by a stranger, it is quite possible to argue that the American rule with respect to the legal effect of a spoliation has been changed. The court, in *Jeffry v. Rosenfeld*, 61 N. E. 49, 179 Mass. 506, thought that section 124 did not change the American rule on spoliation. *Smith, Kline & French Co. v. Freeman*, 106 A. 22, 93 N. J. Law, 45; *Public Bank of N. Y. City v. Burchard Mercantile Co. et al.*, 160 N. W. 667, 135 Minn. 171.

Note

For other cases see Decennial Digests, Bills and Notes ¶378.

Q. 71. M draws a check for \$50 upon the D Bank, payable to the order of P, and delivers the same to P. The instrument was so drawn that a figure could be inserted between the dollar sign and the figure 5. In the line where the word "fifty" appeared there was room to the left to insert several words. This part of the line had not been scratched out. Subsequently some one inserted the figure 1 between the dollar sign and the figure 5, and before the word "fifty" was inserted the words "one hundred." The instrument is negotiated to the holder in due course, who after dishonor by the drawee sues the drawer. May he recover \$50 or \$150?

A. There is a sharp conflict of authority on this question. Most courts hold that changes made in this manner constitute a material alteration, and therefore the paper is void, or, as is now the law under the Negotiable Instruments Law, is valid, but recovery is limited to the instrument as it was before alteration. But there are a

Is maker negl in leaving space so can be altered

number of jurisdictions which hold that the holder in due course may recover upon the instrument as altered; that is, for \$150. The basis for this holding is not always expressed in the same language, but fundamentally it is deemed to be the outgrowth of negligence of the party who executed the paper; that is to say according to the minority rule, a material alteration, effected by the insertion of words and figures in spaces negligently left by the maker or drawer, is not a defense as against the holder in due course. (These courts maintain that the maker or drawer of a negotiable instrument owes a duty to all subsequent holders to execute the instrument in a careful manner, and so as not to invite alteration.) The majority of the courts argue, on the contrary, that there is no reasonable basis for imposing such a duty and that therefore an alteration effected by the insertion of words or figures in blanks negligently left is to be treated in the same manner as an alteration effected by the erasure of words and figures and the substitution of other words and figures. The Negotiable Instruments Law does not deal with this question. Section 124 merely prescribes the legal effect of material alterations, but does not declare whether such a change as appears in this set of facts would or would not constitute a material alteration. The conflict of authority therefore is likely to continue.

Min - negl - holder recover

Maj - no - duty - amt of instr written

Young v. Grote, 4 Bingham, 253.

National Exch. Bank of Albany v. Lester, 87 N. E. 779, 194 N. Y. 461, 21 L. R. A. (N. S.) 402, 16 Ann. Cas. 770.

For other cases see Decennial Digests, Bills and Notes $\S$ 378.

Q. 72. Should a court which adopts the minority rule on the effect of material alteration, arising from the insertion of words and figures in spaces negligently left, also hold that a maker or drawer should be deemed negligent if, in drawing the instrument, he failed to use indelible ink, sensitized paper, or protectograph machines?

A. No; such acts do not constitute negligence, although it has been held in Illinois that it is negligence to insert a clause in an instrument by the use of a lead pencil, when the body of the instrument is written with pen and ink. The maker was there held liable upon the instrument after the portions written in pencil had been erased.

Broad Street Bank v. National Bank of Goldsboro, 112 S. E. 11, 183 N. C. 463, 22 A. L. R. 1124.

Harvey v. Smith, 55 Ill. 224.

For other cases see Decennial Digests, Bills and Notes $\S$ 378.

Q. 73. M executes a negotiable instrument payable to bearer, but does not deliver it. Subsequently the instrument is stolen from

the maker's possession and negotiated to a holder in due course. May the holder in due course recover?

A. At common law the general rule was that nondelivery of a completed instrument was a good defense, even as against the holder in due course. The reason was that a negotiable instrument, as an enforceable legal obligation, came into existence as the result of two distinct acts: (1) The drawing and signing of the instrument; (2) its delivery. Both of the acts had to concur, before there was any contract. Intentional delivery was therefore an essential element in the proof. If it could not be established, the plaintiff failed.

A few jurisdictions, however, held that the nondelivery of a completed instrument did not operate as a defense good against the holder in due course. The minority view proceeds on the theory that there is a duty upon the maker to prevent the escape of such an instrument. Hence, even if stolen from him, he would be liable to an innocent purchaser. Negotiable Instruments Law, § 16, adopts the minority rule, by declaring that, where the instrument is in the hands of the holder in due course, delivery is conclusively presumed. Obviously this section in no way changes the fundamental rule that a person cannot gain title to an instrument through a forged indorsement. The section would apply to the case of an instrument so drawn as to be payable to bearer, and stolen from the maker, and to an instrument payable to the order of the payee, if stolen or otherwise converted by the payee. If stolen by a third party, no subsequent party could gain a title, except through the genuine indorsement of the payee.

Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Clarke v. Johnson, 54 Ill. 296.

Salley v. Terrill, 50 A. 896, 95 Me. 553, 55 L. R. A. 730, 85 Am. St. Rep. 433.

Angus v. Downs, 147 P. 630, 85 Wash. 75, L. R. A. 1915E, 351.

For other cases see Decennial Digests, Bills and Notes ¶63, 368, 382.

Q. 74. M executes a negotiable instrument, and leaves blank the line in which the amount is usually inserted. If the instrument gets into circulation without the authority of the maker, and is filled up, is he liable to a holder in due course?

A. No. The nondelivery of an incomplete instrument was at common law regarded as a real defense, for the same reason that the nondelivery of a completed instrument was by the majority of courts held to constitute a real defense. There was some indication that, where the maker of an incomplete instrument was negligent in his custody of it, he would be liable to a holder in due course. This result would be somewhat analogous to the result reached by the mi-

mority rule with respect to the effect of an alteration arising out of the negligent execution by the maker.

Section 15 of the Negotiable Instruments Law, declaring that, where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery, apparently adopts the rule in *Baxendale v. Bennett*, 3 Q. B. D. 525. There is a possibility, however, that section 15 might be so construed as to make liable one who was negligent in his custody of an incomplete instrument drawn by him to a holder in due course, if it got into circulation as a result of his negligent custody.

Baxendale v. Bennett, 3 Q. B. D. 525.

Nance v. Lary, 5 Ala. 370.

Phillips v. A. W. Joy Co., 96 A. 727, 114 Me. 403, L. R. A. 1916E. 690.

S. S. Allen Grocery Co. v. Bank of Buchanan County, 182 S. W. 777, 192 Mo. App. 476.

For other cases see *Decennial Digests, Bills and Notes* ¶60, 377, 382.

Q. 75. The signature of a drawer of a check is forged, the check negotiated, and subsequently paid by the drawee, and the amount debited to the account of the apparent drawer. The canceled check is returned to the apparent drawer. May the drawee bank, under ordinary circumstances, properly charge the amount of the check to the drawer whose name was forged?

A. Under ordinary circumstances, the drawee bank clearly does not have the right to charge the check to the account of the apparent drawer, for the reason that it was not his order.

Q. 76. But suppose that careful inspection of the check by the apparent drawer, when it was returned to him, would have disclosed the fact of forgery; suppose again that other forgeries are committed by the same person in the same manner, on checks drawn upon the same bank; should the drawee, under these circumstances, have the right to debit the account of the apparent drawer?

A. There is a good deal of authority in favor of allowing the drawee to debit the account under such circumstances. Sometimes courts, in reaching this result, make use of the principle of estoppel; sometimes the result is based upon the doctrine of ratification of the forged signatures. Again it is said that there is a duty upon a depositor to examine his canceled checks when they are returned to him. This duty is said to be one of the implied obligations in the contract of deposit. If he fails to examine his checks, such act constitutes a breach of contract, which would give to the bank a right

to recover from him any sum which it lost, and which would not have occurred, had the depositor exercised reasonable care in the examination of his canceled checks. In other words, a bank is allowed to debit the account of its depositor upon forged checks, if it can be shown that the loss to this extent was caused by the negligent failure of the depositor to examine his returned vouchers. The liability of the depositor will not necessarily be the amount of the check. It will be that sum which the bank lost which can be traced to the negligent act of the depositor. There is the same duty to examine returned checks for forged indorsements, although obviously there is not so much likelihood that the drawer will be able to detect forged indorsements. Hence it will normally be more difficult to establish that he was negligent in not discovering forgery.

First Nat. Bank v. Allen, 14 So. 335, 100 Ala. 476, 27 L. R. A. 426, 46 Am. St. Rep. 80.

Morgan v. U. S. Mtg. Co., 101 N. E. 871, 208 N. Y. 218, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462.

Glassell Dev. Co. v. Citizens' Nat. Bank, 216 P. 1012, 191 Cal. 375, 28 A. L. R. 1427.

For other cases see Decennial Digests, Banks and Banking ¶148(3).

Q. 77. A check is so drawn that it may be raised by the insertion of words and figures in spaces negligently left by the drawer. If raised in this manner, does the drawee bank have the right to debit the account of the drawer for the full amount of the check? *Yes*

*Alteration -
negl of dr*

A. In jurisdictions which permit a holder in due course to recover upon the instrument as altered in this manner, the drawee bank would clearly have the right to debit the account of the drawer for the full amount. In jurisdictions which deny the right of the holder in due course to recover the full amount under these circumstances, and this is the majority rule, it is probable that the drawee bank, unlike the holder in due course, would have the right to debit the drawer's account for the full amount.

The reason for giving the drawee bank a right not possessed by a holder in due course is said to arise out of the contract of deposit. It is held that there is in the contract of deposit an implied term, which imposes upon the drawer the duty to use care in the drawing of his checks. The drawing of a check in such a manner as to invite change by the simple insertion of words and figures constitutes a violation of this duty. Loss arising therefrom is therefore properly chargeable to the drawer. If the instrument is properly drawn, and the alteration is effected by erasures and substitutions, that is, under circumstances where no negligence of the drawer is involved, the drawee bank could not debit for the full amount; but under section

Reason

124 of the Negotiable Instruments Law could charge the instrument to the account of the drawer as it was prior to alteration.

Young v. Grote, 4 Bing. 253.

London Joint Stock Bank, Ltd., v. MacMillan & Arthur, [1918] A. C. (H. L.) 777.

Trust Co. of America v. Conklin, 119 N. Y. S. 367, 65 Misc. Rep. 1.

Hall v. Fuller, 5 B. & C. 750.

For other cases see Decennial Digests, Banks and Banking ¶148(3).

Q. 78. If a completed check payable to bearer is stolen from the drawer and paid by the drawee bank, may the drawee debit the account of the drawer?

A. Probably yes. Were it not for section 16 of the Negotiable Instruments Law, the right of the drawee to debit would be dependent upon proof that the drawer was negligent in his custody of the instrument. But section 16 allows a holder in due course to recover from the maker or the drawer, even in a case where there was no negligence in the custody of the instrument after execution. In view of the policy involved in section 16, it would be possible now to urge that there is an absolute duty upon the drawer of a completed check to prevent its getting into circulation.

Q. 79. If an incomplete check is drawn, and gets into circulation without the authority of the drawer, and is filled up and subsequently paid by the drawee, may the drawee debit the account of the drawer? *No - wt. whq - NIL - incompl instr not del'd, req del.*

A. In view of the analogy between this case and that of a completed check, so drawn as to make possible a subsequent alteration by the mere insertion of words and figures in spaces negligently left, there are some cases where the drawee would have this right. At least the analogy is close, where the incomplete instrument gets into circulation as a result of the drawer's negligent custody, as, for example, where he leaves an incomplete check on his desk at a point accessible to the public, or where he carelessly throws about incomplete checks.

S. S. Allen Grocery Co. v. Bank of Buchanan County, 182 S. W. 777, 192 Mo. App. 476.

For other cases see Decennial Digests, Bills and Notes ¶377.

Q. 80. If the payee obtains a check from the drawer under circumstances where the drawer does not know that he is signing a check, and is not negligent in not ascertaining that fact, would the drawee bank have the right to debit his account?

A. Under these circumstances, the holder in due course could not recover; but these cases do not necessarily mean that the drawee

Fr 14 84 real def.
 bank could not debit the account. If it were a completed instrument, there is reason to believe that the drawee bank might properly charge the check to the drawer's account. If the drawee bank may debit a completed check stolen from the maker, as it is believed, it is not unlikely that the drawee bank would have the right to charge a check to the account of the drawer drawn under these circumstances. *90*

Duress. Per def.
 Q. 81. An instrument is obtained from the maker by duress. May a subsequent holder in due course recover upon it free from this defense? *Yes.*

A. Most of the cases hold that duress is but a personal defense, and is lost by transfer to an innocent person. There are dicta that indicate that duress may be of such a serious nature as to give rise to a real defense.

Fairbanks v. Snow, 13 N. E. 596, 145 Mass. 153, 1 Am. St. Rep. 446.
 For other cases see Decennial Digests, Contracts, §95(1).

Q. 82. Should payment of a negotiable instrument before maturity constitute a defense as against a holder in due course, who acquires title after the instrument was paid?

Per def. dish
 A. No; payment before maturity is a personal defense. Section 119, par. 4, of the Negotiable Instruments Law, provides that a negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money. It has been argued that this section makes a discharge before maturity an absolute discharge of the paper for all purposes. But it has been held that this section was not intended to change the common-law rule, and that the section, by declaring that certain acts will discharge the contract, means merely that a discharge before maturity is a discharge only as between the parties, and not as against a holder in due course. *Know*

Burbridge v. Manners, 3 Camp. 193.

Manchester et al. v. Parsons, 84 S. E. 885, 75 W. Va. 793.

For other cases see Decennial Digests, Bills and Notes §427(2).

Q. 83. A is the owner of a negotiable bond payable to bearer. A acquired title from the obligor. After maturity the bond was stolen from A, and negotiated to an innocent purchaser, B, for value. May A recover the bond from B?

A. Probably so. It is apparent that B, not having taken before maturity, is not a holder in due course, nor can he trace title through a holder in due course. Unless other factors enter in, it would seem

clear that B should lose, he being the purchaser of what may be regarded merely as an ordinary chose in action, and therefore takes subject to outstanding equities and defenses. This seems to be the English rule. It is quite possible to urge, however, that other factors are involved. A holder in due course takes free from two kinds of equities: (1) Equities of defense, such as want of consideration, fraud, and payment before maturity; (2) equities of ownership, such as will arise with respect to an instrument which evidences actual legal obligations, but the equitable ownership of which is in some prior holder or third party. Originally a purchaser was deemed not a holder in due course by purchasing after maturity, for the reason that a purchase at such a time was some indication that there was some defense to the paper. Purchase after maturity may be some indication of the possibility of outstanding equities of defense, but it is no indication that the paper may be owned in equity by a third party.

Note { A negotiable instrument is not only the evidence of a series of contracts, but it is also a species of property; and, being property, one may have a legal title to it, whatever may be true with respect to ordinary choses in action. It is possible, then, to urge that the purchaser of overdue paper should be protected against outstanding claims of ownership under the general equitable maxim that, where the equities possessed by two claimants of the same property are equal, the one having legal title will prevail. Many courts in this country have departed from the English rule, but they have not gone so far as to protect an innocent purchaser of overdue paper from a thief. (A good many courts, however, have found a middle ground, and will protect an innocent purchaser of overdue paper from outstanding equities of ownership, whenever he derives a title from one who was in lawful possession of the instrument; that is, such a purchaser is protected only in so far as the doctrine of estoppel can be relied upon.)

Ab. In re European Bank, L. R. 5 Ch. App. 358.

Carpenter v. Greenop, 42 N. W. 276, 74 Mich. 664, 4 L. R. A. 241, 16 Am. St. Rep. 662.

Gardner v. Beacon Trust Co. et al., 76 N. E. 455, 190 Mass. 27, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303, 5 Ann. Cas. 581.

Wolf v. American Trust & Savings Bank et al., 214 F. 761, 132 O. C. A. 410.

For other cases see Decennial Digests, Bills and Notes $\S$ 350, 365(1); Partners $\S$ 107.

Q. 84. M draws a check on the D bank, payable to the order of P, and delivers to P for value. T steals the instrument, forges P's indorsement, and transfers the check to A, innocent purchaser for val-

ue before maturity. A obtains payment from the drawee bank, D. May D debit M's account? May D recover the money paid to A? *A no. 7. drawee's contract*

A. D may not debit M's account, because the payment was not made in accordance with M's order. D may recover from A, because the payment was made under a mutual mistake of material fact; the mistake being the assumption that A had title, when, because of the forgery of P's indorsement, title had not passed to him. Or, as the rule is sometimes put, money paid out in misreliance upon a supposed duty is recoverable. The right of the drawee is not on the instrument. A is not liable to D as an indorser, nor on any warranty of title as a vendor of the check, for the reason that the transfer to the drawee bank was not a sale, but was a presentation for payment and a surrender of the instrument for the purpose of discharge. The drawee's right of recovery is quasi contractual. The Negotiable Instruments Law neither codifies nor changes this rule. Owing its origin to another branch of the law, it remains the same. *Price v Neal Known*

Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287.

For other cases see Decennial Digests, Bills and Notes §296.

Q. 85. F forged M's name as the drawer of a check drawn upon the D Bank, payable to the order of P, and transferred it to P for value. P negotiated to A, an innocent purchaser for value before maturity. A obtained payment from the drawee D. May D recover the money from A?

A. No; there is a general rule of the law of quasi contracts under which money paid out under a mutual mistake of material fact may be recovered. The rule is perhaps more accurately expressed by saying that money paid out in misreliance upon a supposed duty is recoverable. In this case the drawee paid, thinking it was under a duty to the drawer to do so. The signature of the drawer was forged; therefore there was no duty, and therefore it would seem that the money was recoverable. However, the law in England and practically all of the states in the United States was that under these facts the drawee could not recover. The decision which established this rule is that of the leading case of Price v. Neal, decided by Lord Mansfield in 1762. This case also established the corollary rule that an acceptor of a bill or check bearing the forged signature of the drawer could not defeat liability, when sued thereon, by setting up the fact that the drawer's signature was forged. Much speculation has been indulged in with a view to justifying this exception to the general quasi contractual principle. Some courts have said that the doctrine of estoppel operates so as to change this rule; others have

said that the negligence of the drawee in not detecting the forgery is the basis for the exception. It has also been urged that the equitable doctrine that, where the equities between two or more claimants with respect to the same res are equal, the legal title prevails. When applied to the facts here, this means that the legal title to the money paid out or to the accepted bill prevails. Through all the cases runs the idea that the drawee must know the signature of the drawer. What is meant is that the drawee is held liable, even though he were not negligent in ascertaining the forgery. Objections can be urged against all of the reasons suggested, either because they actually fail to explain the cases or prove too much. Frequently no effort is made to justify the decision upon rules of law, but the decision is based upon conceptions of public policy and of commercial convenience. In any event the rule is well established.

The rule is not applied in cases where the party to whom the drawee paid had knowledge that the drawer's signature was forged, or had knowledge of such facts that made his taking a taking in bad faith; nor is the rule applied when payment was made to a holder other than a holder for value. However a donee, or agent for collection, is a holder for value, if some predecessor in title was a holder for value. Sec. 62 of the Negotiable Instruments Law provides that "the acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument." This section definitely codifies the rule as regards the liability of the acceptor, but leaves unprovided for the case of the drawee who pays. However, it has been held in many cases under the act that section 62 shows an intention to codify the doctrine of *Price v. Neal*, and accordingly the rule is applied to the drawee who pays. And it has also been held that the exceptions to the rule as worked out at common law have not been destroyed by section 62.

Price v. Neal, 3 Burr. 1354.

First Nat. Bank of Portland v. United States Nat. Bank, 197 P. 547, 100 Or. 264, 14 A. L. R. 479.

For other cases see *Decennial Digests, Banks and Banking* ¶147(1).

Q. 86. M drew his check on the D Bank, payable to the order of P, and delivered the same to P for value. P fraudulently erased words and figures thereon, and raised the check from \$100 to \$400. The alteration was not apparent, except to the eye of an expert with the use of a microscope. P negotiated the check to A for \$400, who took before maturity and in good faith. A obtained payment from the drawee. What are the rights of the drawee?

A. At common law the alteration avoided the instrument; hence D could not debit M's account for any amount. But D could recover the sum paid to the innocent holder A. The right of D was regarded as quasi contractual. The result reached and the right involved were the same as that where the drawee was allowed to recover money paid out on a forged indorsement. The analogy of Price v. Neal, where the drawee was denied recovery of money paid out on an instrument bearing the forged name of the drawer, was not followed in the material alteration case. The common-law rule, which allowed the drawee to recover money paid out on altered instruments, has probably been changed by section 62 of the Negotiable Instruments Law, which provides, among other things, that "the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance. * * *" This clause apparently means that the acceptor engages to pay the sum called for at the time he accepts; That is, the "tenor of his acceptance" means the tenor which the instrument had at the time he accepted. To include the case of the drawee having paid, the word "acceptor" will have to read to include both the acceptor and the drawee who pays. This has been done when the issue was with respect to the right of a drawee to recover money paid on instruments bearing the forged name of the drawer, upon the ground that the entire section disclosed a legislative intention to codify the doctrine of Price v. Neal. Doubtless the word could be given this extended meaning in the material alteration case.

While there are few decisions on the question under the Negotiable Instruments Law, and these are in conflict, the National Conference of Commissioners on Uniform State Laws, by its refusal to recommend an amendment to section 62, designed to preserve the common-law rule as to the right of the drawee to recover money paid out on altered instruments, has gone on record as favoring this construction that section 62 changed the common-law rule. Under section 124 the drawee would now have the right to debit the account of the drawer of an instrument subsequently materially altered, according to its original tenor, in this case for \$100.

McClendon v. Bank of Advance, 174 S. W. 203, 188 Mo. App. 417.

National City Bank of Chicago v. National Bank of the Republic, 132 N. E. 832, 300 Ill. 103, 22 A. L. R. 1153.

For other cases see Decennial Digests, Banks and Banking ¶147(1, 2); Bills and Notes ¶78.

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Q. 87. M draws his check on the D Bank, payable to the order of P, who obtained the check by fraud. M has the check certified before delivery to the payee. Upon learning of the fraud, M ordered the drawee not to pay the check. P sued D. May he recover?

A. No; the defense of fraud is available to the certifying bank. While normally the certifying bank agrees to pay the instrument according to the tenor of its acceptance, where the check has been certified at the request of the drawer, the latter may stop payment thereon. A certification at the request of the drawer does not discharge the drawer; hence his power over the instrument continues after transfer, as it does in all cases where the check has not been certified, even when negotiated to a holder in due course. Where the check is certified at the request of the holder, the drawer and indorser are discharged, and hence the drawer thereafter would have no power to stop payment, and as a consequence the certifying bank could not set up defenses which were personal to the drawer. These principles are directly and inferentially codified in section 188.

Times Square Automobile Co. v. Rutherford Nat. Bank, 73 A. 479, 77 N. J. Law, 649, 134 Am. St. Rep. 811.

For other cases see *Decennial Digests, Banks and Banking* ⇨145; *Bills and Notes* ⇨453.

Q. 88. M executed his note, payable to the order of P, intending to borrow the sum called for from P. P refused to make the loan. M then requested A to make the loan, and A agreed. Instead of executing a new note, M delivered the note which he had drawn in favor of P to A, saying: "You may indorse P's name." A did so, and negotiated it to B. B sued M. M urges in defense that he is not liable, because B is claiming through the forged indorsement of P. Is M liable?

A. Yes; the indorsement is not a forgery. At the time of delivery to A, M intended that P should have no interest in the note, but that A should have. The indorsement of P's name must be given the effect of a genuine indorsement. The law reaches this result, not, however, by giving effect to the indorsement as it might, and perhaps with better reason should, have done; but it declares that, when an instrument is drawn payable to the order of a person who by the drawer was intended not to have any interest in it, and is delivered to another person, the instrument will be deemed payable to bearer. It became customary to refer to such a payee as a fictitious payee. At common law the courts were not entirely

harmonious as to the test of the fictitiousness of the payee. In some it was held that an instrument payable to the order of a fictitious payee was to be deemed payable to bearer, when the payee's fictitious character was known to the party sought to be held liable thereon. The better rule has been codified in section 9, par. 3, of the Negotiable Instruments Law, which provides that "the instrument is payable to bearer when it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable." *Note*

Minet v. Gibson, 3 T. R. 481. *Same*

Q. 89. A, an agent of M, induces M to draw a check on the D Bank, payable to the order of P, upon the fraudulent representation that M owed P the sum called for by the check. In fact, there was no such person as P, nor any such debt as that mentioned by A. A indorsed P's name and negotiated the check to B, an innocent purchaser for value. B obtained payment from the drawee. May the drawee debit M's account?

A. No; the instrument was not payable to a fictitious payee, and therefore was not payable to bearer. The drawee could not debit, except under the genuine indorsement of P. P was fictitious in fact, but this is not the test. He was not fictitious as to the drawee, and the act makes the drawee's intention the sole test as to whether the instrument is to be deemed payable to bearer.

American Exp. Co. v. People's Sav. Bank, 181 N. W. 701, 192 Iowa, 366.

Robertson Banking Co. v. Brasfield, 79 So. 651, 202 Ala. 167.

For other cases see Decennial Digests, Banks and Banking ¶148(2); Bills and Notes ¶6, 182, 201, 434. *Same*

Q. 90. A, the agent of M, had authority to sign M's name as the drawer of checks. P was an employee of M, but did not work for a certain week. A drew a check, signing M's name as drawer, by himself, as agent, upon the D Bank, payable to the order of P. A did not deliver the check to P, but indorsed P's name and negotiated the check to B. B obtained payment from the drawee. May the drawee properly debit M's account?

A. Yes; because the instrument was payable to the order of a fictitious payee, and was therefore payable to bearer. While P was a real person, the drawer, A, intended that P should have no interest in the check; that is, P was fictitious as regards A, and this is the test as to whether the instrument is to be treated as payable to bearer. *Know*

Snyder v. Corn Exch. Nat. Bank, 70 A. 876, 221 Pa. 599, 128 Am. St. Rep. 780.

For other cases see Decennial Digests, Bills and Notes ¶6.

*Fictitious
payee*

Q. 91. I, an imposter, represented to M that his name was P, and that he was the owner of a tract of land in an adjoining county. M looked up the records, and found that P did own the tract referred to by I. I induced M to make a loan of \$5,000, to secure which I executed a mortgage on the land owned by P. M made the loan by drawing a check on the D Bank, payable to the order of P, and delivered the check to I, believing that I was P. I indorsed P's name and negotiated to C. C obtained payment from the drawee. May the drawee, D, debit M's account?

A. Yes; because the payment was made in accordance with the drawer's order. While the drawer thought he was making the check payable to a responsible party, P, nevertheless the law regards him as having made the check payable to the order of the physical person with whom he dealt, under the name of P. The indorsement of P's name by I would therefore not prevent title passing to B. I had the title by virtue of M's intention, and his indorsement of P's name transferred that title.

There is the same tendency now discernible in the cases to reach the same result, where the imposter does not deal face to face with the maker or drawer, though it has also been held that despite this tendency, where the imposter deals with the drawer through the mails, and in addition to the use of another's name describes that other by his official position, as, for example, where I represents himself to be P, lieutenant colonel of a designated regiment of the United States Army, a check payable to P, lieutenant colonel, etc., is not payable to the imposter.

Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 109 A. 296, 94 N. J. Law, 152, 22 A. L. R. 1224.

United Cigar Stores Co. v. American Raw Silk Co., 171 N. Y. S. 480, 184 App. Div. 217.

Boatsman v. Stockmen's Nat. Bank, 138 P. 764, 56 Colo. 495, 50 L. R. A. (N. S.) 107.

Mercantile Nat. Bank v. Silverman, 132 N. Y. S. 1017, 148 App. Div. 1.

For other cases see Decennial Digests, Banks and Banking ¶138, ¶148(3); Bills and Notes ¶6, 381.

Q. 92. M drew his check on the D Bank, payable to the order of P, and by mistake mailed it to the address of another person of the same name. The check was received by the person residing at the designated address, and, knowing that he was not the intended payee, indorsed the check to A, who obtained payment from the drawee. Does the drawee have the right to debit M's account?

A. No; the indorsement of P's name by a person of that name, who was not intended by the drawer to be the payee, does not

transfer title. It might be possible to urge that the drawer was estopped, by his negligence in mailing the check to the wrong person, from denying that he intended that person as the payee. One case has protected the indorsee, but most courts have held that the indorsement under these circumstances does not transfer title.

Mead v. Young, 4 T. R. 28.

Simpson v. Denver & R. G. R. Co., 134 P. 883, 43 Utah, 105, 46 L. R. A. (N. S.) 1164.

Beattie v. National Bank, 51 N. E. 602, 174 Ill. 571, 43 L. R. A. 654, 62 Am. St. Rep. 318.

Weisberger Co. v. Barborton Sav. Bank, 95 N. E. 379, 84 Ohio St. 21, 34 L. R. A. (N. S.) 1100.

For other cases see Decennial Digests, Banks and Banking §148(3); Bills and Notes §201, 381.

SECTION 5.—LIABILITY OF PARTIES

Q. 93. If an agent signs a negotiable instrument in his own name, with authority to bind his principal thereon, may the principal be sued on the instrument? *Ans. No designation agency*

A. No; and this is so, whether the principal was disclosed or undisclosed. The desirability that a negotiable instrument should be certain in all of its aspects restricts the liability to the parties whose names appear on the instrument. Section 18 of the Negotiable Instruments Law codifies this rule. There are two exceptions to this rule. An acceptor of a bill of exchange is liable upon an acceptance written upon a separate instrument in cases provided for in sections 134 and 135 of the Negotiable Instruments Law, and an indorser, under section 31, is liable upon the instrument, when he signs upon a separate instrument, provided the back of the instrument was already filled up with indorsements, and the paper bearing his signature is attached to the instrument. *Note*

Q. 94. Is the principal bound on a negotiable instrument whose name has been signed by his duly authorized agent?

A. Yes; the law of agency, in this respect, is left to control. This is codified in Negotiable Instruments Law, §§ 19 and 20. As to the form of the signature required to bind the principal and to release the agent from personal liability, the same difficulty is met with in the cases involving bills and notes as is encountered in the law of agency generally. To bind the principal, the agent must indicate "that he signs for or on behalf of a principal, or in a representative capacity," and he does not exempt himself from

personal liability by "the mere addition of words describing himself as an agent."

Phelps v. Weber, 87 A. 469, 84 N. J. Law. 630.

Commercial Nat. Bank v. Reichelt, 204 P. 1037, 62 Mont. 302.

For other cases see Decennial Digests, Bills and Notes ⌘330; Evidence ⌘423.

Q. 95. If an agent signs his principal's name to a negotiable instrument in such form as to bind him, but without authority to do so, is the agent liable on the instrument?

A. At common law it was generally held that he was not liable on the instrument, but would be liable for breach of an implied contract that he had authority. Negotiable Instruments Law, § 20, provides that the agent "is not liable on the instrument if he were duly authorized." The possible inference is that, if the agent were not duly authorized, he would be liable on the instrument, thus changing the rule in the cases referred to.

Austin, Nichols & Co. v. Gross, 120 A. 596, 98 Conn. 782.

For other cases see Decennial Digests, Evidence ⌘459(2).

Q. 96. The payee of a negotiable note sued the maker thereon, and at the trial introduced the note in evidence, proved the signature of the maker, and rested. The defendant introduced some evidence of want of consideration, but not by a preponderance of the evidence. Is the plaintiff entitled to judgment?

A. Yes; while during the formative period of the law dealing with negotiable instruments there may have been some doubt as to whether consideration was a requisite to the contract, it has long been settled that consideration is necessary. However, there are some variations in the operation of the principle, when compared to the rules which govern consideration with respect to simple contracts. For example, every negotiable instrument is deemed prima facie to have been issued for consideration. Some courts held that, upon the introduction of some evidence tending to show want of consideration, the burden of proving its existence rests upon the plaintiff, but the better view was, and the one adopted by section 28 of the Negotiable Instruments Law casts upon the defendant the burden of proving want of consideration. Unless he discharges this burden by a preponderance of the evidence, the plaintiff is entitled to judgment. In the above case the plaintiff is entitled to judgment.

Shaffer v. Bond, 99 A. 973, 129 Md. 648.

For other cases see Decennial Digests, Bills and Notes ⌘493(3).

BAL. PROB. LAW

Q. 97. M owes P a sum of money. At maturity M gives to P his negotiable demand note in payment of the amount of the debt. May P recover on the note?

A. Yes; if the new promise of M were oral, or a written promise in form nonnegotiable, the new promise might not be enforceable because a promise to pay a precedent debt may not constitute consideration. But the rule is different with respect to negotiable paper. This rule is codified by section 25 of the Negotiable Instruments Law, which provides that "an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." *Note*

Currie v. Misa, 10 L. R. Exch. 153.

In re Wegman Piano Co. (D. C.) 221 F. 128.

For other cases see Decennial Digests, Payment §17.

Q. 98. M delivered his negotiable note to P, the payee, upon consideration. Subsequent to delivery, and before maturity and without any agreement to extend time of payment on the note, A indorses the note. Is A liable to P?

A. No. The rule that a negotiable instrument given in discharge of a precedent debt is not extended so far as to render liable one who signs an existing negotiable instrument after delivery, or who delivers his own note as security for the unmatured debt of another, without some independent consideration. The language of section 25 is broad enough, if taken literally, to render such a promise or note enforceable, thus changing the law in a fundamental respect, but it is not likely that this section will be so construed. *?*

Strong v. Sheffield, 39 N. E. 330, 144 N. Y. 392.

Tenney v. Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347.

For other cases see Decennial Digests, Bills and Notes §226. *Consideration known*

Q. 99. P, the payee of a negotiable note signed by the maker, M, which P received upon consideration indorsed the note to A by way of gift. The instrument is dishonored at maturity. A sues M and P. May he recover?

A. A may recover from M, but not from P. The legal obligation of M, being upon a negotiable instrument, is so far deemed to be property as to be capable of gift. As provided in section 26, "where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time." In order for an indorsee to recover from his indorser, there must be consideration, just as there must be between the payee and the maker of a note, though *Note*

the burden of proving want of consideration is on the defendant indorser.

Parish v. Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378.

For other cases see Decennial Digests, Bills and Notes ¶90.

Q. 100. May the payee of a bill of exchange, who parted with consideration to the drawer, recover from the acceptor, who accepted after delivery to the payee, free from a defense that there was no consideration between the acceptor and the drawer?

A. Yes; the consideration between the drawer and payee will support the promise of the acceptor. While the latter's promise comes after the consideration between the drawer and payee, the bill is drawn upon the representation to the payee that the drawee will accept. When the drawee does accept, his promise, in a sense, relates back to the date of the execution and delivery of the bill to the payee. If there were no consideration between any of parties, the acceptor would not be liable.

Arpin v. Owens, 3 N. E. 25, 140 Mass. 144.

Spurgin v. McPheeters, 42 Ind. 527.

For other cases see Decennial Digests, Bills and Notes ¶74, 94(1), 453.

Q. 101. M signs a note as maker for the accommodation of the payee, P, who for value negotiates to A. May A recover from M?

A. Yes; while there is no consideration between the maker and the payee, the first indorsee, A, pays value for the note upon the faith of two promises, that of the maker and of the payee indorser. Both are liable to the holder. And this is so, even though the indorsee, A, knows that the defendant signed for the accommodation of the payee. An accommodation party may occupy any position on a bill or note. The same result will follow, that the accommodation party will be liable to a holder for value.

Neal v. Wilson, 100 N. E. 544, 213 Mass. 336.

Negotiable Instruments Law, §§ 29, 64.

For other cases see Decennial Digests, Bills and Notes ¶122.

Q. 102. M gives his note for the accommodation of the payee, P. P negotiates the note to A for value after maturity. May A recover from M?

A. At common law the usual answer was, "No," for the reason that the accommodation maker, by signing an instrument with a fixed maturity, was deemed to have authorized its negotiation before maturity, but that the instrument itself showed that the payee, accommodated party, was not authorized to negotiate after matu-

rity. The maker agrees to be an accommodation party up to the date of maturity, but no longer. However, it has been held by one court under the Negotiable Instruments Law that the transfer by the accommodated party after maturity gave rise to no defense to the accommodating maker. This decision is open to criticism.

Marling v. Jones, 119 N. W. 931, 138 Wis. 82, 131 Am. St. Rep. 996.
For other cases see Decennial Digests, Bills and Notes ¶96, 351.

Q. 103. Who are primary parties?

A. A primary party is one who has promised in unconditional terms to pay the amount called for by the instrument, or, as declared by Negotiable Instruments Law, § 192, "one who is absolutely required to pay the same." This definition includes, therefore, the maker of a note and the acceptor of a bill. A drawee of a check, which certifies it, is an acceptor. All other parties—i. e., the drawer of a bill or check and indorsers on all forms of instruments—are secondary parties, and are conditionally liable.

Q. 104. Is the maker of a note, which by its terms is made payable at a special place, as, for example, at a designated bank, liable to the holder, in the absence of presentment and demand for payment at the special place?

A. Yes; Negotiable Instruments Law, § 70, codifying the American rule, declares that "presentment for payment is not necessary in order to charge the person primarily liable on the instrument." This is true, although the instrument is also made payable on demand. At common law bank notes and certificates of deposit were governed by the contrary rule; i. e., presentment was a necessary condition precedent to the liability of the obligor bank. The Negotiable Instruments Law makes no exception as regards bank notes and certificates of deposits, and it may be, therefore, that section 70, in these instances, has made a change in the law. On the other hand, it is not improbable the courts may hold that section 70 was not intended to change the rules as to these special types of negotiable instruments, especially so as the rule in is application to ordinary notes and bills of exchange is somewhat open to criticism.

Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95.

Lebanon State Bank v. Garber, 181 P. 572, 105 Kan. 44.

Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377.

For other cases see Decennial Digests, Banks and Banking ¶154(3); Bills and Notes ¶394, 395.

Tender of payment

Q. 105. If the instrument is made payable at a special place, does the fact that funds are provided there on the date of maturity in any way affect the liability of the maker or acceptor?

A. Yes; section 70, adopting the common-law rule, makes such fact operate as a tender of payment. Some important consequences would be that an unaccepted tender of payment would cut off the running of interest and costs of subsequent litigation, and would discharge a surety known to be such.

Q. 106. Is the drawee of a bill or check liable to the holder before acceptance or certification?

A. Generally not. It is common for the holder of a bill or check to regard himself as possessing rights against the drawee before the latter accepts, but a little reflection shows that in the typical case there exists no basis for such liability. The drawee and holder have not entered into contract relations with each other. There would be a direct liability of the drawee to the holder (1) if the execution and delivery of the bill constituted an assignment pro tanto of the credit which the drawer had with the drawee; (2) if the drawee's promise to the drawer were made under such circumstances as to impose upon the drawee a liability to the holder, based upon the theory that one may make a contract for the benefit of a third party; (3) or where the promise of the drawee, but not on the bill, constituted a virtual acceptance; and (4) where the drawee had converted the bill.

At common law the prevailing rule was that the drawing of a bill or check did not operate as an assignment of the fund, though in a few states the holder of a bill or check was held to be the assignee of the sum called for by the instrument. Negotiable Instruments Law, §§ 127 and 189, adopts the majority rule by providing that a bill or check of itself does not operate as an assignment, and the drawee is not liable on the bill unless and until he accepts. It is to be noted that these sections do not declare that the drawing and delivery of a bill or check cannot operate as an assignment. They simply declare that the facts of execution and delivery alone are not sufficient evidence to prove an assignment. It is therefore still possible, where appropriate words of assignment are used, to assign the fund, or a part thereof, where the rules of law or equity give effect to partial assignments. And it is also still possible for the drawee to make a promise to the drawer for the benefit of the holder which the law will effectuate in juris-

dictions which give effect to contracts for the benefit of third parties.

National Bank of the Republic v. Millard, 10 Wall. 152, 19 L. Ed. 897.

Munn v. Burch, 25 Ill. 35.

First Nat. Bank of McClusky v. Rogers-Amundson-Flynn Co., 186 N. W. 575, 151 Minn. 243.

Ballard v. Home Nat. Bank of Arkansas City, 136 P. 935, 91 Kan. 91, L. R. A. 1916C, 161.

For other cases see Decennial Digests, Assignments ⌘49, 57; Banks and Banking ⌘140(1, 3, 6); Bills and Notes ⌘25.

Q. 107. If the drawee is not, as a rule, liable to the holder until he accepts, what constitutes an acceptance?

A. The essence of an acceptance, like the acceptance of any offer, is an unqualified promise to pay the amount called for by the bill. Formerly oral acceptances were binding, except where the drawee held no funds of the drawer, in which case the oral promise was held unenforceable under that section of the statute of frauds which directed that no action should be brought upon any special promise to answer for the debts, defaults, and miscarriages of others unless the promise was in writing. Statutes, quite generally even before the Negotiable Instruments Law, however, required an acceptance to be in writing. } Note
St. Fr.

Heenan v. Nash, 8 Minn. 407 (Gil. 363) 83 Am. Dec. 790.

Chicago Heights Lumber Co. v. Miller, 76 N. E. 52, 219 Ill. 79, 109 Am. St. Rep. 314.

For other cases see Decennial Digests, Frauds, Statute of ⌘17; Partnership ⌘146(2).

Q. 108. May an acceptance be written on a separate instrument, and may there be an acceptance of a bill to be drawn in the future?

A. Contrary to the rule requiring indorsements to be upon the instrument, or upon a paper attached thereto when there is no room on the instrument for other indorsements, the answer to both questions is, "Yes." The rule is established in this country that "a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." This rule has been codified substantially in sections 134 and 135 of the Negotiable Instruments Law. Note, however, some changes in phraseology, and also that, under the act, the rule applicable to an existing bill is not identical with the rule which governs acceptances of non-existent bills.

Coolidge v. Payson, 2 Wheat. 66, 4 L. Ed. 185.

For other cases see Decennial Digests, Bills and Notes ⌘85.

Q. 109. What language will amount to an unconditional promise to pay the bill? *Note*

A. Questions of this nature occasion considerable difficulty. They usually arise with respect to acceptances on separate instruments, in letters and telegrams. The nature of the difficulty involved is indicated by the holding that a telegram from the drawee to the holder, stating that the draft referred to in the inquiry from the holder "was good," was not an acceptance; whereas, in another case, the court held that a telegram from the drawee to the holder, stating that "James Tate is good; send on your paper," was an acceptance.

Colcord v. Banco de Tamaulipas, 168 N. Y. S. 710, 181 App. Div. 295.

Garrettson v. North Atchison Bank, 39 F. 163, 7 L. R. A. 428.

For other cases see *Decennial Digests, Bills and Notes* ⇨ 68, 85.

Q. 110. Does a tortious conversion of a bill by the drawee constitute an acceptance?

A. Not at common law, though the drawee would be liable in trover; but the rule has been changed by the Negotiable Instruments Law. Section 137, which declares that, on the destruction of the bill by the drawee, or his refusal to return the bill accepted or nonaccepted within 24 hours after delivery to him, the drawee will be deemed to have accepted the same. It will be noted, from section 136, that the drawer has 24 hours within which time to decide whether to accept or to dishonor; that is, during this period the drawer does not commit any wrongful act by retaining the bill, nor may the holder treat such retention and failure to act either as an acceptance or as a dishonor. After the expiration of the 24-hour period, if the bill is not accepted, the holder must, under section 150, treat the bill as dishonored, or, if he does not do so, he loses his rights of recourse against the drawer and the indorsers. The retention of the instrument by the drawee beyond the 24-hour period is not of itself an acceptance under section 137.

Jeune v. Ward, 1 B. & A. 653.

St. Louis Southwestern R. Co. v. James, 95 S. W. 804, 78 Ark. 490, 8 Ann. Cas. 611.

For other cases see *Decennial Digests, Bills and Notes* ⇨ 70.

Q. 111. What is the effect of an acceptance which varies from the terms of the order?

A. Qualified acceptances are unusual, but the law has always given some effect to them, and the common-law rules have been substantially codified by sections 139-142 of the Negotiable Instruments Law. When the drawee accepts upon specified conditions,

or for a part only of the sum called for by the bill, or accepts to pay at a particular place, or at a time different from that fixed in the instrument, the acceptance is qualified.

The most important legal effect of a taking by the holder of a qualified acceptance is that the drawer and all indorsers are discharged from liability on the instrument, unless they assent thereto. Assent may arise by implication, and does so arise when, after a secondary party receives notice of a qualified acceptance, he fails to express his dissent to the holder. The holder of a bill is not bound to take a qualified acceptance, but may treat the bill as dishonored, if he is tendered a qualified acceptance by the drawee.

Q. 112. May a person other than the drawee accept the bill and become bound thereon?

Acceptance for honor.
A. Yes; but only in certain cases. When a bill has been dishonored by nonacceptance, and is not overdue, any person, with the consent of the holder, may accept the bill for the benefit of any party liable thereon, or for the holder, and he thereby becomes liable upon the bill. The liability of such a party is somewhat exceptional, but commercial practice accounts for its recognition in the law. While the practice has now largely fallen into disuse, the Negotiable Instruments Law codifies the rules governing the liability of the acceptor for honor, which are set forth in some detail in sections 161-177.

Closely analogous to the acceptor for honor is the referee in case of need, the term being used to describe a party whose name is inserted on the bill by the drawer as one upon whom the holder may call for payment in the event of dishonor by the drawee. Negotiable Instruments Law, § 131.

Q. 113. Who are secondary parties?

A. The drawer of a bill, including a check, and the indorsers on all forms of negotiable instruments—that is, bills of exchange and promissory notes—are secondary parties. A secondary party is not absolutely liable upon the instrument. He is liable only upon the happening of certain conditions precedent to the existence of his liability.

Q. 114. What are the conditions precedent to the liability of secondary parties?

A. Answered very generally, and without taking account of numerous details and some exceptions, the drawer of a bill or the unqualified indorsers on bills and notes are not liable on the instru-

ment to the holder, unless (1) the holder has made a due presentment, either for acceptance or for payment, or both, as the case may be; (2) the instrument has been dishonored; that is, that the drawee has refused to accept or pay, or the maker has refused to pay; (3) due notice of dishonor has been given to the drawer or the unqualified indorser sought to be held liable; and (4) in the case of foreign bills there has been a formal protest of the instrument.

No part of the law of bills and notes has been carried to greater refinements than these apparently simple rules. There are innumerable cases at common law which construe and apply them to the multitude of situations which have arisen. In the Negotiable Instruments Law, sections 61-118 and 143-160, 186, codify the main aspects of the law, which determines the liability of secondary parties. In spite of this elaboration, these rules even yet are by no means automatic in their operation. There is still opportunity for controversy as to the application of them to the varied situations which are presented. This brief list of questions must necessarily concern itself only with the outstanding features of the liability of secondary parties.

Q. 115. What is the date of maturity of a demand instrument?

A. As far as the liability of the maker of a demand note or the acceptor of a demand bill are concerned, the instrument is due at the moment of issue, and the statute of limitation then begins to run; but as a matter of business practice demand instruments are intended to circulate for a time, hence the law has never required the holder to make an immediate demand in order to charge secondary parties. It might be supposed that the time within which presentment must be made, in order to charge indorsers on notes and the drawer and indorsers of a bill of exchange, would be the same; but there is a radical difference between the two rules.

Q. 116. Within what period of time must the holder of a demand note present the same to the maker for payment in order to hold the indorsers?

A. The rule is that the note must be presented within a reasonable time after its issue. Negotiable Instruments Law, § 71. It is important to note that the period begins to run from the date of issuance of the note, and not from the date on which the indorser who is sought to be held liable indorsed or from the date of the last indorsement. The reasonable time begins to run from the date of issue.

Q. 117. Within what period of time must the holder present a demand bill of exchange, or a check, in order to hold the drawer and indorsers liable?

A. Here again we meet the rule requiring a presentment for payment to the drawee within a reasonable time; but whereas, in the case of demand notes, the period begins to run from date of issue, in the case of the bill of exchange and check the time begins to run, not from date of issue, but from the date of the last negotiation. As section 71 of the Negotiable Instruments Law now provides in the case of a bill of exchange, "presentment for payment will be sufficient, if made within a reasonable time after the last negotiation." This rule governs the liability of indorsers on all forms of bills of exchange, including checks, and also that of the drawer of a bill of exchange, but this rule does not apply to the drawer of a check. Section 71 has changed the common-law rule under which the liability ran for a reasonable time after each one signed. (The distinction between the liability of indorsers on notes and the drawer and indorsers on bills of exchange and the indorsers of checks is a most important one, for the reason that indorsers on notes will, except in rare instances, continue liable for a time measured in months, whereas secondary parties on bills may be liable, perhaps for the full period of time allowed by the statute of limitations, because their liability continues for a reasonable time after the last negotiation, and the last negotiation may not occur until months or even years after the indorser or drawer signed, who is sought to be held liable.

Columbia Banking Co. v. Bowen, 114 N. W. 451, 134 Wis. 218.

For other cases see Decennial Digests, Bills and Notes §404(2).

Q. 118. M in St. Louis on March 1 drew a check on the D Bank in Chicago for \$100 payable to the order of P, and delivered the same to P for value in St. Louis, on the day of execution. P negotiated to A in St. Louis on March 2. A negotiated to B, and mailed the check to B in Cincinnati. B received the check March 4. On March 6 B negotiated and mailed the check to the E Bank in Chicago. The check was received by E on March 7, and on that day presented to the D Bank for payment, but dishonored because of the insolvency of the drawee, a receiver having been appointed on March 5. The drawer had sufficient funds on deposit to meet the check, had it been presented before the appointment of the receiver. The drawee paid depositors 50 per cent. What are the rights of the holder against the drawer and indorsers?

A. The holder may recover 50 per cent. of the amount called for by the check from the drawer, or, if the drawer were not sued, the holder could recover the whole amount from any one of the indorsers. While the drawer is a secondary party, and is conditionally liable, his liability is greater than that of a drawer of a bill of exchange, which is not a check. The rule is that a check must be presented within a reasonable time after issue in order to hold the drawer, but if the instrument is not presented within a reasonable time after issue the drawer is not totally discharged, but is discharged only to the extent of the loss caused by the delay. It is usually held that, where the parties all have their places of business in the same town, presentment to be within a reasonable time after issue must be made on the next succeeding business day after delivery to the payee, and that, if the drawee bank is located in another town, presentment must be made within that period of time which is necessary to send the check by mail to an agent for collection in the place where the drawee is located. This does not mean that the check must necessarily be sent in the shortest route, if a banking custom which under the circumstances is reasonable has established a somewhat circuitous route. In this case the lapse of time is unreasonable. The check was delivered on the 1st of the month. The drawee paid checks up until the 5th. Presentation should have been made on March 3, or at the latest March 4. The drawer was therefore discharged to the extent of the loss caused by the delay, which in this case is one-half of the face of the check. This rule is codified in section 186 of the Negotiable Instruments Law.

As regards the indorsers, under the rule that they are liable if presentment is made within a reasonable time, after the last negotiation, each is liable to the holder for the full amount.

Griffin v. Kemp, 46 Ind. 172.

Rosenbaum v. Hazard, 82 A. 62, 233 Pa. 206, 38 L. R. A. (N. S.) 255, Ann. Cas. 1913A, 1291.

Gordon v. Levine, 80 N. E. 505, 194 Mass. 418, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119.

For other cases see Decennial Digests, Bills and Notes ⇐398, 404(2), 498.

Q. 119. M draws a bill of exchange on D for the price of goods sold to D. The bill was payable to P's order, who indorsed to A. A indorsed to B, and B indorsed the bill to the C Bank for collection and mailed the check to C. A few days before maturity the C Bank wrote a letter to D, telling him that they held the bill for collection and naming the date of maturity. D did not call at the bank, and a few days after maturity the C Bank returned the bill

Presentment

to B, stating that it had been dishonored. B sued the C Bank. May he recover?

A. Yes; the C Bank, being an agent for collection, was under a duty to its principal, B, to make a due presentment. An instrument, to be duly presented, must be exhibited to the person from whom payment is demanded, unless waived by the obligor. There was no physical presentation in this case, and no waiver by D. If the holder lost by reason of the nonpresentment, the C Bank is liable to B, not on the bill, but for breach of its contract of agency.

Torgerson v. Ohnstad, 182 N. W. 724, 149 Minn. 46.

Porter v. East Jordan Realty Co., 177 N. W. 987, 210 Mich. 398, 11 A. L. R. 963.

Gilpin v. Savage, 94 N. E. 656, 201 N. Y. 167; 34 L. R. A. (N. S.) 417, Ann. Cas. 1912A, 861.

For other cases see Decennial Digests, Bills and Notes ⇨397, 404(1), 405.

Q. 120. The holder of a bill drawn upon the X branch of the A Co. is presented for payment at the principal office of the A Co. Is this presentment made upon the proper person?

A. No; where a place of payment is specified, it must be there presented in order to charge secondary parties. If the instrument is not payable at a special place, but the address of the party upon whom presentment must be made is given, it must be there presented, and if no address is given the instrument must be presented at the usual place of business of such person or at his residence. In all other cases the instrument may be presented wherever such person may be found, or, if he cannot be found, at his last known place of business or residence.

Negotiable Instruments Law, §§ 73, 75; Ironclad Mfg. Co. v. Sackin, 114 N. Y. S. 43, 129 App. Div. 555.

For other cases see Decennial Digests, Bills and Notes ⇨403.

Q. 121. M's note is payable at the D Bank. The holder indorsed the note to the D Bank for collection. Is the instrument duly presented, by being in the bank where payable on the date of maturity?

A. Yes; it is considered a sufficient presentment if the instrument is actually in the bank at maturity.

De La Vergne v. Globe Printing Co., 148 P. 923, 27 Colo. App. 308.

For other cases see Decennial Digests, Bills and Notes ⇨405.

Q. 122. Upon whom and by whom must presentment be made?

A. Presentment of a note must be made upon the maker. Presentment of a bill of exchange must be made upon the drawee. Pre-

How about of maker or acceptor?

note

sentment must be made by the holder, or some agent authorized by the holder to receive payment. One should bear in mind that presentment is not necessary in order to charge primary parties, the maker or acceptor, but is necessary in order to hold the drawer and the indorsers.

Negotiable Instruments Law, § 72, pars. 1, 4, and sections 76, 78; *Columbia-Knickerbocker Trust Co. v. Miller*, 109 N. E. 179, 215 N. Y. 191, Ann. Cas. 1917A, 348.

For other cases see Decennial Digests, Bills and Notes ⇨403.

Q. 123. A check is presented to the drawee within a reasonable time after issue and dishonored, but due notice of dishonor is not sent to the drawer. May the holder recover from the drawer?

A. At common law the rule was that the drawer of a check would be discharged only to the extent of the loss caused by the delay, thus adopting the same principle as governs the liability of the drawer of a check after a failure to make a due presentment. The drawer of a bill other than a check and indorsers on all forms of instruments were totally discharged for a failure to give due notice of dishonor. Section 89 of the Negotiable Instruments Law provides that a failure to give the drawer and indorsers due notice of dishonor works an absolute discharge. This codifies the common-law rule as regards the drawer of a bill other than a check and as regards indorsers, but it probably changes it as regards the drawer of a check. Section 186 preserves the rule that a drawer of a check is discharged only to the extent of the loss caused by the delay, but fails to make a similar exception for the failure to give due notice of dishonor to the drawer of a check. It is therefore likely that the common-law rule has been changed, so that under the act a failure to give due notice of dishonor operates to discharge the entire liability of the drawer of a check.

Griffin v. Kemp, 46 Ind. 172.

Bacigalupo v. Parrilli (Sup.) 112 N. Y. S. 1040.

For other cases see Decennial Digests, Bills and Notes ⇨398.

Q. 124. In an action by the holder against an indorser, the proof shows that a proper notice was deposited in the mails, properly stamped, addressed to defendant. There was affirmative evidence that the notice was never received by defendant, and no evidence that he did receive it. Is defendant liable?

A. Yes; when notice by mail is relied upon, sections 105 and 106 provide that the sender is deemed to have given due notice where notice of dishonor is duly addressed and deposited in the

post office, branch post office, or box under the control of the Post Office Department, notwithstanding any miscarriage in the mails.

First Nat. Bank v. Star Watch Case Co., 153 N. W. 722, 187 Mich. 224.

People's Bank & Trust Co. v. Allen, 110 A. 704, 94 N. J. Law, 355.

For other cases see Decennial Digests, Bills and Notes ¶421, 537(7). *Protest.*

Q. 125. The holder of a check drawn in New York, payable in New York, after a due presentment, dishonor, and due notice of dishonor, sues a Pennsylvania indorser. Is he liable on these facts?

A. Probably not, because of the absence of a formal protest. At common law and under the Negotiable Instruments Law, the liability of secondary parties is conditioned, not only upon there being a due presentment, dishonor, and due notice of dishonor, but also upon protest. Protest, in its narrower sense, is the formal certificate, usually of a notary public, that he made a due presentment of the instrument and that the same was dishonored. The certificate must state (1) the time and place of the presentment; (2) the fact that presentment was made and the manner thereof; (3) the reason for protesting the instrument; and (4) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

The rule requiring protest is confined to foreign bills of exchange, which from the bill itself appears to be such. A foreign bill is one drawn in one state or country and payable in another state or country. In the above case, while the bill is drawn and payable in the same state, the action is brought against a nonresident indorser, and it has been held that in such case the bill is to be treated as a foreign bill of exchange. The fact that the defendant was a resident of some state other than that in which the bill is drawn must, however, appear on the instrument before the rule becomes applicable. *Note*

Sublette Exchange Bank v. Fitzgerald, 168 Ill. App. 240.

For other cases see Decennial Digests, Bills and Notes ¶13.

Q. 126. A note is drawn and payable in the same state, but is indorsed by a resident of another state. Is protest necessary in order to charge the nonresident indorser?

A. The rule requiring protest is confined to bills of exchange. Whether for purposes of this rule a note indorsed by a nonresident against whom the action is brought by the holder is to be deemed a bill of exchange or not is not certain. In one sense the indorsement of any instrument operates as a new drawing, and at common law there were some cases which held that, in such case as

the above, protest was necessary, though there were cases which held the contrary.

Negotiable Instruments Law, § 152, merely says that, "where a foreign bill of exchange appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill protest thereof in case of dishonor is unnecessary." There is just as much reason for requiring protest of a promissory note, where it is sought to hold an indorser who is a resident of a state other than that in which the maker lives, as there is in the case of a bill of exchange, but no case has been found which construes the Negotiable Instruments Law on this point.

Burke v. McKay, 2 How. 66, 11 L. Ed. 181.

For other cases see *Decennial Digests, Bills and Notes* ¶409.

Q. 127. M executes his negotiable note, payable to the order of P, and delivers the same to P for value. P indorses the note "without recourse," and negotiates to A for value. The instrument is dishonored at maturity on presentment to M. A sues P. Is he liable?

A. No; the effect of the indorsement "without recourse," or, as is more generally called, the qualified indorsement, is to negative the liability of the indorser to pay the holder in the event of dishonor. The qualified indorsement must be sharply distinguished from the unqualified indorsement. The effect of the unqualified indorsement, whether it be in blank or special, is (1) to pass title to the indorsee; and (2) to impose upon the indorser a contract duty to the holder to pay, if the instrument is dishonored upon due presentment, and due notice of dishonor is given to the indorser, and, in addition, due protest in the case of a foreign bill. Negotiable Instruments Law, § 66, codifying this rule, calls the contractual liability of the unqualified indorser an engagement to pay upon dishonor after due presentment and the necessary proceedings on dishonor have been duly taken. The qualified indorsement, which usually takes the form of special or blank indorsement, with the added words "without recourse," destroys this special engagement to pay the holder, which liability otherwise would be assumed by the indorser. Negotiable Instruments Law, §§ 65, 66.

Cressler v. Brown, 192 P. 417, 79 Okl. 170.

For other cases see *Decennial Digests, Bills and Notes* ¶293.

Q. 128. M's name is forged by P as the maker of a negotiable note payable to the order of P, and negotiated by P to an innocent purchaser, A, who for value negotiates "without recourse" to B. Upon dishonor by M, B sues A. Is he liable?

A. Yes. While the qualified indorsement negatives the special engagement of the unqualified indorser to pay the holder, upon dishonor after proceedings on dishonor have been duly taken, it does not destroy the liability which is imposed upon the indorser because he is a vendor of a species of personal property. To grasp the distinction between these two types of liability is most important. An indorser of a negotiable instrument assumes thereby a conditional liability upon the contract to the holder. It is this liability which, in Negotiable Instruments Law, § 66, is spoken of as an engagement. But a negotiable instrument, after value has once been given for it, becomes a commercial speciality; that is, the instrument becomes something more than the mere evidence of a contract. It is now a species of personal property, capable of being the subject of gift, conversion, etc. The sale of an ordinary chattel under certain circumstances imposes upon the vendor a number of implied warranties, such as that of merchantability and of fitness for a particular purpose. Similarly the sale of a negotiable instrument carries with it certain warranties. These liabilities attach because the indorser is also the vendor of personal property. The qualified indorser, who has merely negatived his special contractual liability, is none the less a vendor. Hence whatever liability attaches to the vendor of a negotiable instrument is none the less present, although the vendor has indorsed without recourse.

As now phrased in section 65 of the Negotiable Instruments Law, the qualified indorser warrants "that the instrument is genuine and in all respects what it purports to be, that he has a good title to it, that all prior parties had capacity to contract, and that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." These clauses have not as yet been construed to any great extent by the courts. The first clause would certainly impose a warranty against forgery, and probably against material alteration; but it is doubtful whether it would impose a warranty against other defenses. warr's
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Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171.

Oressler v. Brown, 192 P. 417, 79 Okl. 170.

For other cases see Decennial Digests, Bills and Notes ☞ 293, 326.

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Q. 129. M executes his negotiable note, payable to the order of P, and delivers the same to P in satisfaction of a gambling debt, in a jurisdiction where a statute declares such a contract absolutely void. P negotiates to A for value, and A without knowledge of the illegal transaction indorses "without recourse" to B for value. Is A liable to B?

A. Probably not. This case is probably governed by the fourth clause of section 65 of the Negotiable Instruments Law, which imposes upon the indorser no warranties against any defenses, but is merely a warranty that the qualified indorser is ignorant of all defenses not included in the first three clauses of section 65. Were it not for the fourth clause, the first clause, being a warranty that the instrument is in all respects what it purports to be, would be broad enough to include a warranty against illegality. Apparently the framers of the Negotiable Instruments Law intended by the fourth clause to codify the minority rule of *Littauer v. Goldman*, 72 N. Y. 506, 28 Am. Rep. 171.

For other cases see Decennial Digests, Bills and Notes ¶326.

Q. 130. A is an unqualified indorser of a note which is void for illegality, but A has no knowledge of the illegality. There is a failure on the part of the holder to make a due presentment for payment. The holder sues the unqualified indorser. Is he liable?

A. Yes. He is not liable on his special engagement, however, because this liability fails to attach because the necessary proceedings on dishonor were not duly taken. His liability arises from breach of warranty. The unqualified indorser is, like the qualified indorser, a vendor. As such the warranties of each should be the same, but the Negotiable Instrument Law has made a very important distinction between the two. The unqualified indorser enters into the same warranties as does the qualified indorser in so far as these warranties are prescribed by subsections 1, 2, and 3 of section 65. But instead of imposing a warranty that the indorser did not know of other defenses, as does section 65—4, section 66—2 provides that the unqualified indorser warrants "that the instrument is at the time of his indorsement valid and subsisting." Section 66 in its entirety, therefore, probably imposes upon the unqualified indorser a warranty against the existence of any real or personal defense possessed by the party primarily liable thereon. In other words, the unqualified indorser warrants, in effect, that the holder is entitled to a judgment against the primary party. He does not warrant that it will be paid. The liability of an indorser as a warrantor is ob-

viously not conditioned upon due presentment or due notice of dishonor. *Note*

Blethen v. Lovering, 58 Me. 437.

For other cases see Decennial Digests, Bills and Notes, ¶676.

Q. 131. A was the owner of a negotiable note, which was negotiated to him for value under the blank indorsement of the payee. A negotiated to B for value without indorsement. The note was dishonored at maturity after due presentment. Due notice of dishonor was sent to A. B sues A. Is he liable?

A. No; the liability of the holder of a negotiable instrument who negotiates without indorsement is the same as that of the qualified indorser. He is merely a seller of the instrument, the same as is the qualified indorser; hence his liability should be that of a vendor only. There is one difference between the liability of the qualified indorser and that of the transferor by delivery, and that concerns the parties to whom the liability runs. The liability of the transferor by delivery, under section 65, "extends in favor of no holder other than the immediate transferee." The inference is that the liability of the qualified indorser runs to all subsequent holders. Under section 66 the liability on warranties of the unqualified indorser is expressly made to run to all subsequent holders in due course. *Know Indor Del - war sa 20 in ea 2. Ind.*

See 12 Cal. Law Rev. 528.

SECTION 6.—DISCHARGE

Q. 132. P, the payee, was the holder of a note on which M was the maker. M and P had a general settlement of all their accounts, and as a part thereof P said, "I will cancel your note." Whereupon P tore up the note, but did not give the pieces to M. Subsequently, the terms of the settlement not having been carried out to P's satisfaction, P pasted the parts of the note together and sued M thereon. Is M liable thereon?

A. No; because the intentional cancellation of a negotiable instrument operates as a discharge thereof, and the facts here disclose an intentional cancellation. This rule has been codified in sections 119 and 123 of the Negotiable Instruments Law. The rule emphasizes the distinction between simple contract in writing and a commercial specialty. The destruction or mutilation of the evidence of a simple contract would not discharge it. Moreover, it is to be noted here that the liability upon a negotiable contract can

be discharged without consideration, which is not true with respect to the simple contract.

Ingham v. Primrose, 7 C. B. (N. S.) 82.

Jones' Adm'rs v. Coleman, 92 S. E. 910, 121 Va. 86.

Greene v. Poz, 182 N. Y. S. 900.

For other cases see *Decennial Digests, Bills and Notes* 491, 537(8).

Q. 133. M executed his note, payable to the order of P, and delivered it to P to secure payment of a loan. S signed as surety co-maker. At maturity P wrote M a letter, in which he said: "I hereby release you from liability on your note." Subsequently P sued S. Is he liable?

A. No; the general rule in suretyship is that indulgence to a debtor does not release a surety, but that a binding agreement to extend time of payment, or a release under seal or upon consideration, would release the surety. A release without consideration would not discharge either the obligor or his surety. However, in the law of bills and notes a written renunciation of the holder's rights against any party liable thereon discharges such party from liability, although the obligee's promise is not supported by consideration. This doctrine came into the English common law from the civil law, but was not adopted in the United States. But section 122 of the Negotiable Instruments Law adopts the principle of renunciation. Hence P's declaration, although without consideration, is binding, and hence the surety would be discharged. This conclusion, however, does not take account of the construction that has been placed upon sections 119 and 120 of the Negotiable Instruments Law, under which some courts have held that the surety's equitable defenses have been abolished.

Foster v. Dawber, 6 Exch. 839.

Baldwin v. Daly, 83 P. 724, 41 Wash. 416.

Leask v. Dew, 92 N. Y. S. 891, 102 App. Div. 529.

For other cases see *Decennial Digests, Accord and Satisfaction* 8(1); *Bills and Notes* 437; *Compromise and Settlement* 6(1); *Principal and Surety* 89.

Q. 134. M borrowed \$100 from P and agreed to give his note therefor, payable in 6 months. Later on in the negotiation there was some discussion as to making the note payable in 3 months. In drawing the note, M made it payable in 6 months, and delivered the same in this form to P. P subsequently changed the date of maturity by scratching out the figure "6" and inserting "3," and after the expiration of 3 months, the note being unpaid, P sued M, who pleaded that the note was discharged by material alteration. The evidence failed to show an agreement that the note should be

a 3-months note, but it also showed that P bona fide believed that M had agreed to make the note for 3 months. May P recover?

A. At common law there was a conflict of authority. Some courts held that the innocent material alteration of a negotiable instrument did not discharge it, but the holder could sue thereon as it was prior to alteration. Other courts held that, although the material alteration was innocent, the instrument was discharged, but that the holder could sue on the original or underlying indebtedness. The courts were agreed that, where the alteration was material and fraudulently done, there could be no recovery, either upon the instrument as it was before alteration or upon the original indebtedness.

It is somewhat uncertain as to what the law is with respect to the effect of an innocent alteration under section 124 of the Negotiable Instruments Law, which provides that, "where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided," etc. If interpreted in its broadest sense, the term "materially" would include both fraudulent and innocent alterations, and under this construction the party who innocently altered a negotiable instrument could not sue upon it in its original state. In view of the fact that under the same section a holder in due course is allowed to recover upon the instrument in its original state—and this clause has been applied to fraudulent as well as to innocent alterations, a right which he did not have at common law—there is reason for believing that the section would not change a common-law rule, under which a party who had innocently altered the paper could sue upon it in its original form. Whether the section would change a common-law rule under which a party who had innocently altered the paper could not sue upon the instrument, there is more doubt. The probabilities are that it would not change such a common-law rule.

Wallace v. Tice, 51 P. 733, 32 Or. 283.

For other cases see Decennial Digests, Alteration of Instruments ¶11(1).

Q. 135. Does a material alteration by a person other than the holder or other party to a negotiable instrument discharge it?

A. In England an alteration by a stranger did avoid the instrument. In the United States it generally did not avoid it. The Negotiable Instruments Law does not deal specifically with this question. The question presented is whether the term "material alteration" is to be construed with the same content which these words had in the American common-law cases, or whether it is

to be construed in accordance with the meaning which these words had in England. Since the Negotiable Instruments Law is in large measure a copy of the English Bills of Exchange Act, there is some reason for urging that the words are to be given the meaning which they possess in the English act. However, it is much more probable that the meaning of words and clauses in the Negotiable Instruments Law is to be derived from the sense in which they had theretofore been used in the American cases. It is likely, therefore, that a material alteration by a stranger, or spoliation, as it is sometimes called, would not avoid the instrument.

Jeffrey v. Rosenfeld, 61 N. E. 49, 179 Mass. 506.

For other cases see Decennial Digests, Alteration of Instruments ⇨20.

Q. 136. M's note was dishonored while C was the holder thereof. A prior indorser, B, paid C 50 per cent. of the amount called for by the note. C sued M for the full amount. May he recover?

A. Yes; because the payment of a negotiable instrument by a party secondarily liable thereon does not discharge the instrument. Payment by an indorser is no defense to the party primarily liable. The holder, therefore, is entitled to recover the face of the note, and will hold in trust for the indorser who paid that portion of the debt theretofore paid by him.

Madison Square Bank v. Pierce, 33 N. E. 557, 137 N. Y. 444, 20 L. R. A. 335, 33 Am. St. Rep. 751.

Negotiable Instruments Law, § 121.

For other cases see Decennial Digests, Bills and Notes ⇨440.

Q. 137. C was the holder of the negotiable note of M, under the blank indorsement of the prior holder. T stole the instrument, and at maturity presented the instrument for payment to the maker, M, who paid without notice that T had stolen the note. May C recover from M, on proving that the note had been stolen from him?

A. No; because payment made to the holder at or after maturity operates as a discharge of the instrument. The thief or finder of a bearer instrument is the holder. Hence the note was discharged.

Negotiable Instruments Law, §§ 88, 119, par. 1.

Q. 138. The maker and the payee of a negotiable note enter into an accord and satisfaction prior to maturity, under which agreement the note is deemed paid. The payee and holder promised to return the note to the maker, but in breach of his agreement negotiated it to A, who sues the maker. May he recover?

A. Probably so. He could not do so at common law, but section 119, par. 4, of the Negotiable Instruments Law, provides that a negotiable instrument is discharged "by any other other act which will discharge a simple contract for the payment of money." An accord and satisfaction does discharge a simple contract; therefore it should discharge a negotiable contract. But it is not likely that this section will be construed to discharge a negotiable instrument as against a holder in due course. The analogous provision dealing with payment as a discharge provides that the only payment which does discharge the instrument is that which is made at or after maturity. Paragraph 4 should have been similarly qualified.

Q. 139. M was the maker of a note, and S was his surety co-maker. P was the payee. P, by binding agreement, extended time of payment to M, without reserving his rights against S, and without the knowledge of S. P sues S; is he liable?

A. At common law S was not liable, because under the rules of suretyship an extension of time of payment under a binding agreement by the creditor to the principal debtor operated to discharge the surety. This was but one of several special defenses, which the surety, because of his relation to the parties, was given. A release of the principal debtor operated in the same manner, as did also a surrender of collateral by the creditor to the principal debtor. Under the Negotiable Instruments Law the question is whether these special defenses of the surety have been abolished. Most courts have held that they have been abolished by the language of sections 119 and 120, although there are some cases holding to the contrary. The majority interpretation of these sections is open to very serious question.

Union Trust Co. v. McGinty, 98 N. E. 679, 212 Mass. 205, Ann. Cas. 1913C, 525.

Scandinavian American Bank v. Westby, 172 N. W. 665, 41 N. D. 276.

For other cases see Decennial Digests, Bills and Notes Ⓔ49, 140; Principal and Surety Ⓔ115(1).

PARTNERSHIP

By J. A. CRANE, Professor of Law, University of Pittsburgh Law School

Section

1. Nature and Distinguishing Features of Relation.
2. Partnership Property and Its Disposition.
3. Powers of Partners in Representing Firm.
4. Actions against Firm.
5. Duties between Partners and Enforcement by Actions.
6. Dissolution and Liquidation.
7. Bankruptcy and Rights of Creditors.
8. Partnership by Estoppel and Notice of Dissolution.

SECTION 1.—NATURE AND DISTINGUISHING FEATURES OF RELATION

Q. 1. Defendant secured rooms, furniture, and goods suitable for conducting a shoeshine parlor. He installed plaintiff as manager under an agreement that, after receipts should repay the cost of the original investment, maintenance, and board and room of plaintiff and defendant, plaintiff, who was to receive in the meantime no compensation, other than board and room, should receive a half interest in the business. After profitable continuance of the venture for two years, plaintiff demanded a half interest in accordance with the contract. Defendant refused to grant this demand, or to make any settlement. Plaintiff brought an action for violation of the agreement, with a count in quantum meruit for his services. Can he recover?

A. Plaintiff should recover. The relation was not one of partnership, with exclusive relief in equity, but one of master and servant. A hiring under which the servant is to be wholly or partially compensated by a share in profits of the business does not constitute partnership. This is an executory agreement for a future partnership, but it does not constitute a present partnership, nor does the happening of the condition on which it became the duty of defendant to take plaintiff into partnership operate automatically to make him a partner. Having broken the contract to pay compensation in a certain way, defendant is liable to plaintiff in quantum meruit for the value of his services.

Coens v. Marousis, 119 A. 549, 275 Pa. 478.

Eastman v. Dunn, 83 A. 1057, 34 R. I. 416.

For other cases see Decennial Digests, Partnership ¶9(1), 21, 105; Work and Labor ¶14(2).

Q. 2. An insolvent partnership agreed with creditors that the business should be continued under the supervision of a managing committee, designated by the creditors, until their claims were fully paid off out of profits. Are the creditors who are parties to this agreement liable as partners to the new creditors of the continued business?

A. The creditors are not partners, and are not liable as such. They are not co-owners of the business. Their interest in the property engaged therein, and in the profits, is limited to the definite amount of their claims. The business is not carried on for their benefit, but for that of the original partners. It is not carried on by the creditors, although for their protection they are empowered to exercise a limited measure of control. They are not principals in the business transactions. It is well established that making a loan to be repaid out of profits, or agreeing that a past indebtedness shall be discharged in that way, does not constitute the lender a partner. Not being partners as to each other, they are not partners as to third persons.

In re Hoyne (C. C. A.) 277 F. 668.

Giles v. Vette, 44 S. Ct. 157, 263 U. S. 553, 68 L. Ed. 441.

National Bank of Commerce in St. Louis v. Francis, 246 S. W. 326, 296 Mo. 169.

Uniform Partnership Act, § 7.

For other cases see *Decennial Digests, Partnership* ¶5, 17, 27, 30, 55; 351, 362.

Q. 3. The Premier Clothing Company was organized under a declaration of trust, vesting the property and general management in trustees; beneficial interest therein being divided into transferable shares. The shareholders were empowered, at annual meetings, to elect trustees for one-year terms, and at any regular or special meeting to alter, amend, or terminate the trust by three-fourths vote. It was provided that the trustees should have no power to bind the shareholders personally. A was injured by the negligence of a servant of the company, driving a delivery truck. What remedies can A pursue?

A. A can sue the trustees conducting the business, as they at least are principals and masters of the servant who drove the truck. Whether the beneficiaries can also be sued turns on whether they are partners or not. The beneficiaries are sharing in profits and are the ultimate owners of the property. But have they sufficient control over the trustees and the carrying on of the business, so that they can be said to be principals? Periodical election of those

who actually carry on the business, and power to terminate or amend, seems too remote and indirect to constitute the control necessary for a partnership relation, as distinguished from a common-law trust. There are many authorities to the contrary, however. After judgment against trustees, the plaintiff could levy execution on the assets of the business. Some states have statutory provisions permitting suit against the association in its company name. Being the victim of a tort, without any voluntary dealings with the association, the plaintiff is unaffected by the provisions in the trust instrument limiting the power of trustees. A contract creditor, who had notice of the agreement, would probably be held estopped to claim personal liability of the associated beneficiaries in nearly every jurisdiction except Texas.

Williams v. Inhabitants of Milton, 102 N. E. 355, 215 Mass. 1.

Home Lumber Co. v. Hopkins, 190 P. 601, 107 Kan. 153, 10 A. L. R. 879.

Rhode Island Hospital Trust Co. v. Copeland, 98 A. 273, 39 R. I. 193.

Thompson v. Schmitt (Tex. Sup.) 274 S. W. 554.

For other cases see *Decennial Digests, Corporations* ¶28(1), 378; *Joint-Stock Companies* ¶15(1); *Partnership* ¶3, 20, 306; *Trusts* ¶30½(1), 272(1).

Q. 4. A, B, and C carried on two businesses as partners, one a grocery business in the name of A & Co., the other a plumbing business in the name of B & Co. Money being needed for A & Co., a note was signed A & Co. and indorsed by B & Co. This was discounted by the X Bank. The question later arose as to whether the transaction was in compliance with a bank rule requiring paper offered for discount to be signed by the names of two firms or persons.

A. This question of interpretation of a bank rule or by-law is aided in its solution, as are many other partnership questions, by adopting either the entity or aggregate views of the nature of a partnership. If the group associated to carry on a particular business is to be considered by the law as a legal person, a unit, distinct from the several human members who make up the group, then two distinct business groups are two firms, although the constituent members are the same. If the law can see nothing but the human persons carrying on several undertakings together, there is but one firm. There is no consistent holding in any jurisdiction on the question of whether or not a partnership is at common law to be treated as a legal person. In many cases particular problems are decided, and the opinions of the courts base the solution on the premise that the partnership is or is not to be treated as a legal person, at least for the purpose of the issue involved. There are

conflicting decisions as to whether the same group of men can form two distinct firms. The interpretation of the bank by-law, such as stated in this question, should turn on whether, in event of bankruptcy, there would be two estates or one available for payment of the note. The weight of authority appears to be that in bankruptcy the assets of the two businesses should be merged and the group treated as one firm.

Second National Bank of Oswego v. Burt, 93 N. Y. 233.

Campbell v. Colorado Coal & Iron Co., 10 P. 248, 9 Colo. 60.

Gay v. Ray, 80 N. E. 693, 195 Mass. 8.

Heinze v. Industrial Commission, 123 N. E. 598, 288 Ill. 342.

For other cases see Decennial Digests, Banks and Banking Ⓔ54(3), 269; Partnership Ⓔ63, 190, 300.

Q. 5. An agreement between A and B for the operation of A's farm provided that A should furnish the farm and B the labor. Live stock and other equipment were to be furnished at joint expense, and net receipts were to be divided equally. The contract described the relation as one of partnership, and stipulated that it should be known as "A & B." B borrowed money of C on his personal note, and gave C a mortgage on one-half the live stock and other property on the farm. Can C, on default, foreclose as against A's claim of a lien for advances on the joint account?

A. If the property were held by A and B as co-owners, B could mortgage his share. If it is firm property, B can only assign as security his interest in the surplus after firm debts are paid out of firm property and firm accounts settled. While payment by a tenant of rent to his landlord out of gross product or net profits does not constitute partnership, facts sometimes present a close case, in which expressed intent is controlling. Where some expenses of the business are shared, and the parties evidently consider themselves partners, and so hold themselves out to the public, the court will hold a partnership exists, with the consequence that a partner cannot mortgage his share in firm property for a separate debt. He can only mortgage an interest in the surplus, if any.

Malvern Nat. Bank v. Halliday, 192 N. W. 843, 195 Iowa, 734.

Uniform Partnership Act, §§ 7, 25, 27.

For other cases see Decennial Digests, Chattel Mortgages Ⓔ138(1); Partnership Ⓔ5, 8.

SECTION 2.—PARTNERSHIP PROPERTY AND ITS DISPOSITION

Q. 6. A and B carried on a laundry business at X as A & Co. They sold out to C and D, the contract stating that the vendors transferred the good will of A & Co. to the vendees and agreed not

to engage in the laundry business within a radius of five miles of X. Later A set up a competing laundry at X. Can he be enjoined for breach of contract?

A. The expectation of continued business, called the good will of a partnership, may appertain to a firm name, the trade-name of a product, a location, or the personal qualities and reputation of those who carry it on. In so far as it is salable, it is a firm asset, which cannot be disposed of by less than all the partners, and in which all are entitled to share on dissolution. The contract in this case binds the firm of A & Co. to refrain from impairing the success of the purchasers of their business by competition within the immediate sphere of operations of this laundry. Is it binding on the partners as individuals? A strict application of the entity theory would lead to an interpretation of the contract prohibiting only firm action. It is, however, a question of what the parties to the contract appear to have intended, and as the good will of a laundry may well inhere in the personality of the titular head of the firm, it is reasonable to suppose the buyers demanded for their protection freedom from competition by the partners whether as a firm or separately. Partners are, of course, parties to firm contracts, and individually bound according to the proper intent and meaning of their agreement.

Southworth v. Davison, 118 N. W. 363, 106 Minn. 119, 19 L. R. A. (N. S.) 769, 16 Ann. Cas. 253.

Didlake v. Roden Grocery Co., 49 So. 384, 160 Ala. 484, 22 L. R. A. (N. S.) 907, 18 Ann. Cas. 430.

Kidder Equity Exchange v. Norman, 173 N. W. 728, 42 S. D. 229, 5 A. L. R. 1180.

For other cases see *Decennial Digests*, Good Will ⇨7; Partnership ⇨67, 141, 256.

Q. 7. A, a soap manufacturer, died, leaving to his sons, B and C, his factory building, with land adjoining. B and C formed a partnership to continue the business. They enlarged the factory and installed new machinery, paying the cost out of earnings. Dwelling houses were erected on the unused land and paid for out of firm funds. These were rented to employees, and the rents collected and retained by the firm. Insurance and taxes on the entire property were paid by the firm. B became bankrupt, and it was necessary to liquidate. What part of the real estate and equipment is firm property, and what is separate property of the partners?

A. Use for firm purposes of real estate owned by the partners as cotenants does not necessarily make it firm property. In the absence of evident intent to the contrary, it remains separate

property. Unless there be a deed to the firm, or entry on firm books of the property as belonging to the firm, or other evidence of an agreement that it becomes such, it remains separate property. Buildings and machinery, acquired with firm funds and used for firm purposes, although attached to separately owned land, are presumably firm property. Dwelling houses erected for employees are not so clearly firm property; but, as their use furthers firm purposes, they should be so held. It would be otherwise, if used for other purposes, as if the return in the form of rentals were paid to the separate accounts of the partners.

Taber-Prang Art Co. v. Durant, 75 N. E. 221, 189 Mass. 173.

Blakeslee v. Blakeslee, 106 N. E. 470, 265 Ill. 48.

Uniform Partnership Act, § 8.

For other cases see *Decennial Digests, Partnership* ¶68(1).

Q. 8. A and B formed a partnership to purchase, develop, and sell suburban real estate. Title was taken in some instances in the firm name, "Suburban Real Estate Co."; in others, in the names of A and B jointly; and in others, in A's name. On death of A, B proceeded to wind up the firm affairs, and to sell the remaining lots. How can he pass title to purchasers?

A. The surviving partner has the power to sell firm property in the course of liquidation. Title to firm property passes to him as surviving partner for this purpose. At common law a firm could not take title to land in an artificial name, not being a legal person, but it may do so under the Uniform Partnership Act, and the surviving partner can convey such property in the firm name. Land held in the names of A and B at common law is held as tenants in common, and A's share on his death would pass to his heirs, who could be compelled by a court of equity to convey to B's grantee. Under the Uniform Partnership Act, on death of A, the entire title would vest in B, and he would be competent to convey the entire legal title. As to land held in A's name, the firm has only the equitable ownership. That would pass to B, and he could convey it, calling on A's heirs to convey the legal title.

Africa v. Trexler, 81 A. 707, 232 Pa. 493.

Shanks v. Klein, 104 U. S. 18, 26 L. Ed. 635.

Wharf v. Wharf, 137 N. E. 446, 306 Ill. 79.

Uniform Partnership Act, §§ 10, 25 (d).

For other cases see *Decennial Digests, Ejectment* ¶90(2); *Partnership* ¶68(2), 246.

Q. 9. A, B, and C formed a manufacturing partnership and acquired real estate for firm purposes. Articles provided that on death of a partner the survivors could continue the business, paying

the estate of the deceased partner the value of his interest. A died, and the survivors paid his executor the value of his interest. Shall the entire amount paid be distributed among persons entitled to A's estate as personalty, or shall the part corresponding to the firm holdings in real estate be distributed as realty?

A. By the weight of authority, firm real estate is considered as equitably converted into personalty for partnership purposes; but on dissolution, after partnership purposes are satisfied, the surplus is reconverted and treated as realty for purposes of distribution. It is, however, possible for the partners by agreement to effect an out and out conversion for all purposes, including distribution, and the partners have made such an agreement in this case. The entire interest of the deceased partner is personalty. Under the Uniform Partnership Act there is conversion by operation of law, without the necessity of any agreement to that effect.

In re Hall's Estate, 109 A. 697, 266 Pa. 312.

Dana v. Treasurer and Receiver General, 116 N. E. 941, 227 Mass. 562.

Uniform Partnership Act, §§ 25, 26.

For other cases see *Decennial Digests*, Conversion ⚡13; Partnership ⚡20, 246.

Q. 10. A and B were in partnership, and owned as partners, for purposes of their business, an automobile truck. A creditor of A recovered judgment and took out execution. C, a sheriff, seized the firm truck under this execution against A, and, taking possession of it, sold it in satisfaction of the execution. Has the firm a right of action in trespass against the sheriff, C?

A. The right of a partner as co-owner of specific partnership property is limited to a share in the surplus after payment of firm debts. His right of disposition of specific property, whether voluntary or involuntary, is limited by the ownership by the firm as a group entity, or, using the language of the aggregate view of partnership, by the equities of copartners restricting the application of firm property to firm purposes. The rights of the firm are so far paramount that it is a trespass for a sheriff to take possession from the firm. Statutes now provide methods whereby separate creditors may reach the intangible chose in action, the partner's interest in the net assets of the firm.

R. A. Myles & Co. v. A. D. Davis Packing Co., 81 So. 863, 17 Ala. App. 85.

Gordon v. Borans, 109 N. E. 950, 222 Mass. 166.

Uniform Partnership Act, §§ 25, 28.

Wright v. Ward, 4 P. 534, 65 Cal. 525.

For other cases see *Decennial Digests*, Partnership ⚡76, 179, 219(1), 220(5); Sheriffs and Constables ⚡113(1), 139(5); Trover and Conversion ⚡28.

Q. 11. The firm of A & B, being insolvent, dissolved; A taking over the firm property and assuming payment of debts. After a few months A assigned for the benefit of creditors, under terms preferring certain of his separate creditors over the partnership creditors. Is the assignment fraudulent?

A. A firm may dissolve and transfer its property to a partner; but, if it be insolvent, such a transaction is fraudulent in so far as it affects the payment of firm creditors out of firm property. The assumption of firm debts by the insolvent continuing partner is not sufficient consideration to validate the transaction. It is fraudulent for partners to defeat the priorities of creditors of the firm that is insolvent by turning firm property into separate property, or by paying separate creditors out of firm property.

Darby v. Gilligan, 10 S. E. 400, 33 W. Va. 246, 6 L. R. A. 740.

Wilson v. Robertson, 21 N. Y. 587.

Sargent v. Blake, 160 F. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58.

Uniform Fraudulent Conveyance Act, § 8.

For other cases see *Decennial Digests, Assignments for Benefit of Creditors* ⚭130; *Bankruptcy* ⚭167(1), 186(1); *Partnership* ⚭69, 180, 183(5).

SECTION 3.—POWERS OF PARTNERS IN REPRESENTING FIRM

Q. 12. A and B were in partnership as dealers in automobiles, and sold secondhand cars, which were taken in trade. A also carried on an automobile repair business in his own name and on premises separate from the firm's selling agency. A ordered from plaintiff, dealer in automobile parts and accessories, a quantity of parts for use in his repair business, ordering in the name of the firm and using firm stationery; the letter head being headed, "A & B, Dealers in Ten Different Makes of Autos, a Full Line of Used Cars." The bill was not paid, and plaintiff sued the firm. The court directed a verdict for the plaintiff on these facts. Is the decision correct as to B's liability?

A. The defendant, B, would not be liable, unless the purchase was within the scope of the partnership business, as it was actually carried on or appeared to be carried on by this firm. A partner has implied power to buy goods on the credit of the firm, if the purchase of such goods is customary with his firm, or in the business in which his firm is apparently engaged. The jury should have been instructed that, to decide for plaintiff, they must find such proof of authority to bind the firm.

Iroquois Rubber Co. v. Griffin, 123 N. E. 369, 226 N. Y. 297.

First Nat. Bank of Ann Arbor, Mich., v. Farson, 123 N. E. 490, 226 N. Y. 218.

Uniform Partnership Act, § 9.

For other cases see *Decennial Digests, Partnership* ⚭127, 129, 141, 218(3).

Q. 13. A and B, partners, were sued for a tort alleged to have been committed by an employee of the firm in the course of business. On the facts stated in the plaintiff's declaration, the firm was liable. A wanted to settle, but B wanted to defend the action. B hired X, an attorney, to conduct a defense. A notified X that he would not be responsible for X's charges. X proceeded to try the case and lost. Can X hold A and B for his fee?

A. Engaging an attorney to defend an action against the firm is within the implied power of a partner. If X had not been informed of A's dissent, his employment would have certainly been a firm act, and A would have been liable for his services. The authorities are in conflict as to whether a partner can exercise an implied power, where the partners are evenly divided as to authorizing the act, and the third person is notified of the state of dissension. One line of cases, the weight of authority, holds that a partner's powers as agent for his copartners can be revoked effectually by notice to a third person, save where the dissenting partner is in the minority. The other view is that formation of a partnership vests each partner with implied powers incident to the conduct of the business, which can be revoked, so long as the firm is a going concern, only by firm action, for which at least a majority is necessary. The latter view seems more adapted to carrying out the intent of the parties in associating themselves for actively carrying on business. The presumption should favor action, not inaction.

Bank of Bellbuckle v. Mason, 202 S. W. 931, 139 Tenn. 659.

Yeager v. Wallace, 57 Pa. 365.

Campbell v. Bowen, 49 Ga. 417.

Lodewick v. Cutting, 201 N. Y. S. 276, 121 Misc. Rep. 348.

For other cases see Decennial Digests, Partnership ¶133, 148.

Q. 14. A borrowed money from C, giving a promissory note signed by A and payable to C. On C's demand, A added, without the knowledge of his copartner, the indorsement of A & B, a trading partnership. C transferred for value before maturity to D, who took without knowledge of any facts beyond those apparent from the note itself. Can D hold the firm as indorsers?

A. It is not within the authority of a partner to bind the firm to an instrument for his personal benefit. C, with knowledge of the facts, could not hold the firm. D can hold the firm only if he is a holder in due course, and if the making of negotiable instruments is within the implied powers of a partner, by reason of the making of such instruments being an act customarily incident to the business of the firm. Assuming the latter fact, the question then is whether the indorsement by the firm of an instrument in the hands of the

payee is so evidently irregular as to charge the transferee with notice that it is unauthorized, as the partner has no implied power to sign the firm name for his personal accommodation. As it is evident on the face of the instrument that the firm's anomalous indorsement is for accommodation, any taker is chargeable with knowledge of the partner's lack of authority to make such an indorsement. This should be so, even under the Negotiable Instruments Law and the Uniform Partnership Act, defining knowledge as actual knowledge, or knowledge of such other facts as in the circumstances shows bad faith.

Union National Bank of Kansas City, Mo., v. Neill, 149 F. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426.

Lemoine v. Bank of North America, Fed. Cas. No. 8240, 3 Dill. 44.

First Nat. Bank v. Sanders Bros., 172 S. W. 689, 162 Ky. 374.

Uniform Partnership Act, §§ 3, 9.

Negotiable Instruments Law, § 56.

For other cases see Decennial Digests, Banks and Banking ⇨183; Bills and Notes ⇨237, 342, 371, 495; Partnership ⇨146(3).

Q. 15. Plaintiff was injured by the negligent operation of an automobile by A. A was a partner in the undertaking firm of A & B, and the automobile belonged to the firm. In a suit against the firm, is the admission of A to the effect that at the time of the accident he was driving the automobile on firm business admissible in evidence against the firm?

A. A firm is liable for torts of a partner only if he is at the time engaged in firm business. Ownership by the firm of the vehicle or other instrument with which the tort is committed, and consent by the firm to his use thereof for purely personal purposes, is insufficient to make it a firm tort. Evidence that the use was in firm business is therefore relevant. But to be admissible against copartners the making of the admission must be itself a firm transaction; i. e., the partner speaking must at the time be acting within the scope and course of firm business. This should be shown before the evidence is admitted against the firm. This view, incorporated in the Uniform Partnership Act, is sustained by the majority of cases, though some courts have apparently assumed that, whenever the partner speaks with reference to firm matters, he is a representative of the firm.

Wise v. Schneider, 88 So. 662, 205 Ala. 537.

Rathbun v. White, 107 P. 309, 157 Cal. 248.

Randall v. Knevals, 50 N. Y. S. 748, 27 App. Div. 146, affirmed 57 N. E. 1122, 161 N. Y. 632.

Treon v. W. A. Shipman & Son, 119 A. 74, 275 Pa. 246.

Uniform Partnership Act, §§ 9, 11.

For other cases see Decennial Digests, Evidence ⇨249(1).

SECTION 4.—ACTIONS AGAINST FIRM

Q. 16. The firm of A, B & C carried on business in New York and in Colorado. A and B resided in New York and C in Colorado. X, having a claim against the firm, sued A, B & C as a firm in Colorado, proceeding under a statute permitting suit in the firm name on service upon one member. C alone was served. In accordance with the statute, the judgment obtained was against the firm, and permitted of execution only against firm property and the property of the partner served with process. The property subject to execution in Colorado being insufficient to satisfy the judgment, what remedies may X pursue in New York?

A. In an action against the firm on the joint obligation, all known partners must be joined as codefendants, or nonjoinder may be pleaded. Under the law as to joint debtors, and regarding the firm as an aggregate, judgment against some of the joint debtors is a merger of the cause of action, and those not parties to the judgment are discharged. The judgment is by statute or decision in many states good for execution against joint property as well as property of the partner served. According to the law in some states, the judgment does not operate as a merger in favor of parties not served, and the plaintiff could sue them in another action on the original claim, wherever he could find them. The Colorado judgment is entitled to such faith and credit in New York as to permit a suit on it against the firm after service on the New York partners, and the recovery of judgment of the same force and effect as the Colorado judgment, viz. leading to execution against firm property.

Walsh v. Kirby, 77 A. 452, 228 Pa. 194, 20 Ann. Cas. 1237.

Sugg v. Thornton, 10 S. Ct. 163, 132 U. S. 524, 33 L. Ed. 447.

Fleming v. Ross, 80 N. E. 92, 225 Ill. 149, 8 Ann. Cas. 314.

Stone v. Wainwright, 17 N. E. 301, 147 Mass. 201.

East Denver Municipal Irrigation Dist. v. Doherty (D. C.) 293 F. 804.

For other cases see Decennial Digests, Constitutional Law Ⓒ309(1); Partnership Ⓒ204; Judgment Ⓒ629, 818(2).

SECTION 5.—DUTIES BETWEEN PARTNERS AND ENFORCEMENT BY ACTIONS

Q. 17. A farm was carried on by the firm of A, B & C, under articles providing that, should any partner make advances out of private funds for the firm account, he should be allowed 6 per cent. interest thereon until reimbursed. A advanced \$6,000 for firm purposes, and after numerous fruitless demands for reimbursement from his partners brought suit against B for \$2,000. Should A recover?

A. A partner cannot sue his copartner at law on an obligation due him from the firm. An item in partnership accounts should not be isolated, and settlement enforced, without reference to the entire state of partnership affairs, unless the partners have by agreement made it a separate obligation. A partner has no remedy on his claim against the firm, except as part of a final accounting, obtainable by a proceeding in equity on dissolution.

Miller v. Kemper, 181 P. 859, 107 Wash. 274.

Lord v. Hull, 70 N. E. 69, 178 N. Y. 9, 102 Am. St. Rep. 484.

For other cases see Decennial Digests, Partnership $\S$ 108, 315.

Q. 18. A and B entered into partnership for the term of three years. After continuance of the business for one year, A forcibly excluded B from the partnership place of business and refused to allow him any further participation in firm affairs, declining to pay him any share of profits, or to make any division of partnership property. What relief can B obtain at law or in equity?

A. Where there is a complete repudiation of the partnership agreement, amounting to a forcible dissolution and ouster, the injured party can maintain an action at law. The damages are the value of the partnership interest, of the enjoyment of which he has been deprived. He may also by bill in equity secure a decree of dissolution and accounting, including damages for breach of agreement by premature termination of the partnership.

Gilbert v. Grubel, 108 P. 798, 82 Kan. 476.

Farwell v. Wilcox, 175 P. 936, 73 Okl. 230, 4 A. L. R. 156.

McCullum v. Carlucci, 55 A. 979, 206 Pa. 312, 98 Am. St. Rep. 780.

Young v. McKenney, 247 S. W. 964, 197 Ky. 768.

Lisco v. Husmann, 152 N. W. 383, 98 Neb. 276.

For other cases see Decennial Digests, Damages $\S$ 124(1); Partnership $\S$ 105, 122½, 273.

SECTION 6.—DISSOLUTION AND LIQUIDATION

Q. 19. The partnership articles of the firm of A, B & C provided that the firm should not be dissolved by the death of a partner, but upon his death his interest should be valued, and the amount paid to his personal representatives, with interest at 5 per cent. per annum until paid, but the firm should not be called upon to pay more than 10 per cent. of the principal in any one year. It was further provided that, if the deceased so directed by his will, the executors could leave one-third of his share in the firm, sharing profits and losses in the same way as the deceased would have shared, except that no dividends in excess of 7 per cent. per annum should be paid on such share. What are the rights and liabilities of the executors under this agreement?

A. Death of a partner dissolves a firm by operation of law. The parties may avoid the losses that would result in many cases from immediate liquidation of a going business by providing for its continuance by the survivors under various terms of participation by the decedent's estate. It is in reality a new partnership of the survivors with the estate of the deceased a creditor of the new firm. As to the first part of the arrangement outlined above, the estate is a creditor of the new firm in a liquidated sum, payable in installments. The estate is on a parity with new creditors as regards priorities in insolvency, and is not liable to new creditors; but, should the new firm become insolvent, with debts of the old firm still unpaid, debts for which the new firm is likewise liable under the Uniform Partnership Act, the old creditors, who are also creditors of the estate of the deceased partner, have a lien on the claim of estate against the new firm, to the extent of their claims. If the executors exercise, under the directions of the will, the option to leave a part of the share of the deceased in the business, "sharing profits and losses in the same way as the deceased would have shared," there is in effect a common-law limited partnership. The claim of the estate is subordinate to those of other creditors, and if the new firm becomes insolvent it may, like the capital of the continuing partners, disappear entirely. While the deceased may, by firm articles or by will, make his estate liable to contribute to pay losses in excess of capital, the language used above would not be sufficient to produce that result; a very clear expression of intent being necessary to charge the estate for transactions after the death of the testator. The executors are not partners, unless it be expressly agreed between them and the surviving partners that they will become such. If they do they are personally liable as other partners.

Holcombe v. Commissioner of Corporations and Taxation, 139 N. E. 633, 245 Mass. 353.

Stewart v. Robinson, 22 N. E. 160, 115 N. Y. 328, 5 L. R. A. 410.

Wild v. Davenport, 7 A. 295, 48 N. J. Law, 129, 57 Am. Rep. 552.

Uniform Partnership Act, §§ 7, 41.

For other cases see Decennial Digests, Partnership ⇨255(1, 2), 275.

Q. 20. A and B formed a stock brokerage partnership to continue for five years. B secretly agreed with customers for waiver of demands for margin in consideration of payments to himself, caused transfer to the name of his wife of profitable firm investments and otherwise fraudulently violated the fiduciary obligations of his relation as partner for his own benefit. A ousted him a year before the expiration of the term of five years, and thereafter conducted the business for his own account. B brought an action for disso-

lution and accounting, praying damages for the expulsion and loss of profits. To what relief is B entitled?

A. As partnership is a personal relation, specific performance of an agreement of partnership cannot be secured by law. A partner can terminate the relation at any time, though the agreed term has not expired; but the expelled partner is entitled to an accounting and to damages caused by a wrongful dissolution and breach of the agreement. Misconduct of a partner does not dissolve the firm by operation of law, nor does it empower the injured partner of his own will to dissolve. It does furnish a ground for which a court may decree a dissolution on prayer of the injured partner. B has a technical right of action for wrongful dissolution by A, and is of course entitled to an accounting as of the time of his expulsion. But since he is so far in the wrong by reason of substantial breach of his own obligations, equity will not award him damages for loss of the future profits of the business.

Schnitzer v. Josephthal et al., 202 N. Y. S. 77, 122 Misc. Rep. 15.

Karrick v. Hannaman, 18 S. Ct. 135, 168 U. S. 328, 42 L. Ed. 484.

Uniform Partnership Act, §§ 32, 38.

For other cases see *Decennial Digests*, Partnership ☞ 105, 120, 122½.

Q. 21. A & B dissolved their partnership January 1, 1900. Among their unpaid obligations was a note for \$1,000, held by C. In 1905 A, without the knowledge of B, gave C a new note for the original sum due on the old note and accrued interest. At that time the statute of limitations had nearly run, only one month lacking of the statutory six-year period. In 1907 C sued A and B on the renewal note. Is B liable on the new or old note?

A. After dissolution, a partner's implied powers to bind the firm and his copartners are limited to acts appropriate to liquidation, unless the partners are estopped to set up the dissolution by reason of failure to give proper notices. While a partner can pay a debt of the firm, the giving of a negotiable instrument is so far in the nature of a new transaction that it is generally held to be beyond his implied authority. The new note being invalid as against B, if the creditor sued on the old note, B would set up the bar of the statute of limitations. The defense would be held good in most jurisdictions. By the weight of authority a partner has no implied power after dissolution to bind the firm by a waiver of the statute.

Kerper v. Wood, 29 N. E. 501, 48 Ohio St. 613, 15 L. R. A. 656.

Gates v. Fisk, 8 N. W. 558, 45 Mich. 522.

Parker v. Butterworth, 46 N. J. Law, 244, 50 Am. Rep. 407.

Meyran v. Abel, 42 A. 122, 189 Pa. 215, 69 Am. St. Rep. 806.

For other cases see *Decennial Digests*, Partnership ☞ 143(3), 149(6), 155(4), 286.

Q. 22. A, an attorney, had been retained by a group of clients having claims against a railroad for injuries received in an accident. After preparing declarations and entering suits, A engaged B, an eminent advocate, to undertake the trial of the cases. All cases had been taken by A under contracts authorizing him to engage associates, who should become the attorneys of the clients, and fixing the compensation as one-third of the judgments recovered, if any. A died, and afterwards B tried the cases, recovering verdicts and judgments, which were paid. B retained the amount of one-third of each judgment. A's executor claims that he is entitled to receive from B one-third of the fees so collected by him, in accordance with the original arrangement of association between A and B. Is A's executor entitled to recover from B, and to what extent?

A. The professional association between A and B, if not strictly that of partnership, is at least a joint adventure, in which the same fiduciary duties exist inter se. On dissolution of a partnership or joint adventure by death of an associate, it is the duty of the survivor to wind up the business, to conclude unfinished transactions, and account for the profits to the representatives of the estate of the decedent. Professional service is so far of a personal nature that the client has the option of severing the relation on death of a partner in the firm retained. If the relation is not severed, the performance of the service is under the original contract as regards terms of remuneration, and the proceeds become a partnership or joint asset for which the survivor must account. Whether the division of the profits is to be on the same basis as if the decedent had not died depends on whether or not the survivor is compelled to put forth substantially greater and more extensive efforts than would have been his duty had the decedent been living. In the present case, if B in trying the cases did no more than he would have done, had A lived, he is entitled to no greater share of the reward; but, if he were compelled to take over what would have otherwise been A's share in the preparation and conduct of the litigation, he should be entitled to extra compensation for that service.

Consaul v. Cummings, 32 S. Ct. 83, 222 U. S. 262, 56 L. Ed. 192.

Clifton v. Clark, 36 So. 251, 83 Miss. 446, 66 L. R. A. 821, 102 Am. St. Rep. 458, 1 Ann. Cas. 396.

Stem v. Warren, 125 N. E. 811, 227 N. Y. 538.

Uniform Partnership Act, § 18 (f).

For other cases see *Decennial Digests, Attorney and Client* Ⓒ30, 76(2); *Joint Adventures* Ⓒ4(1).

Q. 23. A, B and C formed a partnership for the term of five years. The capital was \$5,000, to which A contributed \$3,000, B \$2,000, and C nothing. It was agreed that B and C should conduct the business, while A should give advice when consulted. No agreement was made as to the proportions in which profits and losses should be shared. At the end of three years B became bankrupt and the firm was liquidated. It appeared that the firm property was insufficient to pay firm debts by the sum of \$2,000. How shall the loss be adjusted?

A. In the absence of agreement, partners share profits equally, regardless of unequal capital contributions. They share losses, including capital losses, in the same way as they share profits, in the absence of agreement to the contrary. There has been a loss of \$7,000, which should be borne equally by A, B, and C since the presumption is that they share profits, and therefore losses, equally. But as B is bankrupt his separate creditors will exhaust his estate to the exclusion of his obligation to contribute to the firm account. The loss of \$7,000 must be divided between A and C, after deducting B's capital loss of \$2,000. C would pay \$2,000 to firm creditors and \$500 to A, thus making the losses of A and C \$2,500 each. There is some authority to the effect that a partner who contributes only services should not be required to share the capital loss of one who contributes only capital. What seems to be the better view, however, is that the presumption that losses are to be shared as are profits governs, unless the parties agree otherwise. This is the rule under the Uniform Partnership Act.

Buie v. Kennedy, 80 S. E. 445, 164 N. C. 290.

Whitecomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311.

Meadows v. Mocquot, 61 S. W. 28, 110 Ky. 220.

Uniform Partnership Act, § 18 (a).

For other cases see *Decennial Digests, Partnership* ¶¶87, 303, 305, 306.

Q. 24. C retired from the firm of A, B & C; A and B assumed outstanding debts of the firm and paid C the value of his interest. D was then admitted to partnership with A and B, and the business was continued. Creditors of the former firm not being paid, what are their remedies?

A. C is not discharged from his obligations to firm creditors by his retirement. He would be discharged by a novation effected between the creditors and the new firm, whereby they accept the obligation of the new firm in place of that of the old. As the retired partner's obligation is in the nature of that of a surety, cred-

itors with notice, who assent to any material alteration of the terms of their claims, as by extension of time of payment, do by the weight of authority discharge him. The property of the old firm becomes that of the new, and old creditors cannot reach it, unless insolvency existed at the time of the reorganization. Debts of the old firm are not obligations of the new firm at common law, but by provisions of the Uniform Partnership Act, where some of the old partners unite with incoming partners to continue the business, the obligation of the old debts is good as against the new firm, except that, in the absence of assumption by the incoming partner, he is not personally liable.

Clinchfield Fuel Co. v. W. M. Lundy & Son, 169 S. W. 563, 130 Tenn. 135, L. R. A. 1915B, 418.

Freeman v. Huttig Sash & Door Co., 153 S. W. 122, 105 Tex. 560, Ann. Cas. 1916E, 446.

General Tire & Rubber Co. v. Noble, 193 N. W. 229, 222 Mich. 545.

Wood v. Macafee (Sup.) 172 N. Y. S. 703.

Uniform Partnership Act, §§ 17, 35, 41.

For other cases see Decennial Digests, Partnership  236, 238, 239 (1, 3, 4, 5).

SECTION 7.—BANKRUPTCY AND RIGHTS OF CREDITORS

Q. 25. The X Bank loaned money to the firm of A & B, taking a firm note indorsed by A and partially secured by a pledge of securities owned by B. On bankruptcy of the firm, what are the rights of the bank?

A. The bankruptcy Act permits a secured creditor to prove only for the deficiency between the claim and the proceeds of the security. But a secured creditor is defined as one having security upon the property of the bankrupt. The bank is therefore a secured creditor of B only, and not of the firm or of A. It may prove for the full amount of the note against the firm estate. It can also prove for the full amount of the note against the estate of A. While a firm creditor, as such, cannot receive dividends from the separate estate of a partner until his separate creditors are paid in full, a creditor who has the separate obligation of the partner is also a separate creditor, and can share in distribution *pari passu* with other separate creditors. The bank, of course, can realize on the security. Should the proceeds of the security, added to the dividends from the estates of the firm and of A, exceed the amount of the debt, the dividend of the firm estate would be paid in full, since it is the fund primarily liable, and should exonerate the es-

tates secondarily liable as far as possible. The surplus should be credited to the separate estates of A and of B in the proportion that the dividend payable from A's estate bears to the proceeds of the security from B. Cosureties are entitled to contribution according to payments made. B would be entitled, for purposes of contribution, to subrogation to the bank's separate obligation of A, for purposes of marshaling.

Fourth Nat. Bank of Boston v. Mead, 104 N. E. 377, 216 Mass. 521, 52 L. R. A. (N. S.) 225.

In re Effinger (D. C.) 184 F. 728.

In re Mertens, 144 F. 818, 75 C. C. A. 548, affirmed sub nom. Hiscock v. Varick Bank of New York, 27 S. Ct. 681, 206 U. S. 28, 51 L. Ed. 945.

For other cases see Decennial Digests, Bankruptcy $\S$ 149, 172, 323, 351; Bills and Notes $\S$ 230.

Q. 26. The firm of A, B & C became bankrupt. Among the claims presented was an unpaid income tax due the United States by a partner, A. The tax was based on income he had received from the partnership business. Is the United States entitled to payment out of the firm estate in priority to firm creditors?

A. The United States, as a creditor, is entitled to priority out of the estate of its debtors. But the debt of a partner for income tax is a personal separate debt, not a firm debt, even though the source of his income was firm profits. The co-ownership of partners in firm property does not entitle the United States, any more than any other separate creditor, to claim a priority out of firm estate. The tax is payable only out of A's separate estate. Had it been a tax assessed against the firm, the United States could have secured priority in the separate estate, as well as in the firm estate, as it is not bound by the statutory rule for priority of separate creditors.

United States v. Kaufman, 45 S. Ct. 322, 267 U. S. 408, 69 L. Ed. 685.

Lewis v. U. S., 92 U. S. 618, 23 L. Ed. 513.

For other cases see Decennial Digests, Bankruptcy $\S$ 346, 349.

Q. 27. A purchased securities through the brokerage firm of B & C, and allowed them to remain in the firm's possession. The firm embezzled the securities, and later became bankrupt. Against what estates can A prove?

A. A can prove against the firm estate, on the contract of broker and customer. He cannot prove against the separate estates. There is joint and several liability of partners for torts and breach-

es of trust, but tort claims are not provable in bankruptcy, except as implied contracts. An implied contract claim, to be provable, must result from an enrichment of the estate against which it is proved. No implied contract liability exists on the part of the separate estates, in the absence of evidence that any other than the firm estate was enriched by the conversion of A's property.

Schall v. Camors, 40 S. Ct. 135, 251 U. S. 239, 64 L. Ed. 247.

Matter of Peck, 99 N. E. 258, 206 N. Y. 55, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914A, 798.

For other cases see Decennial Digests, Bankruptcy ⌘318(1), 320, 353; Partnership ⌘153(1), 176, 185.

Q. 28. The firm of A & B, engaged in the grocery business, purchased gasoline and automobile supplies of the firm of B & C, engaged in the garage business. On bankruptcy of both firms, can the firm of B & C prove against the other firm's estate for an unpaid balance of account due for goods sold?

A. A partner cannot prove a debt due him from his firm in bankruptcy in competition with other creditors. But another firm, having a non-common partner or partners, is regarded as a stranger for this purpose, and can prove as an ordinary creditor.

In re Buckhause, Fed. Cas. No. 2086, 2 Low. 331.

Haines & Co.'s Assigned Estate, 35 A. 237, 176 Pa. 354.

In re Effinger (D. C.) 184 F. 728.

For other cases see Decennial Digests, Bankruptcy ⌘309, 351; Partnership ⌘190.

Q. 29. A & Co. was a partnership, the partners in which were A and another firm, B & Co., the latter firm composed of B & C. Both firms and A, B, and C became bankrupt. What are the rights as to priorities in distribution of the X Bank, holder of a note made by A & Co., and indorsed by A?

A. The bank can, of course, prove and share *pari passu* with other creditors of A & Co., the maker of the note. It can prove on the maker's liability against the estates of A and of B & Co., receiving distribution subordinate to the separate creditors of A in his estate, and subordinate to the direct firm creditors of B & Co. in its estate. The bank is a firm creditor of B & Co., as a partner in the maker firm, but subject to B & Co.'s ordinary creditors, who are treated as separate creditors of a partner for this purpose. The bank can also prove against A on his indorsement, and receive distribution as a separate creditor. A firm creditor, who has obtained both joint and

several obligations of the firm and partners, is entitled to the double proof in bankruptcy which is the fruit of its diligence.

In re Knowlton & Co. (D. C.) 196 F. 837.

Id., 202 F. 480, 120 C. C. A. 610.

Bank of Reidsville v. Burton, 259 F. 218, 170 C. C. A. 286.

Fourth Nat. Bank of Boston v. Mead, 104 N. E. 377, 216 Mass. 521, 52 L. R. A. (N. S.) 225.

For other cases see *Decennial Digests, Bankruptcy* ⚡309, 351; *Bills and Notes* ⚡230.

Q. 30. A, B, C, and D entered into an agreement, which designated A, B, and C as general partners, and D as a silent or special partner. D was to contribute \$10,000, and the others \$5,000 each. The entire management and control of the business was vested in A, B, and C, who were to own the entire title, legal and equitable, to the assets of the partnership. D was not to be held out as a partner, or to act in any way for the partnership. Each was to receive 6 per cent. interest on his contribution. A, B, and C were to receive salaries, and the net profits were to be divided in proportion to the contributions. A petition in bankruptcy was filed against the firm. Can D be joined as a partner?

A. No. D is not a partner, but a creditor. The question is, not what the parties called their relation, but what it actually was under the terms of the contract. D is not a co-owner of firm property, and has no right to carry on or direct the business. He is not a coprincipal. Failure to register under a limited partnership act does not constitute general partnership, if the essentials of that relation are lacking.

Giles v. Vette, 44 S. C. 157, 263 U. S. 553, 68 L. Ed. 441.

Matter of Burgess, Lang & Co. (C. C. A.) 297 F. 696.

For other cases see *Decennial Digests, Partnership* ⚡20, 218(3), 362.

Q. 31. In a partnership composed of A, B, C, and D, D's interest was purchased by the remaining partners, who gave in payment a note was signed by A, B & C. Later C retired, and his interest was purchased by A & B, who continued the business. On A & B becoming bankrupt, can D prove his unpaid note, given for the value of his interest against the firm estate, as a firm creditor?

A. Yes; the note is a firm obligation. Although it was signed by A, B, and C individually, it appears to be actually a firm obligation, as the firm got the consideration in the release of D's interest. Being an obligation of the firm of A, B & C, it is also an obligation under the Uniform Partnership Act of the firm of A & B, which took over the firm property and continued the business on C's retirement. D is, of course, liable to any unpaid creditors of the original firm,

and they, being also creditors of the firm of A & B, have a lien on D's claim against the firm estate, under the Uniform Partnership Act.

Matter of Hess & Hanna (D. C.) 1 F.(2d) 342, 2 Am. Bankr. Rep. (N. S.) 81.
Mock v. Stoddard, 177 F. 611, 101 C. C. A. 237.

Uniform Partnership Act, §§ 41, 42.

For other cases see Decennial Digests, Bankruptcy ⇨309; Evidence ⇨418; Partnership ⇨173.

Q. 32. The firm of A, B & C, trading as A & Co., was adjudicated bankrupt. A composition of 25 per cent. was offered and accepted by firm creditors. It was approved by the court and carried into execution, and the firm discharged. No payments were made to separate creditors of the partners, nor were there separate estates taken over by the trustee in bankruptcy, nor their separate debts and assets scheduled. Later a firm creditor, holding a firm note indorsed by A, sued the partners as makers of the note and A as indorser. They pleaded discharge in bankruptcy. Is the plea good?

A. A firm is not insolvent, unless the partners are insolvent, since partners are individually liable on firm debts, and their obligation to contribute to the firm for the meeting of its obligations is a firm asset. The trustee of the estate of a firm which is adjudicated bankrupt has the right in his discretion to administer the separate estates, paying separate creditors, and applying the surpluses, if any, to the firm estate. Where the partner's estate is not administered, as in the case of a firm adjudication followed by firm composition, it seems the better view that the discharge does not protect the partner individually, because he has not performed the usual condition to a discharge, viz. submitted to an inventory and administration of his separate assets. This view is supported by the weight of authority, but there is a minority holding, based on the ground that, as his estate might have been administered in firm proceedings, firm creditors who have not caused that to be done have waived their rights against him. It would seem clear that, where his estate is not administered, his separate liability collateral to a firm obligation is not discharged, any more than any other separate debt would be, as a result of a firm composition.

Francis v. McNeal, 33 S. O. 701, 228 U. S. 695, 57 L. Ed. 1029, L. R. A. 1915E, 706.

Abbott v. Anderson, 106 N. E. 782, 265 Ill. 285, L. R. A. 1915F, 668, Ann. Cas. 1916A, 741.

Nashville Saddlery Co. v. Green, 89 So. 816, 127 Miss. 98.

Curlee Clothing Co. v. Hamm, 254 S. W. 818, 160 Ark. 483.

Armstrong v. Norris, 247 F. 253, 159 C. C. A. 347.

For other cases see Decennial Digests, Bankruptcy ⇨54, 149, 387, 404(1), 429.

SECTION 8.—PARTNERSHIP BY ESTOPPEL AND NOTICE OF DISSOLUTION

Q. 33. The firm of A & B operated in the firm name a textile mill. On January 1, A, without B's knowledge, ordered a quantity of cotton from the X Company, cotton brokers, who had never previously had any dealings with the firm. January 5, A and B dissolved partnership, advertising the dissolution in local newspapers, and mailing written notices to certain former dealers. A notice was addressed to X and put in the mails, but never delivered. January 10, X shipped the cotton, and it was received by A and by him resold for his own account. Is B liable to X for the price of the cotton?

A. Purchase of cotton is presumably within the implied powers of a member of a textile manufacturing firm if cotton is one of the raw materials it uses. The giving of the order by A may be taken to be a firm act. The order, unless accepted by X, was but an offer, and no contract was entered into until the goods were shipped. A purchase of goods after dissolution is beyond the implied powers of a partner. The question is whether B is estopped, as regards X to set up the dissolution at the time of shipment and receipt of the goods, if X had no knowledge of the dissolution and did not receive the notice in writing. To terminate the power of representation of a partner, copartners on dissolution must convey actual knowledge to third persons or give notice in proper form. The Uniform Partnership Act requires delivery of written notice to former dealers, who before dissolution extended credit, and publication in local newspapers as to the public. If X is entitled to written notice the notice given was insufficient, as it must be actually received. But X is not entitled to written notice, since X had not extended credit prior to dissolution. There are some jurisdictions in which all former dealers, whose names are known to the firm, should be personally notified; but the weight of authority and the Uniform Partnership Act restricts the duty to those dealers who before dissolution had given credit to the firm.

Smith & Cheney Co. v. Schmidt, 105 N. W. 39, 142 Mich. 1.

Askew v. Silman, 22 S. E. 573, 95 Ga. 678.

Uniform Partnership Act, § 35.

For other cases see Decennial Digests, Partnership ⇨ 141, 241, 289.

Q. 34. On dissolution of the mercantile partnership of A, B & C, it was agreed that A and B should continue the business, but that they should make use of C's name as before, agreeing to indemnify him against any liability caused thereby. The new firm borrowed money of X, giving a note signed with the old firm name, "A, B & C." X

knew of C's retirement, and that he had authorized the continued use of his name. Can X hold C?

A. While C is not estopped to deny his membership in the firm as against one who knows of the dissolution, he cannot disclaim liability on an obligation to which his name is signed with his authority.

Farmers' State Bank of Evansville v. Forsgren, 184 N. W. 966, 150 Minn. 221.

Poillon v. Secor, 61 N. Y. 456.

For other cases see Decennial Digests, Partnership ¶37, 241.

Q. 35. The Pure Food Grocery Company was a partnership composed of A, B, and C. C contributed capital only. He took no part in carrying on the business, and was unknown to the public as a partner. He retired from the firm, and no notice of the dissolution was given. A few days later X was hit by a truck negligently driven by a servant of the continuing firm. X inquired as to the membership of the firm, and, on the information that C was a partner, sued C alone for his injuries. Is C liable?

A. A dormant partner, whose membership in a partnership cannot be said to have given it credit, is not under any duty to give notice of retirement. It has been suggested that, where the firm uses an artificial name, the public trusts to an indefinite number of unknown principals, whose more or less active participation in the business has built up the credit of that name. But it does not seem that investment of capital alone in a partnership of three by a dormant partner can have caused the public to rely on him, except in a case where his retirement means the withdrawal of a very substantial part of the firm capital. In any case, X cannot set up any estoppel against C, as the injury was not due to any reliance by X on the responsibility of partners. He did not change his position, up to the time he brought suit, because of any belief that C, or any one else, was a partner. C, therefore, is not liable to make compensation for the tort. The most that could be successfully claimed would be that C is liable for costs incurred up to the time X is informed of his not being a partner. Had X been injured in the course of some dealings with the firm, upon which he had entered in the belief that C was still a partner, the latter would be estopped to deny liability for the acts of a supposed servant of his. Partners are liable in tort jointly and severally.

Rowland v. Estes, 42 A. 528, 190 Pa. 111.

Stables v. Ely, 1 Car. & P. 614.

Jewison v. Dieudonne, 149 N. W. 20, 127 Minn. 163.

For other cases see Decennial Digests, Partnership ¶55, 174.

Q. 36. A and B dissolved partnership, B retiring and A continuing the business. No notice of dissolution was given. A later went into bankruptcy. What are the respective priorities in his estate of his personal creditors and trade creditors?

A. While A and B are estopped to deny the continued existence of the partnership as against creditors, who deal with A believing that they are dealing with the firm of A & B, the estoppel is personal. It does not effect a distribution of A's property as firm and separate property. All creditors who dealt with A after the dissolution are his personal creditors, and all his property is separate property, in which his creditors share equally. The rule of distribution of partnership property to partnership creditors and of separate property to separate creditors cannot apply, except where there is a partnership in fact.

Johnson v. Williams, 68 S. E. 410, 111 Va. 95, 31 L. R. A. (N. S.) 406, Ann. Cas. 1912A, 47.

Broadway Nat. Bank v. Wood, 43 N. E. 100, 165 Mass. 312.

In re Pinson & Co. (D. C.) 180 F. 787.

Thayer v. Humphrey, 64 N. W. 1007, 91 Wis. 276, 30 L. R. A. 549, 51 Am. St. Rep. 887.

For other cases see Decennial Digests, Bankruptcy ⌘69; Partnership ⌘38, 180, 189.

PERSONS AND DOMESTIC RELATIONS¹

By MAX RADIN, Professor of Law, University of California

Sections

1. Parents' Right of Custody.
2. Child's Earnings and Support.
3. Actions by Parent in Injuries to Child.
4. Liability of Parent for Torts of Child.
5. Illegitimate Children.
6. Adoption.
7. Guardianship.
8. Reform School.
9. Contracts and Torts of Infants.
10. Liability for Necessaries.
11. Ratification and Disaffirmance.
12. Marriage—Validity.
13. Contracts and Torts of Married Women.
14. Husband and Wife in the Law of Tort.
15. Annulment and Divorce.

SECTION 1.—PARENTS' RIGHT OF CUSTODY

Q. 1. A and W had two children, a boy and a girl. At the death of their mother, W, the girl, was four, and the boy was ten months old and in delicate health. The mother's dying request was that the children should be left with her sisters, Miss B and Miss C. A assented, and agreed to relinquish completely the custody of the children. A offered to contribute to their support, but B and C declared it to be unnecessary, since they had ample means. Ten years later, five years after A's remarriage, A wishes to take the children back, and, upon refusal by B and C to give them up, brings habeas corpus proceedings. The children prefer to remain with their aunts. Result?

A. A will be successful. At common law the father's right of custody was practically absolute. In most states, by statute, the infant's interest is declared to be paramount; but this does not mean the immediate benefit, but the ultimate advantage, of the child. It will be presumed that this ultimate advantage is best served by the custody of the natural guardian. Custody may be forfeited by aban-

¹ The common law concerning persons has been more modified by local statutes than almost any other topic. These statutes are widely diverse, and even the most cursory study demands a knowledge of them. Except as so modified, however, the underlying ideas are still those of the common law, and the rule that statutes in derogation of the common law must be strictly construed is frequently applied here. To acquaint himself with the common-law principles, the student will do well to read Blackstone, Commentaries, bk. I, chs. XV and XVI.

donment or unfitness, but these facts show no abandonment which implies an indifference to what becomes of the children, and unfitness, to bar the father, must be clearly shown. Even if the agreement mentioned is treated as a contract supported by consideration, it is void as against public policy. The children's preference, while an element to be considered, will not be controlling, unless there is a positive and invincible dislike to the father.

Hibbette v. Baines, 29 So. 80, 78 Miss. 695, 51 L. R. A. 839.

Moon v. Children's Home Society of Virginia, 72 S. E. 707, 112 Va. 737, 38 L. R. A. (N. S.) 418.

Contra; *Chapsky v. Ward*, 26 Kan. 650, 40 Am. Rep. 321.

Wood v. Wood, 77 A. 91, 77 N. J. Eq. 593.

For other cases see *Decennial Digests*, *Habeas Corpus* ⚭99(7, 8); *Infants* ⚭17; *Parent and Child* ⚭2(1, 3).

Q. 2. In a divorce action by W against H, the custody of a three year old child is awarded to W (the mother), and H is ordered to pay a fixed sum for its support. W resides with her parents, X and Y. Three years later she dies, and several years after her death H sues the grandparents to recover the custody of the child. Result?

A. H will be successful. As between father and mother, under modern statute law (not at common law), the rights are equal, and in preferring one parent to the other the courts exercise a wide discretion. A determination awarding custody to one parent is not of itself a determination that the other parent is unfit, and, when the parent to whom custody has been awarded dies, the natural right of the other parent to be preferred to a third person revives. Against a delinquent parent, however, a foster parent, who has given care to the child, has a strong equity. Gre

Clarke v. Lyon, 118 N. W. 472, 82 Neb. 625, 20 L. R. A. (N. S.) 171.

Bell v. Krauss, 146 P. 874, 169 Cal. 387.

For other cases see *Decennial Digests*, *Divorce* ⚭304; *Habeas Corpus* ⚭99(1, 4); *Parent and Child* ⚭2(2).

SECTION 2.—CHILD'S EARNINGS AND SUPPORT

Q. 3. B, aged 17, working on a farm at some distance from his father's residence, becomes seriously ill. P, a physician summoned by B himself, attends him for several weeks. B's father, C, although notified of the facts, has communicated with neither B nor P. On B's recovery, he returns to his father's house. P sues C for the value of the services rendered.

A. At common law P would fail. The father was under no legal obligation to support his minor children, though he was liable to the parish if they became a burden on the parish, and was criminally

responsible if they were injured by his neglect. This rule still prevails in some states, but in most, with or without a statute, the father, who is unable or unwilling to furnish necessities to his child, is directly liable to a third person, who furnishes them. However, he is liable only for the reasonable value, not for the price agreed upon between the child and the third person, and in most jurisdictions the child himself cannot sue the father for such necessities.

Porter v. Powell, 44 N. W. 295, 79 Iowa, 151, 7 L. R. A. 176, 18 Am. St. Rep. 353.

Pretzinger v. Pretzinger, 15 N. E. 471, 45 Ohio St. 452, 4 Am. St. Rep. 542.

For other cases see Decennial Digests, Divorce Ⓒ324; Parent and Child Ⓒ3(1).

Q. 4. A, a minor, aged 19, regularly employed at a weekly salary of \$30, is injured in a railway accident. He sues the company by a guardian ad litem. In his allegations of damages he includes the loss of future earnings from the day of his injury. The railroad company ask for an instruction that such damage may not be considered. Result?

A. The instruction will be given. The earnings of minor children belong to the father, who may bring an action in his own name for them. The earnings may be donated to the son, or relinquished by the father, with or without emancipation in other respects. Since they are not the son's property, their loss forms no part of his damage.

Orr v. Wahlfeld Mfg. Co., 179 Ill. App. 235.

Donk Bros. Coal & Coke Co. v. Retzloff, 82 N. E. 214, 229 Ill. 194.

For other cases see Decennial Digests, Damages Ⓒ216(2); Parent and Child Ⓒ5(3), 16.

Q. 5. A, a tradesman, while insolvent and with knowledge of his insolvency, tells his 19 year old son, B, that from now on he may keep all his earnings for himself. B had up to this time been turning his earnings over to his parents. It is understood that B will continue to pay a reasonable sum for his board and lodging. B's earnings are considerable, amounting sometimes to \$50 a week. A's creditors, M and N, assert that A's action in relinquishing his claim to B's earnings was a fraud on his creditors. They seek to have the earnings of B applied to their debts. Result?

A. The claim of M and N will be denied. A owns the earnings of B, but he does not own the earning power of B, and this earning power could not be levied upon by his creditors. He cannot be made to work his children for the benefit of such creditors. He may make a gift to his son of the latter's earnings, in advance, and this gift is valid. (But if the earnings have already accrued, whether col-

lected or not by the son, they cannot then be given gratuitously by an insolvent father to his son, or to anybody else, without constituting a fraud on the creditors.) } *Not*

Johnson v. Silsbee, 49 N. H. 543.

Geringer v. Heinlein, 6 Ohio Dec. 26.

Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207.

For other cases see Decennial Digests, Fraudulent Conveyances ⌘43(3); Garnishment ⌘13, 49; Parent and Child ⌘5(3), 16.

Q. 6. A tells his 18 year old son, B, that he (B) may from now on regard himself as independent, that he may go where he likes and keep whatever money he can earn, and that he (A) will no longer support him. A publishes a notice to this effect in the local newspaper. B obtains employment elsewhere, and after a few months returns to his father's farm, under an agreement to work on the farm for \$15 a week and his board. They quarrel, and A dismisses B, who sues for accrued wages. It is argued by A that the so-called emancipation was revocable at will, and that, since he was entitled to his son's services, no action can be maintained. Result?

A. B will recover. The term "emancipation" is often used of a mere gift of earnings accrued or to accrue. It is properly used only when, as in this case, the attempt is made to sever the legal relation of parent and child. The agreement between father and son to do so is a valid contract, and certainly binds the father, who is thereby relieved from his duty to support, as well as deprived of his custody and his claim to future earnings. The son may then contract with the father as a stranger might. If the emancipation is not express, as in this case, but is implied from the acts of the parties, it is generally held to be revocable by the father, except so far as the rights of third persons have intervened. Abandonment by the father, ejection of his child from the parental domicile, or such misconduct of the father as compels the child to leave the domicile, may be construed as an emancipation, if it is to the child's interest so to construe it; but the father cannot rid himself, against the child's wish or interest, of his duty to support him during minority. } *Not*

Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115.

Abbott v. Converse, 4 Allen (Mass.) 530.

For other cases see Decennial Digests, Fraudulent Conveyances ⌘96(4); Parent and Child ⌘16.

SECTION 3.—ACTIONS BY PARENT FOR INJURIES TO CHILD

Q. 7. A permits his 17 year old daughter, B, to work as a domestic servant in the house of C. She visits her parents frequently and gives them part of her earnings. While in C's employ she is seduced by her employer. She gives birth to a child, and after her confine-

ment she returns to her father's home. A sues C for damages, and is awarded \$10,000 damages. C appeals. Result?

A. Appeal will be dismissed. The right to recover for the seduction of a minor daughter is based upon the right which the father has to the services of his minor child. Although, at the time of the injury, the right to the girl's services was in her employer, C, the right to her prospective services still remained in the father, since the employment was terminable. Since the effect of the seduction was to impair B's ability to render such services in the future, A has the basis for an action. Even if there had been no pregnancy, A might still maintain the action, although in that case it would be more difficult to prove that B's capacity to render services had been impaired.

Nor are the damages necessarily excessive. The right to the services is necessary, in order to base the action; but, in estimating the damages, the jury may take the injury to the parental feelings and disgrace into account. If the right to services had been completely lost by emancipation, or by an enforceable contract of apprenticeship for the whole term of B's minority, A could not recover, unless a specific statute, as in some states, permitted it.

Mulvehall v. Millward, 11 N. Y. 343.

For other cases see Decennial Digests, Seduction ¶7.

Q. 8. A, while traveling with her two year old daughter, B, was run over by a locomotive of the X Railroad Company. The child was injured, and ultimately died of her injuries. A brings an action against the railroad company for wrongful death. She pleads no special damage, but brings in evidence of mental anguish and suffering and recovers \$10,000. The court refuses an instruction that mental suffering may not be considered. The railroad appeals. Result?

A. The appeal will be allowed. Actions for wrongful death were unknown to the common law, but have been established by statute in most jurisdictions. In some, the relative entitled by statute may sue directly. In others, the administrator or representative sues for the benefit of such relative. Unless, however, the statute especially allows recovery for mental suffering, this will constitute no element of the damage, and the only elements to be considered will be pecuniary, viz. the expenses and the loss of services or loss of support.

Morgan v. So. P. R. Co., 30 P. 603, 95 Cal. 510.

State, to Use of Coughlan v. Baltimore & O. R. Co., 24 Md. 84, 87 Am. Dec. 600.

Amos v. Atlanta Ry. Co., 31 S. E. 42, 104 Ga. 809.

For other cases see Decennial Digests, Death ¶18(2), 85, 89.

SECTION 4.—LIABILITY OF PARENT FOR TORTS OF CHILD

Q. 9. A, an unruly boy of 15, is permitted by his father, B, to have access to firearms. A has frequently shot at and maimed other persons. B had knowledge of these facts, but took no measures to restrain his son. A, in a quarrel with a neighbor, C, took his father's gun, which was not locked up and shot C, inflicting serious wounds. C sues B. Result?

A. The action will fail. Parents are not responsible for the torts of their minor children, even if they have notice that the habits and disposition of the child will make the commission of torts likely. If the son had been acting as the father's agent, B might be liable on principles of agency. Again, if B had given A the gun, B's act in so doing might itself be negligence proximately causing C's injuries, and C could recover from B. Neither situation is indicated in the facts.

Figone v. Gusti, 185 P. 694, 39 Cal. App. 606.

Bassett v. Riley, 111 S. W. 596, 131 Mo. App. 676.

Johnson v. Glidden, 76 N. W. 933, 11 S. D. 237, 74 Am. St. Rep. 795.

For other cases see Decennial Digests, Parent and Child ¶13(1, 2).

Q. 10. A owns an automobile, which he permits various members of his family to use whenever they wish. A's minor son, B, is to A's knowledge a reckless driver. B, while driving the automobile for his own pleasure, negligently runs down and injures C. The latter sues A. Result?

A. On general principles, unless B was at the time performing services assigned by his father, A is not liable, merely by reason of parental relationship. Some states, however, have adopted the "family purpose" doctrine in the case of automobiles, and under that doctrine, if any member of A's family used the machine for purposes of amusement or business, A would be liable. In other states, motor vehicle laws require the father to sign his son's application to drive, and make him liable after such signature. But if the owner permits his son to use the car with knowledge that the son is a reckless driver, he may be held negligent, and liable for damage caused by the son in driving the car. } *One*

Birch v. Abercrombie, 133 P. 1020, 74 Wash. 486, 50 L. R. A. (N. S.) 59.

Rocca v. Steinmetz, 214 P. 257, 61 Cal. App. 102.

Perry v. Simeone (Cal.) 239 P. 1056.

13 Cal. Law Rev. 337.

29 Yale Law J. 467.

23 Mich. Law Rev. 83, 427.

For other cases see Decennial Digests, Master and Servant, ¶302(2, 6), 303; Parent and Child ¶13(1).

SECTION 5.—ILLEGITIMATE CHILDREN

Q. 11. A is the mother of an illegitimate child, B. She obtains employment as a nurse in the family of C, and goes with C's family on several trips, including a trip to Europe. During her absence she leaves the child in the care of H, who is in every way a suitable person. The father of the child is D, who has been contributing a fixed sum each month for the child's support. During A's absence, he visits B, and, despite the protest of H, takes the child with him. On A's return, she brings proceedings to recover the custody. Result?

A. A will succeed. At common law an illegitimate child was *filius nullius*, and related by blood neither to its father nor its mother. This has been changed in most states, so that the relationship to the mother is recognized, and the father may be compelled to support the child. In a very small number of states, the relationship to the putative father is also recognized. However, in the majority of jurisdictions, the mother's right to custody is exclusive, even as against the father, and his voluntary support of the child does not give him a right.

Pratt v. Nitz, 48 Iowa, 33.

Hesselman v. Haas, 64 A. 165, 71 N. J. Eq. 689.

For other cases see Decennial Digests, Bastards ¶15.

Q. 12. H and W are husband and wife. Two children are born to them, A and B. W dies, and H marries M, who gives birth to C. After the death of H, intestate, A disputes the right of C to share in the inheritance on the ground that C is not the legitimate child of H, but the offspring of S, M's paramour. A offers in evidence letters and witnesses to prove M's adultery with S, and H's nonaccess for nearly a year before C's birth. Result?

A. A will probably fail. The answer largely depends on the specific statutes of the state. In many states the presumption of legitimacy in the case of children born in wedlock, is said to be "conclusive." Such a presumption will certainly bar the evidence of M's adultery, but it is doubtful whether it would bar the evidence of H's nonaccess. If the evidence were overwhelming, such as evidence establishing the impotency of H, or the birth of a mulatto child to a white couple, the presumption would almost surely be rebutted. The courts are in general opposed to bastardizing issue, and will do so only with great reluctance.

Wallace v. Wallace, 114 N. W. 527, 137 Iowa, 37, 14 L. R. A. (N. S.) 544, 126 Am. St. Rep. 253, 15 Ann. Cas. 761.

For other cases see Decennial Digests, Bastards ¶3.

SECTION 6.—ADOPTION

Q. 13. A, a woman of 25, adopted B a 3 year old orphan, going through all the formal proceedings necessary for that purpose. A lived with her parents, C and D. A died suddenly, a year after B's adoption, and C and D continued to care for B, treating him in every way as a grandchild, and frequently speaking of their intention to provide for him. Twenty years later C dies intestate, and his administrator resists B's claim to share in the estate. The only other relative is a distant cousin, E.

A. B will fail. Adoption was not known at the common law, and has been introduced by statute, and the formal requisites must be strictly followed. This has been done, but its only effect is to create the relationship of mother and child between A and B. The latter does not acquire new grandparents by this adoption, nor any other new relatives. Since C has failed to adopt B himself, the latter, despite the existence of the quasi parental relationship, is a stranger, and cannot share in the estate.

Estate of Darling, 159 P. 606, 173 Cal. 221.

In re Bradley's Estate, 201 N. W. 973, 185 Wis. 393, 38 A. L. R. 1.

Contra: Denton v. Miller, 203 P. 693, 110 Kan. 292.

Shick v. Howe, 114 N. W. 916, 137 Iowa, 249, 14 L. R. A. (N. S.) 980.

For other cases see Decennial Digests, Adoption $\Leftrightarrow$ 1, 21, 25.

SECTION 7.—GUARDIANSHIP

Q. 14. H and W are husband and wife. W obtains a decree of divorce and the custody of their child A. H kidnaps A and takes him into a distant part of the country. W has no knowledge of their whereabouts. H dies shortly after, and A is homeless and destitute. Upon the application of X, as next friend, the local court appoints X as guardian. X is a suitable person for that purpose. When A is 15, W finds out where he is and seeks to regain custody by habeas corpus proceedings. Result?

A. W will fail. If the statute so provided, the local court in which the minor is found has jurisdiction to appoint a guardian. Generally notice must be given to the parent, or a reasonable attempt be made to do so. In this case such notice was impossible. But, if the court has literally followed the statute, X is the legal guardian, and has the custody of A, even against A's mother. W's remedy is to apply to the court to have the guardianship in X rescinded, and herself appointed as such guardian. In view of A's age, his preferences will be consulted, and by statute his preference may be conclusive.

Ex parte Miller, 42 P. 428, 109 Cal. 643.

For other cases see Decennial Digests, Guardian and Ward $\Leftrightarrow$ 8.

SECTION 8.—REFORM SCHOOL

Q. 15. A, a boy of 16, assaults a little girl of 12. He is arrested and brought before the juvenile court, which commits him to a reform school. He appeals, on the ground that he has been denied a jury trial, and A's father, B, appeals on the ground that he, B, has been deprived of custody without due process of law.

A. Both A and B will fail. Commitment to a reform school, although in fact detention, is not treated as penal, but as a means of training. The determination by a court of competent jurisdiction that A stands in need of such discipline does not come within the constitutional provision requiring a jury trial. While B's right to custody is protected, as though it were a property right, the right to custody may be forfeited for cause. To do so there must be a determination of B's incompetence or unfitness to control A. A's crime is sufficient evidence to permit the court to reach this conclusion, but the court must find incompetence as a fact.

Milwaukee Industrial School v. Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

For other cases see Decennial Digests, Infants ☞ 12.

SECTION 9.—CONTRACTS AND TORTS OF INFANTS

Q. 16. A, an infant of 7 years, is ordered by his father, B, to climb a fence inclosing railway tracks and pick up certain pieces of copper. While there, he falls into an uncovered excavation and is injured. The railroad claimed that it owed no duty to trespassers to cover the hole. A sues by his next friend for damages. Result?

A. The railroad will prevail. A is a trespasser, despite his youth and despite the fact that he was obeying his father's orders. Infants are as fully liable for torts unconnected with contracts as adults would be. The landowner owes no duty to make its premises safe for trespassing children, except under circumstances where the "turntable" or attractive nuisance doctrine is applicable.

Heller v. New York, N. H. & H. R. Co. (C. C. A.) 265 F. 192, 17 A. L. R. 823.

For other cases see Decennial Digests, Electricity ☞ 15(1); Negligence ☞ 23(1), 33(3).

Q. 17. A entered into a contract with a correspondence school to pay a certain amount monthly for instruction in accounting, to be given by correspondence. A has received all the various books and papers and paid a few of the installments. After reaching majority, A pays a further installment, but still owes \$100, due before he became 21. The school sues him for the installments due and for damages for breach of contract. Result?

A. A will win. The contract of an infant is voidable by him. If he is sued upon it, infancy is a complete defense. In order to be held upon it, he must have ratified it by some unequivocal act of confirmation after majority. Mere silence is not a ratification, nor is the payment of the installment in this case, which might be construed to be in return for services rendered after his majority.

International Text-Book Co. v. Connelly, 99 N. E. 722, 206 N. Y. 188, 42 L. R. A. (N. S.) 1115.

For other cases see *Decennial Digests, Infants* ⇨50, 53, 57(1), 58(1).

Q. 18. A, a minor, sells his land to B, and receives a reasonable consideration for it. This consideration he invests in goods to be used for his personal convenience. When he becomes of age, a large part of the goods has been lost. A has been very improvident in the care of his property. He now seeks to rescind the sale and recover his land. Result?

A. A will fail, unless he is ready to restore to B as much of the consideration as he has actually in his possession. However, if the consideration has been destroyed in whole or in part, even by his fault, he is not required to make the loss good, unless, as in some states, a statute puts such an obligation on infants above a certain age.

Bell v. Buckhalter, 57 So. 460, 176 Ala. 62.

For other cases see *Decennial Digests, Infants* ⇨31(2), 58(2).

Q. 19. A, an infant, sold an automobile to B, and warranted that it had been driven only 5,000 miles. As a matter of fact it had actually been driven more than 10,000 miles. A had bought the machine from C, and had been in possession of it for six months, during which he has driven it 3,000 miles. B seeks to rescind the sale and recover his consideration. Result?

A. B will fail. It is only the minor who can avoid a contract made during minority, not the adult who has made a contract with the minor. Nor would B have been successful, if he had sued for damages for breach of warranty. Such an action is also a contract action, and the plea of infancy is good. But if B could establish that A knew that his statement was false, and made it to induce the contract, B will, in most American jurisdictions, be permitted to rescind for fraud.

Hastings v. Dollarhide, 24 Cal. 195.

Collins v. Gifford, 96 N. E. 721, 203 N. Y. 465, 38 L. R. A. (N. S.) 202, Ann. Cas. 1913A, 969.

For other cases see *Decennial Digests, Infants* ⇨57(1), 62.

Q. 20. A, an infant, who appeared to be of full age, represented himself as such and further falsely stated that he was a member of a certain firm, in which he had been employed. In this way he obtains goods from B. On discovering the facts, B brings an action for conversion against A, who pleads infancy. Result?

A. B will recover. The fraudulent representation by A that he is of full age, will in some American jurisdictions not make the infant liable in deceit, or even estop him from setting up his infancy in an effort to avoid the contract. But the fraudulent representation of his membership in a certain firm is the basis of a wholly independent action, and it has been held that property obtained in this way may be recovered by the person defrauded.

Alvey v. Reed, 17 N. E. 265, 115 Ind. 148, 7 Am. St. Rep. 418.

Shenkein v. Fuhrman, 141 N. Y. S. 909, 80 Misc. Rep. 179.

Grauman, Marx & Cline Co. v. Krienitz, 126 N. W. 50, 142 Wis. 556.

For other cases see *Decennial Digests*, Infants ¶55, 56, 62.

SECTION 10.—LIABILITY FOR NECESSARIES

Q. 21. A, a girl of 17, voluntarily leaves the home of her father, B, and takes lodgings with C. She agrees to pay \$15 a week. She remains there for a year, during which time she pays no board at all. C does not know that A is a minor, and does not know that B has never consented to her leaving his house. C sues B for \$700, alleging the furnishing of board and lodging, and alleging that the board furnished was of a character suited to A in her position in life. B demurs. Result?

A. The demurrer will be sustained. Board and lodging are necessities, and the general rule is that an infant is liable for necessities furnished, and cannot repudiate such liability. What a necessity is will be determined by the special facts of every situation. No commodity, however, even the most essential, is a necessary, if the infant is already supplied with it, or where, as in this case, the father, who is under a legal duty to support the infant, is ready and willing to do so. A complaint that necessities have been furnished is demurrable, unless it shows that the infant is not already supplied.

Goodman v. Alexander, 50 N. Y. S. 884, 28 App. Div. 227.

For other cases see *Decennial Digests*, Infants ¶92.

Q. 22. A, an infant, contracts with the Western Radio School for instruction in wireless operating. A is an orphan, and desires this instruction in order to learn a trade, which will be a means of livelihood for him. He agrees to pay \$300 in yearly installments.

When the course is completed, he is sued by the school for the installments due. Result?

A. The school will recover, but not necessarily the price agreed upon. Training of this sort might be determined to be a necessity in this particular case; but, even if it is determined to be so, A is liable, not for the agreed amount, but for the reasonable value of the services rendered. The liability is really quasi contractual, established by law without reference to the agreement, except that recovery cannot exceed the amount agreed upon.

Plummer v. Northern Pac. R. Co., 167 P. 73, 98 Wash. 67, 7 A. L. R. 104.

For other cases see Decennial Digests, Infants $\S$ 50, 58(1).

SECTION 11.—RATIFICATION AND DISAFFIRMANCE

Q. 23. A, an infant, makes a contract to work for B, and after a year, just before coming of age repudiates the contract. He is persuaded by his employer to withdraw his repudiation, and he does so in a letter written after attaining his majority. He, however, does not return to work, and B sues him for breach of contract, alleging the letter as a ratification. Result?

A. B will fail. An infant's contracts are voidable. When duly ratified after the infant becomes of age, they are valid ab initio. If disaffirmed before or after the infant comes of age, they are void ab initio. In the latter case they cannot be revived, and liability could be created only by a wholly new contract.

Peck v. Cain, 63 S. W. 177, 27 Tex. Civ. App. 38.

For other cases see Decennial Digests, Infants $\S$ 50, 58(1).

Q. 24. A, an infant, about to leave on an extended trip, appoints B as his agent by a written power of attorney. B sells some realty of A to C, believing it to be to A's interest so to dispose of the realty. A does not return till he is of age. On being informed of the sale, he expresses approval. Later he changes his mind and seeks to recover the property. Result?

A. In many states the appointment of an agent by an infant would be merely voidable, and subject to ratification like any other contract. But in others the old rule prevails that the giving of a power of attorney by an infant is wholly void and cannot be ratified. In such states A can disregard the ratification of this void power and recover the land.

Casey v. Kastel, 142 N. E. 671, 237 N. Y. 305, 31 A. L. R. 995.

Gruba v. Chapman, 153 N. W. 929, 36 S. D. 119.

33 Yale Law J. 790.

For other cases see Decennial Digests, Infants $\S$ 5, 26.

SECTION 12.—MARRIAGE—VALIDITY

Q. 25. A and B, both of full age, agreed to marry, procured a license, and went through a marriage ceremony before a qualified officer. It was expressly understood between them that the marriage was to be kept secret, and that they would not live together for six months. Before the expiration of the six months, B, the wife, brings proceedings to have her husband support her. Result?

A. B will succeed. The status of husband and wife is created by a contract of marriage, provided in this contract words of present import (*verba de presenti*) are used, as distinguished from words of future import (*verba de futuro*). Whether a ceremony is necessary depends upon the laws of the jurisdiction in which the contract is made. If the statutory requirements have been fulfilled, a contract not to assume mutual marital duties for a specified time, or to keep the marriage secret, has no effect on the existence of the relation, and the obligations imposed by law upon those in the relation of husband and wife will be enforced.

Reifschneider v. Reifschneider, 89 N. E. 255, 241 Ill. 92.

For other cases see Decennial Digests, Marriage Ⓒ1.

Q. 26. B, a woman of 21, lives as housekeeper of C. Later she becomes his mistress, and continues to perform her housekeeping duties. Several children are born, who bear C's surname. B is generally believed to be the wife of C, and is frequently referred to by C as his wife. Thirty years after B originally came to C's house, she brings an action for divorce against him. He denies the marriage. Result?

A. The decision will depend upon the local laws. In many states the so-called "common-law marriage" is still recognized. Such a marriage is entered into by mutual consent to assume the relation of husband and wife to each other. Cohabitation and repute, such as existed in this case, establish a presumption that a mutual agreement has been made. But this presumption is rebuttable, and proof that the relations were originally meretricious will establish the counter presumption that they continued so. B, in this case, must offer evidence that an actual agreement had been made between herself and C to be husband and wife, if the common-law marriage is recognized in the state.

Judson v. Judson, 111 N. W. 78, 147 Mich. 518.

Ziegler v. P. Cassidy's Sons, 115 N. E. 471, 220 N. Y. 98, Ann. Cas. 1917E, 248.

Boyd v. U. S. (D. C.) 8 F.(2d) 779.

For other cases see Decennial Digests, Marriage Ⓒ13, 14, 22, 50(1, 5).

Q. 27. A, a young man of 17, and B, a girl of 16, both domiciled in the state of X, in which the age of consent to marriage is 21 and 18, go aboard a yacht, and while 30 miles away from land are married to each other by the captain of the vessel. They cohabit as man and wife. On their return to X, B's parents compel her to leave A and return to their home. A brings an action against B's parents for alienation of his wife's affections. Result?

A. A will probably fail. The statutes of the various states prescribe rules governing the capacity to marry and the formal requirements of a marriage ceremony. Marriages contracted by persons in violation of these rules are void, if expressly asserted to be so. This marriage was contracted on the high seas, where no special marriage rules prevail. In such a case, the domicile of the parties will be regarded, and, since the marriage would have been invalid if contracted in X, it will be given no effect.

Norman v. Norman, 54 P. 143, 121 Cal. 620, 42 L. R. A. 343, 66 Am. St. Rep. 74.

For other cases see Decennial Digests, Marriage ¶27.

Q. 28. A, who is a man of unsound mind, marries B. They live together for several years. A dies, and B claims dower in the estate. A's children by a former marriage resist the claim, on the ground of A's mental incapacity. Result?

A. Unless the common law has been changed by statute, B will fail. At common law, insanity of either party rendered marriage a nullity, and no judicial proceedings were necessary to have it so declared. A and B were therefore never husband and wife. But, if a statute has made such a marriage merely voidable, B will succeed, since no action has ever been brought to annul the marriage in A's lifetime, and none can now be brought.

Hagenson v. Hagenson, 101 N. E. 606, 258 Ill. 197.

For other cases see Decennial Digests, Marriage ¶7.

Q. 29. A, a boy of 16, and B, a girl of 14, intermarry. The statutes of the state in which they are domiciled and in which they marry make the age of consent 18 for males and 16 for females. The law expressly forbids marriages of persons below that age and imposes a penalty on those who violate it. A and B cohabit for 6 months after which they separate. B seeks to compel A to contribute to her support. A denies the marriage. Result?

A. B will win. Even though the statute in terms expressly forbids marriage below a certain age, and penalizes those who take part in such a marriage, the general rule is such marriages are not

void, but merely voidable, and, unless proceedings for annulment are duly taken, the marriage will be valid for all purposes.

Hunt v. Hunt, 100 P. 541, 23 Okl. 490, 22 L. R. A. (N. S.) 1202.
For other cases see Decennial Digests, Marriage ¶54, 62.

Q. 30. A and B are husband and wife. A is known to have been in a railroad train at the time of an accident, and the body of one of those killed in the accident is identified as that of A. A year later, B marries X, and lives with him for five years until X's death. B claims dower in X's estate. It appears that A had not really been killed in the wreck, but had survived for two years; i. e., until after B's marriage to X. X's heirs resist the claim of B. Result?

A. Ordinarily, B will fail. In spite of her good faith, she was already married at the time of her union to X, and the marriage is consequently wholly and completely void. Technically she might have been prosecuted for bigamy. There never having been even a voidable marriage, cohabitation after A's death cannot validate it. B, therefore, was not the wife of X at his death, and has no claim on his estate. Some states (Texas, Louisiana, and California) recognize the "putative" marriage, in which those who in good faith contract an invalid marriage may claim the incidents of such a marriage.

Schneider v. Schneider, 191 P. 533, 183 Cal. 335, 11 A. L. R. 1386.
For other cases see Decennial Digests, Marriage, ¶54.

Q. 31. A and B marry, and B subsequently discovers that A is physically incapable of consummating marriage. She remains in A's home for a year, and then removes from it and brings an action to annul the marriage. Result?

A. B will fail. If A's physical incapacity existed before marriage and is incurable, this would at most constitute a ground for annulment. If B, however, after discovering the facts, continues to cohabit with A, for which cohabitation sexual relations are not essential, the marriage is ratified, and cannot thereafter be avoided.

Schroter v. Schroter, 106 N. Y. S. 22, 56 Misc. Rep. 69.
For other cases see Decennial Digests, Marriage ¶58(2).

Q. 32. A, representing himself to be a man of wealth and social position, induces B to marry him. Shortly after the marriage, B discovers that A is financially destitute and is an ex-convict. She leaves A and brings an action to annul the marriage on the ground of fraud. Result?

A. The older cases very rarely allow marriage to be annulled for fraud, even if there was a fraud sufficient to annul a contract. The only exceptions were cases in which the woman was at the time of the marriage pregnant by another man and concealed the fact, or when either party was afflicted with a loathsome or dangerous disease and concealed the fact. The fraud is in that case said to go to the essence of the relation. But in many recent cases fraud of the kind specified in the question has been treated as a sufficient ground for annulment, and this tendency is growing.

Wells v. Talham, 194 N. W. 36, 180 Wis. 654, 33 A. L. R. 827.

9 Minn. Law Rev. 497.

For other cases see *Decennial Digests, Marriage* ¶58(7).

SECTION 13.—CONTRACTS AND TORTS OF MARRIED WOMEN

Q. 33. A makes a note, payable to B at his (A's) death. Subsequently he marries B. Some years later he dies. B has before A's death indorsed the note to C, who now brings an action on it against A's estate. The parties are all domiciled in a state in which by statute married women may have and manage property separately from their husbands, and a married woman may contract with third persons. Result?

A. C will recover. At common law, coverture—i. e., the status of a married woman—created an almost complete legal disability. In most states, these disabilities have been removed by married women's property acts, but, unless the disability is specifically removed, the common law prevails. In this jurisdiction, accordingly, a married woman could contract with a third person, but not with her husband. However, in this case, when the contract evidenced by the note was made, it was valid. No contract was made between A and B during marriage, and the contract between B and C is specifically validated by the statute.

MacKeown v. Lacey, 86 N. E. 799, 200 Mass. 437, 21 L. R. A. (N. S.) 683, 16 Ann. Cas. 220.

For other cases see *Decennial Digests, Husband and Wife* ¶38.

Q. 34. A, the husband of B, so cruelly misuses her that she leaves his home and brings an action for damages for assault and battery against him. Result?

A. Unless the statute unequivocally permits such an action, B will fail. At common law, husband and wife could bring no action against each other, and this rule has been retained as a rule of policy in states that have abrogated almost all the disabilities

of coverture. A would almost certainly be punishable criminally, and his conduct might justify divorce.

Lillienkamp v. Rippetoe, 179 S. W. 628, 133 Tenn. 57, L. R. A. 1916B, 881, Ann. Cas. 1917C, 901.

Drake v. Drake, 177 N. W. 624, 145 Minn. 388, 9 A. L. R. 1064.

4 Minn. Law Rev. 538.

10 Cal. Law Rev. 471.

For other cases see *Decennial Digests, Husband and Wife* ¶205(2).

Q. 35. A and B are husband and wife. B took some property of A and eloped with X, her paramour, who aided her in taking the property. Both B and X are arrested, and A brings an action against each for the conversion of his goods. Result?

A. Both actions are maintainable. Even in jurisdictions that do not in general allow actions between husband and wife for tort, the rule is confined to torts against the person, and does not prohibit actions for torts when property rights are violated. At common law, of course, no action against B could be maintained.

Wood v. Wood, 83 N. Y. 575.

For other cases see *Decennial Digests, Husband and Wife* ¶205(4).

SECTION 14.—HUSBAND AND WIFE IN THE LAW OF TORT

Q. 36. B, a married woman, is severely injured in a railroad accident. She brings an action, in which her husband does not join, claiming as damages, among other items, loss of weekly salary allowed her by her husband for domestic services. Result?

A. B will not be allowed to recover this amount. Her damages are limited to the expenses involved in being restored to health, together with any permanent disability, and in some jurisdictions to damages caused by mental pain and suffering. Her domestic services are duties she owes her husband as an incident of the marital relation. Payment made for them is in the nature of a gift.

Chesapeake & O. R. Co. v. Stump, 178 S. W. 1037, 165 Ky. 708.

For other cases see *Decennial Digests, Damages* ¶46.

Q. 37. B, a married woman, brings an action against X for injuries caused by negligent driving. The statute authorizes married women to sue in their own name for injuries caused to them. However, she joins her husband, A, as plaintiff. While the action is pending, A brings a separate action against X, alleging as damages the loss of his wife's services. In his answer, X sets up as his defense that another suit is pending on the same cause of action. Result?

A. A will succeed. The words of the statute are merely permissive, and give B an option of suing alone or joining her husband in the action for the injuries suffered by her. A's action, however, is wholly separate, being for injuries recoverable only by him, and not by his wife, and his presence as plaintiff in his wife's action is no bar to this subsequent one.

Laskowski v. People's Ice Co., 168 N. W. 940, 203 Mich. 186, 2 A. L. R. 586.
For other cases see Decennial Digests, Husband and Wife ¶209(3); Judgment ¶693.

Q. 38. A and B were husband and wife. During A's absence overseas, B commits adultery with C. On A's return, she admits her offense to him, and a reconciliation is effected, and A and B resume cohabitation as husband and wife. A brings an action against C for alienation of B's affections. Result?

A. A will fail. The basis of an action for alienation is such an estrangement as to cause one spouse to lose the consortium, the support or services, of the other. No such loss has taken place here, and adultery of itself is not sufficient.

Ballard v. Money, 47 Ont. Law R. 132.

For other cases see Decennial Digests, Husband and Wife ¶322, 323, 324.

Q. 39. A and B are husband and wife. A has been maintaining adulterous relations with C, without, however, abandoning B, or failing to contribute to her support, or otherwise neglecting her. B sues C for criminal conversation. Result?

A. At common law B would fail. The essence of criminal conversation was the possibility of bastardizing the issue. Such an action was therefore maintainable by a husband against his wife's paramour, but not by a wife against her husband's mistress. In many American jurisdictions, however, the rights of husband and wife have been equalized in this respect.

Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397.

For other cases see Decennial Digests, Husband and Wife ¶325.

SECTION 15.—ANNULMENT AND DIVORCE

Q. 40. A, who is married to B, deserts her and marries C, who is ignorant of his bigamy. On discovering the fact, she leaves A's house and subsequently marries D. On D's death, his heirs attack the validity of the marriage, because C never had brought an action to have her marriage to A annulled, although the statute cites this situation among causes for which annulment will be granted. Result?

A. C will succeed. Her marriage to A was completely void, and no action is necessary to make it so. The statutory right to bring an action for annulment is granted, merely to enable her to put the facts on public record, and her failure to do so does not affect the validity of her second marriage.

Eickhoff v. Eickhoff, 68 P. 237, 29 Colo. 295, 93 Am. St. Rep. 64.
For other cases see *Decennial Digests*, Divorce ⚭236.

Q. 41. A and B are husband and wife. In the presence of third persons A makes a false and unfounded charge of improper conduct against B. B brings an action for divorce against A, alleging extreme cruelty and citing this single act of A. The jury finds that B was caused intense mental suffering, but that there had been no permanent impairment of her health. A appeals, on the ground that no cruelty had been established. Result?

A. The judgment will be affirmed. Permanent impairment of health is not necessary, in order to establish cruelty, and a single act may be enough. The jury's verdict on the fact of mental suffering will not be disturbed, if there is any evidence whatever to support it.

Nye's Appeal, 17 A. 618, 126 Pa. 341, 12 Am. St. Rep. 873.
For other cases see *Decennial Digests*, Dower ⚭51.

Q. 42. A and B are husband and wife. A announces his intention of removing to Mexico and there acquiring citizenship. B refuses to follow him, because she does not wish to lose her rights as an American citizen. After A's absence for one year, she brings an action for divorce on the ground of desertion. Result?

A. B will fail. If A is ready and willing to receive B into his home, and has been guilty of no conduct which makes living with him intolerable, he has a right to determine where the family domicile will be, provided he selects a suitable and proper place. The mere fact that it is in a foreign country does not render the place unsuitable. Under the facts, it is B, and not A, who has been guilty of desertion.

Franklin v. Franklin, 77 N. E. 48, 190 Mass. 349, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851.
For other cases see *Decennial Digests*, Divorce, ⚭37(21).

Q. 43. A and B are husband and wife. B learns of A's adultery and leaves his home. She writes him a letter expressing her willingness to forgive him for the offense committed, provided he would promise that it should not be repeated. A makes this prom-

ise, but B has in the meantime concluded to bring action for divorce. A pleads B's forgiveness as condonation. Result?

A. B will succeed. Condonation means, not merely the forgiveness of the marital offense, but a resumption of cohabitation thereafter. A mere offer to forgive is not enough, nor is even an unconditional forgiveness, unless it is followed by renewal of marital relations.

Alexander v. Alexander, 127 S. W. 740, 94 Ark. 438, 140 Am. St. Rep. 127.
For other cases see Decennial Digests, Divorce, ¶133(1).

Q. 44. A and B are husband and wife. A has been habitually intemperate and also guilty of adultery. B, after leaving the house, is induced to return and to condone A's adultery. Thereafter A is guilty of repeated acts of cruelty, which finally compel B to leave his home again. She brings an action for divorce, based on the original act of adultery. He pleads condonation. Result?

A. B will win. Condonation is conditional. If the spouse whose offense is condoned fails to treat the other with conjugal kindness, the original ground for divorce is revived, and may become the basis of an action.

Langdon v. Langdon, 25 Vt. 678, 60 Am. Dec. 296.
For other cases see Decennial Digests, Divorce, ¶51.

Q. 45. A sues his wife B for divorce, alleging her adultery with C. In her answer she alleges extreme cruelty on A's part. This occurs in a state in which both adultery and extreme cruelty are grounds for divorce. A demurs to B's answer. Result?

A. The demurrer will be overruled. Any act which is a ground for divorce may be set up in an answer to a suit for divorce, by way of recrimination. If both charges are proved, the court will deny a divorce, and leave the parties where it found them. But the recriminatory charge must be set up affirmatively, and cannot be proved under a general denial. In some jurisdictions, desertion is not an available recrimination in a suit based on adultery, but in general no exception is made.

Church v. Church, 19 A. 244, 16 R. I. 667, 7 L. R. A. 385.
For other cases see Decennial Digests, Divorce ¶54.

Q. 46. A induced his wife, B, by the promise of a large sum of money, not to defend an action for divorce which he was bringing against her. The divorce was duly obtained. B, who had received only a small part of the amount promised, six months later brought an action to have the decree vacated as collusive. Result?

A. B will fail. A decree of divorce collusively obtained may be vacated by the court, but it cannot be attacked directly or collaterally by any person who has been a party to the collusion. There is authority to the opposite effect, but this rule is distinctly the prevailing view.

Davis v. Davis, 61 Me. 395.

For other cases see Decennial Digests, Divorce ⇨168.

Q. 47. A by intimidation and threats has compelled his wife, B, not to appear in a divorce suit he was instituting against her. The divorce was granted, and the time for opening the default or for appealing passed. A remarries and has a child by this second marriage. A year after the decree became final, B moved to have the decree set aside on the allegations stated. Result?

A. This is not a collusively obtained decree, but one obtained by duress, which the court will generally vacate on the application of the injured party. It would have been equally the case if A by fraudulent representations had kept B ignorant of the fact that these proceedings were being instituted. The fact that rights of third persons are involved will not bar B's claim, but courts will demand stronger proof of fraud in such cases than in others. But if the circumstances show that B was guilty of laches in waiting a year, she will fail.

Graham v. Graham, 102 P. 891, 54 Wash. 70, L. R. A. 1917B, 405, 18 Ann. Cas. 999.

For other cases see Decennial Digests, Divorce ⇨165(3).

Q. 48. A by false and perjured testimony obtains a decree of divorce against his wife, B. After the time for appeal has expired, the principal witnesses for A are indicted for their perjury and are convicted. B moves to have the decree of divorce set aside. Result?

A. B will fail. The act of A, while a fraud on the court, is deemed an intrinsic fraud, and not an extrinsic one. Under the general rules of finality of judgments, no new proceeding can be obtained to determine issues that were cognizable in the proceedings attached. If the time for appeal or for a motion for a new trial has expired, the injured party has no redress in most jurisdictions.

Graves v. Graves, 109 N. W. 707, 132 Iowa, 199, 10 L. R. A. (N. S.) 216, 10 Ann. Cas. 1104.

For other cases see Decennial Digests, Divorce ⇨245(2).

Q. 49. A and B, who are husband and wife, have been living separately under an agreement whereby A has conveyed a valuable piece of land to B, and is relieved in consequence of the obligation of supporting her. B subsequently brings an action for divorce against A and obtains it. The decree recites the agreement and makes it part of itself. Subsequently, on an application showing that the return of her property is inadequate to maintain her, B applies for alimony to the court. A denies the power of the court to entertain such an application.

A. A will probably succeed, although the point is disputed. An agreement between husband and wife concerning property rights, supported by adequate consideration, and not made to stimulate divorce, will be enforced according to its tenor. Even if the statute confers on the court the power to modify its award of alimony after the divorce is granted, it has been held not to allow a modification of such an agreement.

Henderson v. Henderson, 60 P. 597, 61 P. 136, 37 Or. 141, 48 L. R. A. 766, 82 Am. St. Rep. 741.

For other cases see Decennial Digests, Husband and Wife ⇨279(2).

Q. 50. In a divorce granted B against A, the custody of the children is granted to B. B has ample means, and declines any financial assistance from A to support the children, although the court urges her to permit a nominal sum to be put into the decree. Five years later, B loses most of her property, and applies to the court to have A pay a certain amount for their support. Result?

A. B will succeed. Most statutes permit the court to vary or modify their decrees as to custody and maintenance of children. This will be so, even though there was no provision whatever on the subject of maintenance in the decree, and therefore nothing to modify. The contrary has been held with reference to maintenance of the wife.

Muir v. Muir, 92 S. W. 314, 133 Ky. 125, 4 L. R. A. (N. S.) 909.

Harlan v. Harlan, 98 P. 32, 154 Cal. 341.

For other cases see Decennial Digests, Divorce ⇨240(4), 309.

Q. 51. B sues her husband, A for divorce. The divorce is denied, but the custody of the children is awarded to B. A claims that the court had no power to do this. Result?

A. Unless a specific statute permitted it, A is probably right. Custody and maintenance are incidents of the divorce action, and cannot be determined separately from it. However, there is con-

trary authority, and in most states the matter is regulated by statute.

Thomas v. Thomas, 95 N. E. 345, 250 Ill. 354, 35 L. R. A. (N. S.) 1158, Ann. Cas. 1912B, 344.

For other cases see *Decennial Digests*, Divorce ⇨289, 294.

Q. 52. A and B are husband and wife. B brings an action for divorce and obtains an interlocutory decree. By the statute of the state, this decree cannot be made final till a year after it has been rendered. Nine months later A dies intestate. B claims the share of a widow in his estate.

A. B will be successful. An interlocutory decree, or a decree nisi, does not dissolve the marriage or affect the status of the parties. It is purely conditional, and since the condition had not taken place, and can no longer take place, B is as much A's widow as though no such decree had been obtained.

Grannis v. Superior Court of City and County of San Francisco, 79 P. 891, 146 Cal. 245, 106 Am. St. Rep. 23.

For other cases see *Decennial Digests*, Divorce ⇨152.

Q. 53. B obtains an interlocutory decree of divorce from A, which by statute can be made final after a year. A makes several tentative efforts at reconciliation, and induces B to cohabit with him during the year. At the end of a year B moves to have the decree made final. A opposes the motion, alleging a reconciliation and condonation.

A. B will be successful, if the statute makes the interlocutory decree nonreviewable after the time for appeal has expired. The court in that case can consider the temporary reconciliation only as far as it may be evidence of collusion or a fraud on the court; otherwise, the court has no jurisdiction to amend or set the decree aside, and cannot refuse to make it final. If there is no such statute, the old equity rule holds that a decree nisi is a conditional decree, and the condition is the failure to show cause why it should not be made final. In such a case the court may consider the public interest, in determining whether the decree is to be made final or not.

Bancroft v. Bancroft, 173 P. 582, 178 Cal. 367.

Grant v. Grant, 92 A. 791, 84 N. J. Eq. 81.

For other cases see *Decennial Digests*, Divorce ⇨156, 164, 165(1).

PLEADING—COMMON-LAW

By O. L. McCASKILL, Professor, University of Illinois College of Law

Section

1. The Forms of Action.
 - (a) Trespass and Case.
 - (b) Ejectment.
 - (c) Detinue and Replevin.
 - (d) Trover.
 - (e) Debt, Covenant, and Assumpsit.
2. Joinder of Remedies.
3. Necessary Allegations—Substance and Form.
4. Demurrers and Pleas—Respective Functions.
5. Departure.

SECTION 1.—THE FORMS OF ACTION

(a) *Trespass and Case*

Q. 1. In her action of trespass against D, P proved that, as she was driving an automobile on a highway, D approached rapidly from the rear in his car, and suddenly and without previous warning ran close to and past P's car, making loud and startling noises with his horn; that his sudden appearance, high speed, and noise caused P to turn involuntarily to the right, and to run into a tree alongside the road, injuring P. D asked that P be nonsuited, on the ground trespass was not a proper action. What would you decide?

A. I would refuse the nonsuit. Trespass is a proper action to recover damages for a direct force causing immediate injury. Courts have found it difficult to give a description of a "direct" force and an "immediate" injury, which will serve as a guide for all cases. It is well settled, however, that a sudden and startling act, though it produce its result through fear and involuntary action in another person or in an animal, may still be looked upon as a force operating directly and producing an immediate injury. For assaults and their consequences, though there be no battery, trespass will lie.

Loubz v. Hafner, 12 N. C. 185.

James v. Caldwell, 7 Yerg. (Tenn.) 38.

For other cases see Decennial Digests, Action ☞30.

Q. 2. Could P have maintained an action of case on the facts stated in the previous question?

A. Yes; for injuries resulting from force, a plaintiff may elect to sue in trespass or case, unless he shows that the force was ac-

accompanied by an intent to do injury. If he sues in trespass, he treats the act as the gravamen of the action. If he sues in case, he charges the injuries were brought about indirectly through negligence. Thus it happens that from the same group of facts, through a different emphasis, a plaintiff may show direct force and immediate injury to maintain trespass, and indirect force and consequential injury to maintain case. If, however, plaintiff shows that defendant's act, which may be treated as a direct force, was accompanied by an intent to do injury, trespass is his only action to recover for the first direct injury. Intent negatives the possibility of negligence.

Mullan v. Belbin, 100 A. 384, 130 Md. 313, 327.

Percival v. Hickey, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

For other cases see Decennial Digests, Pleading §193(6); Trespass §17.

Q. 3. Assume that the evidence shows D intended to injure P, and that P expended \$1,000 in endeavoring to be cured of his injuries, and lost \$500 in wages. Could P recover for the money expended and wages lost in an action of case, provided he made no claim for the direct injury?

A. The modern tendency is to permit a recovery, but there is a conflict of authority. Plaintiff may recover for consequential injuries in trespass, if they grow out of or are connected with a direct injury, being treated as an incident of the trespass. An allegation of special damage, known as the *per quod* clause, is, however, essential. Conservative courts, inclined to administer remedies with a strict economy, require that the consequential injuries be recovered as an incident to the direct injury in trespass. More liberal courts, following the precedents which permit an intentional appropriation of chattels to be treated as a conversion, and even as a purchase, the trespass being waived, and those other precedents which permit debauching of servants and defamation during a trespass to lands to be redressed either in trespass under a *per quod* or in independent actions on the case, hold that plaintiff may pass over the direct injury and recover for the consequential injuries in case. This seems the better view.

Baldrige v. Allen, 24 N. C. 206.

Wilson v. Smith, 10 Wend. (N. Y.) 325.

Carleton v. Cate, 56 N. H. 130.

For other cases see Decennial Digests, Action on the Case §1.

Q. 4. P's declaration in trespass against the D Railroad Company, a corporation, alleged an assault on P while a passenger by the conductor of defendant in charge of the train. Defendant de-

murred to the declaration, on the ground that trespass would not lie against it for the acts of its conductor. How would you decide the demurrer?

A. I would overrule it. For the forceful acts of ministerial servants such as engineers, corporations are held not to be liable in trespass, though there be a liability in some other action. It seems to be thought that the force proceeds from the servant, and that the master's liability is indirect. For commanded acts, however, it is generally conceded the master may be held liable in trespass. By an extension of the command doctrine to include commands of a general nature, involving the use of delegated powers of discretion, or by a recognition of the fact that a corporation can command only through superior servants, and including conductors within this class, courts have held that a railroad company may be held liable in trespass for violent acts of conductors within the scope of their duties.

Brokaw v. New Jersey R. & Transp. Co., 32 N. J. Law 328, 90 Am. Dec. 659.
St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 352.

Southern R. Co. v. Hanby, 52 So. 334. 166 Ala. 641.

For other cases see *Decennial Digests*, Action ¶30, 50(6); *Corporations* ¶493.

Q. 5. P leased X a furnished cottage for three months, reserving a radio set, the use of which, however, he gave X until he should call for it. Just after X took possession, D broke into the cottage, breaking doors and windows, and carried away the contents. X notified P, who immediately brought trespass against D, charging separately the breaking into the cottage, taking the furniture, and taking the radio set. Is the action proper for any of these claims?

A. For the taking of the radio set only. To maintain trespass for an intermeddling with property rights, it is essential that there be a forceful interference with plaintiff's possession, actual or constructive. Courts have applied the fiction of constructive possession more liberally when dealing with chattels than with land. Most courts now hold that a general ownership of chattels, accompanied by an immediate right to possession, amounts to a constructive possession in the owner, though there be another in actual possession. But only when lands are vacant, or held by a servant, tenant at will, or tenant at sufferance, do courts indulge a constructive possession in the owner. Actual possession in one negatives constructive possession in another. P had actual possession of none of the property at the time of D's acts, and it was X who had the right to possession of everything but the radio set.

P's right to possession of that, coupled with his ownership, gave him a constructive possession, for the forceful interference with which trespass was a proper action. For the injury to his reversionary interests in the cottage (breaking of doors and windows), case was P's proper action.

Lane v. Thompson, 43 N. H. 320.

Holly v. Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

For other cases see Decennial Digests, Action ⇨30; Trespass ⇨19(9), 20(2), 20(8).

Q. 6. P, an owner of lands, was dispossessed by D, who subsequently sunk an oil well on the property and extracted large quantities of oil. P regained possession while D was off guard, and then brought trespass against D for sinking the well and removing oil. These facts appearing on trial of the action, D moved for judgment, on the ground P was not in possession of the lands at the time of the acts complained of. What ruling should have been made?

A. The motion should have been overruled. While P was not in actual possession, we have an exception to the rule that a constructive possession will not be indulged when another is in actual possession of lands. One out of possession when the action of trespass is brought cannot maintain the action for acts done on the land by one in possession; but if he repossesses himself, with or without action, the courts treat his possession as a continuous one, and the acts done in the interim as trespasses to his possession. The requirement that he repossess himself before a constructive possession will be indulged is probably an attempt to avoid trying title to lands in trespass actions.

Johnson v. C. & N. W. Sand & Gravel Co., 86 F. 269, 30 C. C. A. 35.

Smith v. Wunderlich, 70 Ill. 426.

For other cases see Decennial Digests, Trespass ⇨20(2), 20(6).

Q. 7. O and P, owners of Buick automobiles of the same model, parked their cars outside an office building. By mistake P took O's car, and, while driving it away, was struck by D, who was driving at a reckless speed. To P's declaration against him in trespass for damages to the car D pleaded that it was owned by O, and that P was merely a trespasser in possession. Was this a good defense?

A. No; it is no defense to an action of trespass that plaintiff was himself a trespasser. A wrongdoer cannot justify by showing title and right to possession in another than plaintiff, unless he further shows that he was acting on the latter's authority. It is immaterial that under the facts set out in the plea O might also

bring trespass against D. The right being an alternative one, the action is maintainable by the one first bringing suit.

Cox v. Hall, 18 Vt. 191.

W. K. Syson Timber Co. v. Dickens, 40 So. 753, 146 Ala. 471, 477.

For other cases see Decennial Digests, Attachment ⚡365; Trespass ⚡27.

(b) *Ejectment*

Q. 8. To P's action of ejectment for two parcels of land, D pleaded as to the first parcel a judgment in his favor in a previous action of ejectment between the same parties on the same issues, and as to the second parcel a judgment in his favor in a previous action of trespass quare clausum fregit, in which D's only plea was liberum tenementum (entry by reason of a freehold right). P demurred to both pleas, on the ground that they presented no defense. What ruling should have been made?

A. The answer must depend upon the jurisdiction. At common law the first plea presented no defense. Though ejectment came to be the proper action in which to try title to land, it was determined for the purposes of the particular suit only; the defeated party being permitted to bring successive ejectment actions until stopped by a bill of peace in equity. This has been modified by statute everywhere, but in varying degrees; some jurisdictions still permitting as many as three ejectment suits, while some make a judgment in one final. A judgment for defendant in trespass, where his only plea is liberum tenementum, necessarily determines that his title is superior to plaintiff's, since, to win on that plea, he must establish, not only a possessory right, but such a right by reason of a freehold. Plaintiff would win by negating either of these propositions. But, as title came in issue in trespass only as an incident in determining possessory rights, it would be most unusual to find a common-law court giving greater finality to a judgment on a plea of liberum tenementum in trespass than to a judgment in ejectment. Statutory curtailment of successive ejectment actions has indirectly led some courts to give finality to such a judgment in trespass, but there is still much conflict and confusion. A single judgment in favor of defendant on a plea of liberum tenementum in trespass should be given the same effect as to finality that the statutes of a particular jurisdiction require to be given to a single judgment in ejectment.

Williamson v. Mayer, 23 So. 3, 117 Ala. 253, 259.

Elson v. Comstock, 37 N. E. 207, 150 Ill. 303, 309.

Dickinson v. Mankin, 56 S. E. 824, 61 W. Va. 429.

Kimball v. Hilton, 42 A. 394, 92 Me. 214.

For other cases see Decennial Digests, Ejectment ⚡31; Judgment ⚡589(1), 702; Trespass ⚡43(2)

Q. 9. In P's ejectment action against D, the proof showed that D had been in possession of the parcel of land in question until the week before P's suit was brought, when he leased it to X, who immediately took possession, and remained in possession to the time of the trial as D's tenant. At this point D objected to further proof, and moved that P be nonsuited. P insisted on proceeding, and proving the validity of his title. How would you rule?

A. I would grant the nonsuit. Ejectment is a possessory action, and can be maintained only when plaintiff is seeking to obtain a possession of land which defendant withholds from him. Plaintiff must show he is out of possession, that defendant is in possession, and that plaintiff has a right to immediate possession. Title comes into issue only as an element of plaintiff's right to take possession from defendant, and is not tried in this action independently of that right. As X, and not D, was in possession, the action is against the wrong party.

Southgate v. Walker, 2 W. Va. 427.

For other cases see Decennial Digests, Ejectment ¶19.

Q. 10. D, the owner of certain lands, by written contract agreed to convey them by warranty deed to P, when the latter had paid him \$3,000 therefor. P has paid D that sum. D has title, and is in possession of the land. May P maintain ejectment against him?

A. No. The contract gives P the right to call upon D for title and possession, but this right is specifically enforceable only in equity. Plaintiff cannot maintain ejectment on an equitable right to possession, or upon an equitable title giving such right.

Fenn v. Holme, 21 How. 481, 16 L. Ed. 198.

For other cases see Decennial Digests, Ejectment ¶13.

(c) *Detinue and Replevin*

Q. 11. In P's action of replevin against D, the evidence showed that P's cows strayed into D's cornfield, doing \$100 damage; that D impounded them; that P subsequently demanded his cows, tendering D \$100; and that D refused to surrender them unless P paid him \$200. On this proof D moved that P be nonsuited, contending that detinue, not replevin, was the proper action. What would you rule?

A. I would deny the nonsuit. The action of replevin was first used in connection with wrongful distrains, a fact which led some writers to contend that it was limited to such situations. A distraint of trespassing cattle for damage done is lawful, but a refusal to surrender them when the actual damage done is tendered is unlawful.

To the early Massachusetts courts this looked like a wrongful detention after a lawful taking, and led them to announce that replevin would lie for an unlawful detention, though the taking was lawful. The great weight of authority, however, is to the effect that replevin lies only when there has been an unlawful taking. An unlawful taking is found in the distress cases, since what would have been a good justification for the taking ceases to be any justification at all when the taker makes an illegal demand, and the distrainer is treated as a trespasser from the beginning.

Pangburn v. Patridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250.

Dame v. Dame, 43 N. H. 37, 38.

For other cases see *Decennial Digests*, *Detinue* ⚡6; *Replevin* ⚡9.

Q. 12. Suppose that the above action had been detinue, as D contended it should have been, would the fact that there was an unlawful taking, such as would support replevin, defeat detinue?

A. No; undoubtedly there are a number of early decisions to the effect that detinue will not lie where there has been an unlawful taking, but by the weight of modern authority plaintiff may pass over the wrongful taking, and complain of the wrongful detention alone.

Schulenberg et al. v. Campbell, 14 Mo. 491.

Dame v. Dame, 43 N. H. 37, 41.

For other cases see *Decennial Digests*, *Detinue* ⚡6.

Q. 13. In P's action of detinue against D for a tapestry of unique design, the evidence showed that D had sold the tapestry to a dealer three weeks before P brought his suit, and that after suit, but just before the trial, a fire had destroyed a large part of the dealer's stock, but whether the tapestry was included in the fire loss was unknown as yet. On this evidence D asked that the action be dismissed (a) because he did not have the chattel when suit was brought; and (b) because it did not appear that the chattel was in existence at the time of trial. Decide both points.

A. I would overrule both contentions. While detinue is primarily an action to recover chattels in specie, the mere fact that defendant does not have the chattel when judgment is rendered does not defeat the action. If he has had the possession, though he has parted with it before or pending suit, the action may still lie; but instead of the chattel the plaintiff will obtain its value, the judgment in this action being in alternative form, that plaintiff recover the chattel if it is to be had, and, if not, that he recover its value. Courts say that, though defendant has parted with the chattel, he may, perhaps, re-

cover it and satisfy the judgment for the return of the chattel. But, if the chattel has been destroyed before suit, detinue will not lie. If it is destroyed pending suit, the suit was properly instituted, and the action does not abate, judgment being taken for the value.

Caldwell v. Fenwick, 2 Dana (Ky.) 332.

Jones v. Dowle, 9 Mees & W. 19.

For other cases see *Decennial Digests*, Detinue ¶1.

Q. 14. Suppose that D had been in possession of the tapestry when the judgment in alternative form was rendered against him, and, desiring to keep it, had tendered the sheriff the value found by the judgment; could plaintiff insist that the sheriff seize the tapestry?

A. At the present time it would seem that the option to surrender the property or its value does not rest with defendant, though at ancient common law he doubtless had this privilege. Where a defendant had come rightfully into the possession of chattels, the common-law courts would not issue writs authorizing sheriffs to break into people's houses to search for and seize these chattels, even in aid of a judgment in detinue. This defect of procedure gave a recalcitrant defendant the privilege, if not the right, of forcing plaintiff to be satisfied with the value. In modern times sheriffs have ample power to break and enter houses in executing writs placed in their hands, and, though the judgment in detinue is still in the alternative, it is for plaintiff, rather than defendant, to say whether defendant may keep the chattel and pay its value.

Robinson v. Richards, 45 Ala. 354.

Keith v. Johnson, 31 Ky. (1 Dana) 604, 25 Am. Dec. 167.

For other cases see *Decennial Digests*, Detinue ¶25, 26; Execution ¶124.

Q. 15. To P's declaration in detinue, describing the property involved as "a certain horse belonging to P," without marks of identification or value, D demurred on the ground the description of the horse was insufficient. What should be the ruling on the demurrer?

A. It should be sustained. As detinue is an action to recover specific chattels, it is necessary to describe them in the declaration with sufficient definiteness to enable them to be identified. As value is an issue of importance, if the chattel itself cannot be recovered, the pleading must also allege the value of the chattel.

Boggs v. Newton, 5 Ky. (2 Bibb) 221.

For other cases see *Decennial Digests*, Detinue ¶17.

(d) *Trover*

Q. 16. P shipped goods by railroad from Washington to Philadelphia, consigning them to himself. Through negligence the railroad company delivered the goods to another, and they were lost. P

brought an action of trover against the railroad company. Should he recover in this action?

A. While the decisions are not harmonious, I would decide in favor of the action. It is well settled that a bailee is not liable in trover for mere acts of omission, not amounting to an assertion of dominion over the chattel inconsistent with the rights of the one entitled to possession. This principle has led some courts to declare broadly that a negligent loss of chattels by a bailee does not constitute a conversion of them. Where, however, the negligence consists in an affirmative act which deprives plaintiff of possession, giving it to another, the mere absence of wicked intent does not prevent this act from being a conversion. As one who sells or purchases the property of another, though innocently, is a converter, it would seem that a bailee, who delivers it consciously, though negligently, to the wrong person, is likewise a converter, and it has been so held by many courts.

Davis v. Hurt, 21 So. 468, 114 Ala. 146.

Wing v. Milliken, 40 A. 138, 91 Me. 387, 64 Am. St. Rep. 238.

For other cases see *Decennial Digests, Trover and Conversion* §52; *Warehousemen* §34(1).

Q. 17. In P's action of trover against D for the conversion of an automobile, the evidence showed a collision between P's car and D's, due entirely to D's negligence; that P's car was disabled in the middle of a busy highway; that D towed it to the side of the highway, and directed a garage man to get it and repair it, sending the bill to him; that a dispute arose between P and D as to whether certain parts of the car should be replaced with new parts or repaired; and that P refused to accept the car from the garage when the repairs were finished, because it was not in as good condition as before the collision. On this proof, D asked that P be nonsuited. What should be the ruling?

A. The nonsuit should be granted. While true that trover will lie wherever trespass de bonis asportatis is proper, it is not accurate to say that it is coextensive with all trespasses to chattels. For trover to lie, the trespass must involve an assertion of dominion over the chattel in violation of the rights of the one entitled to possession. The collision, though a trespass, was not a conversion of the car. The removal of the car from the street and to the garage were to the interest of P, consistent with his possessory rights, and impliedly with his consent. In no sense did they constitute an asportation, for which either trespass or trover would lie. A direction to the repair man to do a kind of work on the car disapproved by P, together with a detention of the car against his wishes for this purpose would

doubtless have been a conversion of the car; but, in the absence of a demand of P for the car, the retention of it for making repairs was lawful, and D's wrong, if there was one, consisted in omitting to do something to the car which should have been done, or in doing something to it which should have been omitted, falling short of exercising dominion over it.

Haines v. Cochran, 26 W. Va. 719, 723, 724.

McKeesport Sawmill Co. v. Pennsylvania Co. (C. C.) 122 F. 184.

See *Rubin v. Huhn*, 118 N. E. 290, 229 Mass. 126, 4 A. L. R. 1190.

For other cases see *Decennial Digests*, *Bailment* Ⓒ2, 16, 31(3); *Trover and Conversion* Ⓒ1, 4, 12.

Q. 18. P's declaration in trover against the Sky Blue Company, a corporation, alleged that P owned and possessed ten shares of the preferred stock of defendant company, of the par value of \$100 per share, with guaranteed dividends of 6 per cent. per annum, and of the actual value of \$100 per share, which shares of stock were represented by certificates of stock possessed by plaintiff; that defendant, desiring to retire said stock, falsely and fraudulently represented to P that it had a purchaser for said stock at \$105 per share, and that, if P would deliver to it his stock certificates indorsed in blank, it would consummate the sale for him; that defendant had no such purchaser; that P delivered to defendant his stock certificates indorsed in blank, relying upon said representations; and that thereupon defendant canceled said stock on its books, and converted it to its own use, to P's damage, etc. Defendant demurred to the declaration on two grounds: (a) That intangible property, like shares of stock, are not the subject of conversion; (b) that the declaration is one in case for deceit, and not for a conversion. Decide both points.

A. There are a few decisions to the effect that trover will not lie for the conversion of intangible property, like shares of stock, choses in action, franchises, evidences of indebtedness, and even money, unless it is earmarked; but the great weight of authority is to the effect that property of this kind is the subject of conversion, and that acts which have the effect of depriving an owner of its beneficial use constitute such conversion. Obtaining dominion and control by fraudulent representations, though a deceit, is also a conversion, and, as possession is obtained wrongfully, a demand and refusal is not essential. The declaration states a good cause of action in trover; neither point made by defendant being well taken.

Daggett v. Davis, 18 N. W. 548, 53 Mich. 35, 51 Am. Rep. 91.

Herrick v. Humphrey Hardware Co., 103 N. W. 685, 73 Neb. 809, 814, 119 Am. St. Rep. 917, 11 Ann. Cas. 201.

See *Pardee v. Nelson*, 205 P. 332, 59 Utah, 497, 21 A. L. R. 385.

For other cases see *Decennial Digests*, *Trover and Conversion* Ⓒ2, 4, 9(1).

Q. 19. During an extremely dry season at a lake summer resort P found a diamond ring in what would be the bottom of the lake in a normal season. It had apparently been in the lake a long time. D asked to see the diamond, and P handed it to him for that purpose. After inspection, D refused to return the diamond to P, and shortly afterward gave it to a young lady as an engagement ring. Can P maintain trover against D on these facts?

A. Yes; it is generally stated that, to maintain trover, plaintiff must have a general or special title, as well as a right to possession. There is much indefiniteness as to what constitutes a special title. Persons having possessory rights in chattels, and who, by reason of bailments or otherwise, are liable to the general owner for their return, have such special title. Authorities are agreed that, when the owner is not known, a finder has a sufficient title. When he is known, however, there is a conflict of authority. Some courts hold that a naked possession, as in trespass, is sufficient as against every one except the true owner. The weight of authority, however, seems to be that in this action possession merely raises a presumption of title, which may be rebutted, and that it is a good defense to show title and right to possession in a third person, though defendant does not claim under him. In trover the recovery is for the value of the chattel at the time of conversion, and, according to the majority view, it is thought undesirable to give a finder this remedy when the owner is known, since the owner would have a like remedy, and defendant would be subjected to a double liability. When the owner is not known, the tortious taker must evidently run the risk that he will subsequently appear.

Stitt v. Namakan Lumber Co., 103 N. W. 707, 95 Minn. 91.

Barwick v. Barwick, 33 N. C. 80.

For other cases see *Decennial Digests, Remainders* ¶17(1); *Trover and Conversion* ¶16.

Q. 20. In P's action of trover against D, the proof showed that D rented P the shelving, counters, and showcases of a certain store for five years; that he dispossessed P wrongfully during the first year of the term; that the property rented was worth \$3,000; and that its rental value for the unexpired term was \$750. D moved for a nonsuit on this evidence, claiming the action should have been on the contract, or in trespass, or case. What ruling should be made?

A. The motion for nonsuit should be denied. Trover will not lie for fixtures, as a part of realty, but the shelves, counters, and showcases here were not fixtures in the strict sense, but chattels. Courts have extended the action of trover to cover wrongful taking of chat-

tels by the general owner from one entitled to their possession. In these cases, however, the plaintiff recovers, not the full value of the chattels, but the value of his special interest in them.

Burk v. Webb, 32 Mich. 173.

For other cases see *Decennial Digests, Trover and Conversion* §42.

(e) *Debt, Covenant, and Assumpsit*

Q. 21. In P's action of debt against D, the proof showed that P had acted as caretaker for D's country estate at the latter's request, but without definite agreement as to wages, and that he had worked 100 days. He then asked a properly qualified witness the reasonable value of such labor; but, upon D's objection that this was proving damages in an action of debt, the court excluded the evidence. Was this a proper ruling?

A. No; it is well settled that debt lies to recover only a sum certain of money, but the concept of a sum certain has undergone some changes in modern times. In the early cases the certainty was required to be established by the agreement of the parties, or by statute, record, or other obligation creating the liability to pay. This rule was relaxed, so that the sum was held to be certain if the obligation specified a mode of ascertaining it by reference to extrinsic facts. There also evolved the more liberal, but very indefinite, rule that that is certain which can readily be made certain. Recoveries in cases like the present were first allowed under the quantum valebant, and later under the indebitatus counts in general assumpsit, an action to recover damages. Soon the recovery was permitted in debt, though it was denied that the sum recovered was damages. It was a sum readily made certain by the value of the quid pro quo received.

Incedon v. Crips, 2 *Ld. Raym.* 814.

Thompson v. French, 10 *Yerg.* (Tenn.) 452.

Shipman, *Common Law Pleading* (3d Ed.) p. 139.

For other cases see *Decennial Digests, Contracts* §324(1, 2) *Debt, Action of* §3.

Q. 22. P's declaration against D in debt set forth a contract between P and D, whereby D promised that, if P would work for him as a farm hand for six months, he would give him his board and lodging, \$100 in cash, and his pinto horse, Milo, worth \$250. P alleged that he had worked for the six months, and had received his board and lodging and the \$100 in cash, but that D had refused to give him the horse, Milo, or its value, and that D was indebted to him \$250, the stated value of the horse. D demurred to the declaration, on the ground debt was not the proper action. Decide the case.

BAL. PROB. LAW

A. The demurrer should be sustained. Contracts calling for a sum certain of money, "payable in" property, which is specified, have been variously construed as (a) obligations which must be discharged in property; (b) obligations which the debtor may discharge in property at maturity, but which, after maturity, are money obligations only; (c) obligations payable in money only at maturity, where the property is but vaguely described as to character or quantity. Debt is the proper action only under constructions making them money obligations at or after maturity. Where the contract calls for a delivery of property, the value of which is then specified, the courts are unable to see an obligation for the payment of a sum certain of money, in the nature of a debt, though the fixing of the value may serve to measure the damages recoverable.

Dungan v. Henderlite, 21 Grat. (Va.) 149.

Pinney v. Gleason, 5 Wend. (N. Y.) 393, 21 Am. Dec. 223.

Watson et al. v. McNairy, 4 Ky. (1 Bibb) 356.

For other cases see Decennial Digests, Damages §126; Debt, Action of §1.

Q. 23. In P's action of debt against D, the evidence showed that D had executed the following instrument: "I acknowledge myself indebted to P in the penal sum of \$1,000, for the payment of which I bind myself, my administrators and assigns. Now, if X shall pay to P \$750, the purchase price of an automobile sold by P to X, on or before January 1, 1925, this obligation to be void; otherwise, to remain in full effect. Given under my hand and seal this October 1, 1924. [Signed] D. [Seal.]" It was further shown that X had paid P but \$500 by January 1, 1925. D asked that P be nonsuited, on the ground that debt will not lie on a collateral obligation to pay the debt of another, nor for damages. Decide the motion.

A. The motion will be denied. It has been held that debt will not lie upon a collateral obligation to pay the debt of another, though it be created by a sealed instrument, and the amount to be recovered can be readily ascertained. Though binding, the obligation is not a technical debt, but calls for the payment of damages. There are, however, some situations where the debt of another is more or less involved, in which the contracting party creates a direct obligation on which debt will lie. The obligation of a surety is one illustration. The obligor in a penal bond, though it be conditioned upon the nonpayment of a debt owed by another, has always been considered as primarily liable. His acknowledged indebtedness is in the amount of the bond, not the amount unpaid by another, though nonpayment by the other fix his liability. The practice of courts in modern times to insert in a judgment for the full amount

of the bond a provision that it may be discharged upon payment of plaintiff's damages, in this case the amount of X's unpaid debt, with interest, has not served to bring these within the class of collateral obligations, nor to make the claims sound in damages, for which debt will not lie.

Gregory v. Thomson, 31 N. J. Law, 166.

Meakings et al. v. Ochiltree et al., 5 Port. (Ala.) 395.

For other cases see Decennial Digests, Bonds ⚡119; Debt, Action of ⚡1.

Q. 24. Your client desires you to bring suit upon an instrument which recites that D and X covenant and agree to pay him a certain sum of money, which has not been paid. The instrument has a sort of scroll after the signature of X, but it is impossible to tell from inspection whether it was intended to be a seal or not, and your client's statement about it is very uncertain. What action will you bring?

A. Debt. While covenant is a proper action on a sealed instrument, whether the recovery sought be a sum certain or damages, many jurisdictions still insist that the actual presence of the seal is essential to this action. As it is uncertain whether X sealed the instrument, and still more uncertain whether D adopted a seal used by X, covenant would be a precarious action. On the other hand, assumpsit will not lie upon a sealed instrument, and if it were found that D and X, or either of them, sealed the instrument, this action would be hazardous. The instrument does, however, create a joint debt, and, as the action of debt is not dependent upon the absence or presence of a seal, this is the preferable action.

Jerome v. Ortman, 33 N. W. 759, 66 Mich. 668.

Crandall v. Johnson, 58 A. 765, 26 R. I. 250.

Rankin v. Roler, 8 Grat. (Va.) 63, 67.

For other cases see Decennial Digests, Assumpsit, Action of ⚡6(2); Covenant, Action of ⚡1; Debt, Action of ⚡8.

Q. 25. P's declaration against D in assumpsit contained the common counts only. On trial P offered in evidence a written contract between himself and D, wherein D promised to pay P \$500, if he would drain certain swamp lands. D objected to the evidence, contending that P could not recover in general assumpsit under the common counts, but should have pleaded the contract specially. Decide the point.

A. The evidence is competent under the common counts. When an express contract, not under seal, has been fully performed on one side and nothing remains to be done on the other but to pay an agreed sum of money, a recovery can be had under the indebitatus counts in assumpsit, without pleading the contract specially. These

are known as the common counts, because they allege in the most general terms indebtednesses created by the more common transactions, such as goods sold, work done, rent, money lent, etc. In this case the count for work and labor done at defendant's request is appropriate.

Fairfax Forrest Min. & Mfg. Co. v. Chambers, 23 A. 1024, 75 Md. 604, 611.
For other cases see Decennial Digests, Contracts $\S$ 346(4½).

Q. 26. Suppose that, in an action of assumpsit, where P pleaded the common counts only, he attempted to show that D owed him three months rent on a lease under seal; would the evidence be competent?

A. No; though the contract is fully performed, except for the payment of the rent, and though the contract so performed creates a debt, the fact that the debt is created by a sealed instrument prevents a recovery under the indebitatus counts as well as under a special count in assumpsit. The reason is purely historical. In debt on simple contracts, defendant could wage his law; that is, swear he did not owe the debt, and produce oath helpers who would swear he was a truthful man, and thus be discharged. To escape this inconvenience, courts began to treat breaches of promises founded upon a consideration as deceptions, and to allow recoveries thereon in assumpsit. They even implied promises to pay simple debts, and treated breaches of these implied promises as deceptions. The indebitatus counts in assumpsit were the result. Wager of law, however, did not apply to contracts under seal, and debts created by statute and records, and, as the necessity of escaping this defect in procedure did not exist, assumpsit was not extended to cover such obligations.

North v. Nichols, 37 Conn. 375.

2 Street, Foundations of Legal Liability, 62.

For other cases see Decennial Digests, Assumpsit, Action of $\S$ 6(2).

Q. 27. P sued D in assumpsit, his declaration containing the common counts only. On trial P proved a written contract, whereby he was to receive \$1,500 from D for doing all the plumbing work on a certain building; that he did a part of the work, and was then wrongfully stopped by D. P then offered to prove by competent witnesses (a) the value of the work done, and (b) the proportion of the work done to the total to be done; but the court held this evidence was not competent under the pleadings. Was the ruling correct?

A. It was not. Though work is done under an express contract, recovery under the common counts in assumpsit is not limited to

the cases where plaintiff has fully performed, and nothing remains but for defendant to pay the agreed price. Where there is partial performance, and complete performance is prevented by defendant, most courts permit plaintiff to recover for the part done upon a quantum meruit. The theory is to prevent defendant being unjustly enriched at plaintiff's expense. As it is now generally conceded that a quantum meruit may be the basis of a debt, a recovery can be had under the indebitatus as well as under the quantum meruit counts. Though there is some disagreement as to whether plaintiff can recover more than the contract rate of compensation, it is generally agreed that the contract rate is competent on the question of reasonable value, as the contract rate is *prima facie* a reasonable rate.

Fitzgerald v. Allen, 128 Mass. 232.

For other cases see *Decennial Digests*, *Contracts* ¶274.

Q. 28. Under the common counts in *assumpsit*, P, over D's objection, proved that he was prevented from obtaining an architect's certificate as to the completion of the work and its satisfactory character, which the contract called for before final payment, by collusion between the defendant and the architect to withhold the certificate, though P had completed the work according to contract. Was this evidence of collusion competent under the pleadings?

A. The weight of authority on this specific point is against receiving the evidence. Despite the decisions that, under the common counts, plaintiff may show that defendant prevented him from doing work, the courts seem to think that an excuse for not performing this particular term of a building contract should be specially pleaded. The rulings purport to be based on the principle that an excuse for performance cannot be proven under an allegation of performance; but it is apparent the courts are thinking only of the precedents where a recovery is permitted under the common counts in cases of full performance of the express contract, neglecting the precedents dealing with partial performance and recoveries on quantum meruit. In fixing the limits to which proof may go under the noninformative common counts, there are apt to be conflicts and departures from strict logic.

Expanded Metal Fireproofing Co. v. Boyce, 84 N. E. 275, 233 Ill. 284.

For other cases see *Decennial Digests*, *Assumpsit*, *Action of* ¶5.

Q. 29. Add the fact to question 27 that the contract was under seal; could there be a recovery for the partial performance under the common counts?

A. Here the seal does not prevent a recovery in assumpsit, since plaintiff is proceeding on the theory of a rescission of the contract, or on an obligation to pay for value received, independent of the contract repudiated.

Orem v. Keely, 36 A. 1030, 85 Md. 337, 346.

For other cases see *Decennial Digests, Work and Labor* ¶12.

Q. 30. P's declaration against D in assumpsit contained the common counts only. On trial P testified he owned a horse worth \$500, and that D took it from him without his permission. Upon D's objection that the evidence was not pertinent to the common counts, the court struck out the testimony that the taking was without P's consent, and prevented P from proving what D did with the horse after the taking. Were these proper rulings?

A. No; it is everywhere held that, if one wrongfully in possession of chattels sells them, the owner may pass over the tort in the taking or selling, treat the seller as a duly authorized agent to sell, and hold him accountable for the proceeds. On this theory a recovery is permitted under the count for money had and received by defendant to plaintiff's use. Even where the converter has not sold the chattels, some jurisdictions permit the owner to treat the facts which show a conversion as evidence of a purchase by the converter at the reasonable value. On this theory a recovery is permitted under the count for goods sold and delivered to defendant. The latter jurisdictions permit plaintiff to recover on the one of these two theories which is most favorable to him. The evidence excluded was competent to show whether there was a basis for one or other of these theories.

Jones v. Hoar, 22 Mass. (5 Pick.) 235, 290.

City of Elgin v. Joslyn, 26 N. E. 1090, 136 Ill. 525, 532.

For other cases see *Decennial Digests, Assumpsit, Action of* ¶8.

Q. 31. P's action of assumpsit against D contained the common counts only. P proved that D, in watering his lawn, negligently placed a sprinkler so close to P's open window that water was thrown on some nice furniture, causing water stains; that P complained to D, who said, "Have the furniture refinished, and send me the bills;" that P had it refinished, sent the bills to D and D refused to pay anything; that the bills were proper bills, and P had been obliged to pay them to avoid useless litigation and additional costs. D moved to exclude all this evidence as improper under the common counts. Decide the point.

A. Though a close question, the decision should be for P. Before the repair work was done, D's obligation to P sounded wholly in

tort, with no circumstance from which the law would imply a promise. If D's conversation with P be construed either as a promise to pay P's damages or as a promise to pay his indebtedness to the repair men, aside from the question of a supporting consideration, no recovery could be had under the indebitatus counts, as the promise did not create a strict debt, and the quantum meruit and quantum valebant counts would be wholly impertinent. If, however, it can be construed as a direction to P to create an indebtedness for D, which would serve to discharge P's tort claim against D, P's payment could be regarded as money paid by him to the use of D, and a recovery had under the count for money paid by plaintiff to the use of defendant. Courts have been somewhat slow to work out a recovery under this count, where plaintiff's original claim against defendant sounds in tort, and where his payment serves to reduce his own damages.

Parker & Son v. Clemons, 68 A. 646, 80 Vt. 521.

Davis v. Smith, 10 A. 55, 79 Me. 351; 1 Chitty on Pleading (14th Am. Ed.) 350.

For other cases see Decennial Digests, Assumpsit, Action of 5.

SECTION 2.—JOINDER OF REMEDIES

Q. 32. P's declaration against D in case charged in a single count that D negligently and maliciously ran him down with an automobile. D demurred to the declaration, on the grounds (a) of duplicity, and (b) of misjoinder of causes of action. What is the proper ruling on each point?

A. Both grounds of demurrer are well taken. As an act cannot be both negligent and malicious, but may be one or the other, it is apparent that P is attempting to set forth facts which will support alternative theories of recovery. This is permissible only within certain limits, to avoid a variance between the pleadings and proof. To facilitate separateness and certainty of issues, a pleader desiring to avail himself of alternative theories is required to plead as separate narratives the facts pertinent to the maintenance of each theory; the separate narratives being known as counts in the declaration. A pleading which intermingles in one narrative facts tending to support various theories is demurrable for duplicity. That fault was committed here.

For purposes of pleading, the facts supporting each theory of recovery are deemed different causes of action, and only certain kinds of causes of action may be joined in one action. The rule has been variously stated; one of the more common being that only those causes of action may be joined which are of the same nature, and

will take the same form of plea and the same judgment. This is an artificial way of expressing the ancient doctrine that the original writ marked the limits of the court's jurisdiction, and that all pleadings under a writ must conform to its nature. Thus counts in trespass and case could not be joined in one action. It was possible to join counts in debt with those in detinue, and counts in case with those in trover, for detinue was a development of debt, and trover was a development of case. Though writs no longer confer jurisdiction of subject-matter, the ancient boundaries have survived, except where modified by statute. For malicious use of force, trespass is an exclusive remedy. In attempting to plead malicious use of force and negligence in an action of case, whether in separate counts, or commingled in one count, a plaintiff subjects his declaration to a demurrer for misjoinder of causes of action. P did that here.

Highland Ave. & Belt R. Co. v. Dusenberry, 10 So. 274, 94 Ala. 413.

Dalson v. Bradberry, 50 Ill. 82.

1 Tidd's Practice, 11.

For other cases see Decennial Digests, Action ⚡41; Pleading ⚡64(2).

Q. 33. John Brown and Sarah, his wife, sued D in an action of case. The first count of the declaration described an accident, due to D's negligence, in which Sarah was injured, and claimed damages for these injuries. The second, after describing the same accident and injuries, alleged that Sarah was John's wife, that he had been deprived of her services, and compelled to pay out large sums to doctors, nurses, and hospitals for her treatment due to the accident, and claimed damages therefor. What defects, if any, are present in this declaration?

A. There is a misjoinder of parties plaintiff. At common law only those injured in a common or joint right could unite in an action. When a wife was injured, any action for pain and disfigurement was hers, though her husband was required to join to indicate his consent. The husband was given a separate action for loss of her services and expenditures made by him, and she was not a proper party to it. Modern acts affecting married women have left the husband's suits as before, but vary in the requirement as to suits by wives. In some jurisdictions she is required to sue as though single, while in others, she is given an option to join her husband or omit him. Whether the first cause of action in the declaration is properly constituted as to plaintiffs, therefore, depends upon the jurisdiction. Sarah would be considered an improper party to the second cause of action everywhere. Not only must each cause of action in a declaration have its proper parties, but the parties to each cause of action must be the same, if they are to be joined. This

requirement, though it pertains to a joinder of causes of action also, is generally treated as a rule affecting joinder of parties.

Lewis v. Babcock, 18 Johns. (N. Y.) 443.

For other cases see *Decennial Digests*, Action ¶42.

Q. 34. P's declaration against D in trover contained two counts. In the first count, P declared as for a conversion of his own goods. The second count alleged that P, as administrator of the estate of X, deceased, was possessed of certain described goods which had belonged to X, and that D took and converted these goods after X's death, to P's damage as administrator, etc. D demurred to this declaration on the ground of misjoinder of parties. Was the demurrer well taken?

A. No; it is true that, where one sues in different capacities, he is regarded, for purposes of suit, as having a separate personality for each capacity, and where he seeks to enforce one cause of action in one capacity, and another cause of action in another capacity, there is a misjoinder of plaintiffs. But that is not the case here. In the second count, the facts show he is not suing in his capacity as administrator, though he describes his appointment and says he has been damaged as such. The goods were taken from his possession, and it was his right to possession and special property right that was interfered with. The allegations as to administratorship are surplusage, serving only to describe him, but not the nature of his right. Had this count alleged that the goods were converted in the lifetime of X, then such allegations would have been essential to show his right to sue, would have described him in a new capacity, and there would have been a misjoinder.

Lashlee v. Wily, 8 Humph. (Tenn.) 659.

For other cases see *Decennial Digests*, Action ¶50(2).

SECTION 3.—NECESSARY ALLEGATIONS—SUBSTANCE AND FORM

Q. 35. P's declaration against the D Railroad Company alleged that, while P was upon a train operated by defendant, it so negligently operated the train and its railroad system connected therewith that P was thrown violently against the iron work of one of the cars, whereby three teeth were knocked out and a leg broken, to his damage, etc. Does the declaration state a cause of action?

A. No; to state a cause of action, a declaration must state facts showing a duty owing by defendant to plaintiff, and a breach of that duty, resulting in a recognized legal injury to plaintiff. The statement must be so made that defendant may recognize the material

facts relied on, to the end that he may either deny their truth or challenge their sufficiency in law to establish the duty or its breach. The allegations should be confined to facts, from which the principles of law involved may be deduced, and should not be in terms of legal principles. For pleading purposes, the allegations of material operative facts are neither detailed narratives of evidence nor general conclusions based upon legal principles, the fact basis of which is not apparent. They are rather allegations which, though they contain some legal elements, serve in the particular action reasonably to inform the defendant of the character of the case he will be called upon to meet, without stating the evidence itself. These are said to be allegations of ultimate facts, as distinguished from details of evidence, on the one hand, and general legal conclusions on the other. Tested by these principles, the allegations are insufficient to show defendant's duty to P. He does not allege whether he was a passenger, a licensee, or a trespasser. He does not show his position on the train. He does not tell the nature of the immediate force which caused his injury, whether there was a derailment, a collision, a sudden jarring of the train or an assault by some person.

McAndrews v. Chicago, L. S. & E. Ry. Co., 78 N. E. 603, 222 Ill. 232, 236-240.

Campbell v. Walker, 76 A. 475, 1 Boyce (24 Del.) 580, 583.

See 32 Yale Law J. 483.

Shipman, Com. Law Pl. (3d Ed.) pp. 494, 496.

For other cases see Decennial Digests, Negligence ⚡110; Pleading ⚡1, 8(1, 17).

Q. 36. Where a passenger sues a carrier for injuries received in a train wreck, is it sufficient for him to allege "that defendant so negligently managed its train that it collided with obstacles on the track," without alleging the particular causes of the collision?

A. Yes; where an act is comparatively simple, as swinging an ax, to allege that it was negligently performed conveys a definite concept. Even where the act charged is general and complex in its nature, as the operation of a train or the management of a factory, where it is so completely under the control of defendant that he presumptively has exclusive knowledge of the details of operation or management, to allege that it was negligently performed reasonably advises defendant of the facts which will be at issue, and, consequently, of the legal questions involved.

Chicago City Ry. Co. v. Jennings, 41 N. E. 629, 157 Ill. 274.

Cox v. Providence Gas. Co., 21 A. 344, 17 R. I. 199.

For other cases see Decennial Digests, Master and Servant ⚡258(3, 11); Street Railroads ⚡110(1).

Q. 37. P's declaration against D in trespass contained the following: "And plaintiff alleges upon information and belief, that D, with force and arms, on the night of April 1, 1923, took and carried away a certain calf then in P's possession," etc. Was this a proper method of alleging a trespass?

A. No; allegations of fact, whether known to plaintiff or not, were required to be made positively, that a definite issue could be taken on them. Common-law declarations were not under oath, and it was immaterial whether the allegations in them represented the personal knowledge of any individual. Unlike pleadings in equity, no discovery could be obtained, and, consequently, this object of swearing to the pleadings, and of avoiding perjury by swearing to facts unknown, did not exist.

State ex rel. Ballard v. Greene, 88 A. 515, 87 Vt. 94, 97.

For other cases see Decennial Digests, Pleading $\S$ 68.

Q. 38. P's declaration against D in assumpsit by appropriate allegations showed that D had failed to pay P at maturity a promissory note executed by P to D in payment of a bill of goods. D demurred to the declaration on the ground it did not negative payment before suit. Was this objection valid?

A. No; in determining whether nonpayment as of a particular time is an essential allegation to show a breach of duty, consideration must be given to the nature of the duty, and by what it is created. Where it is apparent that the duty is created by an express promise, the terms of the promise determine the scope of the duty. Here the duty was to pay at maturity of the note. When this duty was broken the right of action was complete. Matters in defeasance of rights once accrued are treated as defenses, and, under the common-law plan of arriving at an issue, defenses should not be anticipated and met in the declaration. They may or may not be raised by the defendant. If raised, they may be traversed or avoided in the replication.

Conkling v. Weatherwax, 73 N. E. 1028, 181 N. Y. 258, 268, 2 Ann. Cas. 740.

For other cases see Decennial Digests, Wills $\S$ 826(1), (5).

SECTION 4.—DEMURRERS AND PLEAS—RESPECTIVE FUNCTIONS

Q. 39. To P's declaration against him on a promissory note in the usual form D demurred. On argument of the demurrer he urged that the note was given in payment of a gambling debt, and was therefore void. The court sustained the demurrer on this ground. Was this a proper ruling?

A. No; it is the function of a demurrer to challenge the effect of facts alleged by an opponent. It neither denies those facts, nor adds other facts to them. For the purpose of testing their legal effect, it admits them to be true. If D desired to put upon the record the fact that the note was given for a gambling debt, he should have done so by a plea. He cannot assert such a fact in a demurrer, nor can he urge it orally in support of a demurrer.

Tyler v. Hand, 7 How. 573, 581, 12 L. Ed. 824.

Von Glahn v. DeRossett, 76 N. C. 292, 294, 14 Ann. Cas. 348.

For other cases see *Decennial Digests, Equity* ⚭225; *Pleading* ⚭193(5).

Q. 40. P's declaration in a state court of Illinois contains two counts. The first seeks to establish a stockholder's liability to a creditor of the corporation under the laws of Illinois, and the second a similar liability under the laws of Ohio. Without purporting to quote any part of the text of the statutes, the first alleges that under conditions which are alleged to exist the Illinois statutes impose a stated liability and the second alleges that under conditions which are alleged to exist the Ohio statutes impose a stated liability. D wishes to challenge the statements in the declaration as to the effect of the respective statutes. How shall he do it?

A. He should demur to the first count, and plead by way of traverse to the second. Courts take judicial notice of the public laws of their own jurisdiction, but not of other jurisdictions. These must be pleaded as facts. As in the case of other written documents, foreign statutes need not be pleaded in *hæc verba*, but may be pleaded according to their legal effect. If the exact words of the statute are pleaded, their construction is a matter of law for the court, and any construction inserted in the pleading is ignored. If, however, the statute is pleaded according to its legal effect, this effect is admitted by a demurrer, for pleading purposes. Domestic public laws, being judicially known, need not be pleaded. Allegations construing them are treated as surplusage, are ignored by the court, and are not admitted by a demurrer. A demurrer admits only what is well pleaded. The allegations as to the effect of the Illinois statutes may therefore be challenged by a demurrer, but those as to the effect of the Ohio statutes must be met by a plea, so as to require plaintiff to prove them.

People ex rel. Drake v. Mahaney, 13 Mich. 481, 491.

Pendar v. H. & B. American Mach. Co., 87 A. 1, 35 R. I. 321, 326, L. R. A. 1916A, 428.

For other cases see *Decennial Digests, Evidence* ⚭33; *Pleading* ⚭214(6).

Q. 41. To P's declaration in trespass, alleging, among other things, that P was possessed of certain lands, D demurred. The court over-

ruled the demurrer, directing P to plead, which he did by way of traverse. On trial D started to prove that P was not possessed of the lands mentioned in the declaration. P objected to this proof, contending D had admitted the fact of possession by his demurrer. Was P's objection valid?

A. No. A demurrer admits facts pleaded for the sole purpose of testing their sufficiency in law to establish a cause of action or as an answer to a preceding pleading. It has no evidentiary value on a trial of issues of fact in the same or another suit.

Havens v. Hartford & N. H. R. Co., 28 Conn. 69, 88-92.

For other cases see *Decennial Digests, Pleading* Ⓒ214(8).

Q. 42. To P's declaration in case to recover damages for negligence, D served one document containing: (a) A denial of the negligence alleged; (b) a demurrer to the declaration; and (c) a plea to the jurisdiction, setting out facts which showed that summons had not been properly served on D. What should P do?

A. Move to strike out the plea to the jurisdiction and the demurrer. By pleading to the merits, defendant has waived both of them. If a defendant desires to take advantage of some dilatory matter, he must plead it alone, and in advance of other defensive moves touching the merits. If the writ is to abate, there is no need of inquiring into the action farther. Demurring to the declaration, or pleading to it, waives all defects in the writ and the manner of its service. Likewise, if a declaration is demurrable, it ought not to be pleaded to. The demurrer should be first disposed of. Hence the rule that a plea to the merits, interposed before a demurrer is disposed of, waives the demurrer. This rule is applicable, whether the demurrer and plea are interposed at the same time, or whether the plea follows the demurrer.

Sheppard v. Graves, 14 How. 505, 509, 14 L. Ed. 518.

Martin v. Bank of Tennessee, 2 Cold. (Tenn.) 332.

For other cases see *Decennial Digests, Abatement and Revival* Ⓒ84, 85; *Pleading* Ⓒ110, 188.

Q. 43. To P's declaration in assumpsit, D pleaded in abatement; alleging: "The promise mentioned in P's declaration was made by D jointly with divers other persons, and not by P alone." Is this plea demurrable?

A. Yes. Pleas in abatement should generally give a better writ; that is, set out the facts which will enable plaintiff to cure the defects complained of in bringing the suit. It is only when the nature of the defect is apparent from inspection of the writ or declaration

or where knowledge concerning it rests peculiarly with plaintiff, that the giving of such information in the plea is excused. In this case the plea should have given the names and addresses of the parties defendant claims made the promise jointly with him.

Witmer v. Schlatter, 15 Serg. & R. (Pa.) 150.

Boston Type & Stereotype Foundry v. Spooner, 5 Vt. 93.

For other cases see *Decennial Digests*, Pleading $\S$ 106(1), 111.

Q. 44. To P's declaration, D pleaded as follows: "Without admitting the allegations in plaintiff's declaration, defendant says that the said supposed acts of the defendant therein charged, if committed, were not committed within five years next preceding the bringing of this suit," etc. Assuming that the statute of limitations barring plaintiff's action was five years, do you see any fault in this plea?

A. Yes; except in the case of pleas of the general issue, common-law courts require that each plea of the defendant tender but one issue, and that it take the form either of a traverse (denial) or a confession and avoidance. A combination of denials and avoidances in one plea is not permitted. If defendant denies, he must do so positively. If he confesses, it must not be hypothetically. In pleas by way of confession and avoidance, defendant must give color to plaintiff's allegations; that is, admit they are true as far as they go, and then supply the additional facts which bring into operation principles favorable to defendant. As what is not denied is admitted the admissions in such pleas are usually implied from a failure to deny them. But the words, "without admitting," "supposed acts," and "if committed," do not admit, expressly or impliedly and so fail to give color. The statute of limitations is available as a defense only in a plea by way of confession and avoidance, and not, as attempted here, in a combination of evasive traverses and avoidances.

Conger v. Johnston, 2 Denio (N. Y.) 96.

For other cases see *Decennial Digests*, Pleading $\S$ 133.

Q. 45. To P's declaration in assumpsit on a promissory note, D pleaded specially that he had paid said note. D demurred to this plea on the ground that it amounted to the general issue. Should the demurrer have been sustained?

A. No; it is sometimes said that matters which can be proved under the general issue cannot be made the subject of a special plea. It is more accurate to say that a defendant is precluded from traversing specially matters which he can traverse generally. The general issue is in form, and was originally in fact, a traverse. By deny-

ing more than one fact in plaintiff's declaration, it violated the rules calculated to produce singleness and separateness of issues, but was sanctioned, as it lessened the number of pleas. The sanction grew into a mandate. In some of the actions the practice developed of permitting matters in avoidance to be proved under the general issue. While it might have been logical to have extended the mandate to this field also, the step was not taken, due possibly to a reaction against concealing the nature of defenses under the general issues. Payment may be proved under the general issues in *assumpsit* and debt, but, being matter in avoidance, may also be specially pleaded.

Thayer v. Brewer, 32 Mass. (15 Pick.) 217, 219.

For other cases see *Decennial Digests*, Pleading $\S$ 136.

Q. 46. P's declaration in trespass alleged that D wrongfully, and with force and arms, broke and entered the close of P. D's only plea was the general issue, not guilty. On trial, D offered to prove that he was the line superintendent of the X Telephone Company; that the company had purchased of P the right to erect poles on the land in question, and to stretch wires on the poles; and that he entered by direction of the company for said purpose. Was this competent evidence under the pleadings?

A. No. The general issue varies in scope in the different actions. In trespass, it puts in issue only the possession of plaintiff and the entry by defendant. No defense by way of confession and avoidance is provable under it. To be availed of, such defenses must be specially pleaded.

Louisville & N. R. Co. v. Bartee, 86 So. 394, 204 Ala. 539, 541, 12 A. L. R. 251.

For other cases see *Decennial Digests*, Trespass $\S$ 43(2).

Q. 47. P's declaration omitted an allegation essential to the statement of a cause of action, and was defective in form. D's plea there-to alleged as a fact the allegation omitted from the declaration, and attempted to set forth a defense in avoidance, but was defective in both form and substance. To it P demurred specially, pointing out the defect of form. To whom should judgment be given on the demurrer?

A. To P. A demurrer is special when to the general objection of insufficiency in law is added a clause specifying some particular defects of form. Every special demurrer is therefore both general and special. The special part of a demurrer reaches only the particular defect mentioned in the pleading to which it is directed, but the general part searches back through all preceding pleadings and attacks

the defect of substance first appearing, though it be in the pleading of the party demurring. The special part of P's demurrer, therefore, would go back no farther than D's plea, but the general part may reach defects of substance in P's declaration. It would not reach the defects of form there. The judgment would therefore be for D, but for the fact that the omission in P's declaration is supplied by an allegation in the plea. Errors of omission may thus be inadvertently corrected by an opponent.

McCue v. Washington, 3 Cranch, C. C. 639, Fed. Cas. No. 8735.

Ordinary v. Bracey, 1 Brev. (S. C.) 191, 196.

Probate Court for District of Georgia v. Vanduzer, 13 Vt. 135.

For other cases see *Decennial Digests*, Pleading §217(1, 3).

SECTION 5.—DEPARTURE

Q. 48. To P's declaration in assumpsit, D pleaded the statute of limitations. P's replication alleged that D had made a new promise in writing within the statutory period, thus removing the bar. D's rejoinder alleged that D's original promise was obtained by fraud. P demurred to this rejoinder. What effect, if any, is apparent in it?

A. There is a departure, i. e., an abandonment of a position taken earlier in the pleadings, and a shift to a new one. This is not permitted. To arrive at an issue, it is essential that each pleading be responsive to the one immediately preceding. An allegation of fraud in obtaining the new promise would have been responsive, but reverting to the manner of obtaining the first promise is a shift of positions.

Pollard v. Taylor, 5 Ky. (2 Bibb) 234.

For other cases see *Decennial Digests*, Pleading §180(2).

BAL.PROB.LAW—49

PLEADING—EQUITY

By O. L. McCASKILL, Professor, University of Illinois College of Law

Section

1. Necessary Allegations of Bill.
2. Joinder of Remedies.
3. The Functions of an Equity Bill.
4. The Theory of the Pleading.
5. Defensive Pleading.
6. Splitting Causes of Action.

SECTION 1.—NECESSARY ALLEGATIONS OF BILL

Q. 1. In a divorce action by a wife, her bill alleged marriage, birth of a child, its age, and peaceful cohabitation for three years. It alleged the style of living of the wife before marriage, the wealth of the husband, and their style of living after marriage. It then alleged that the husband began drinking, keeping fast company, and remaining away from home nights; that after this continued for six months he became insulting and abusive to his wife, came home intoxicated, and broke the dishes and furniture while in drunken condition, and finally began to beat plaintiff, describing several instances. It charged he took other women to dances and dinners, spending his income on them, buying them clothes and jewels, and charged two specific acts of adultery. It charged he had finally deserted plaintiff, leaving her without funds, and that she had been compelled to appeal to friends and relatives for support. It prayed for a divorce, custody of the child, alimony, and counsel fees. Defendant moved to strike from the bill all allegations as to style of living, wealth of husband, drinking, company kept, money spent by defendant, appeals for help by wife, and all conduct of defendant, except the specific charges of cruelty, adultery, and desertion, on the ground such allegations were irrelevant, surplusage, and, in any event, amounted to pleading evidence rather than facts. Discuss the merits of the motion.

A. The motion should be denied. In equity it is frequently proper to set forth the facts upon which plaintiff relies with more detail than is common in the law courts. This is due partly to the difference in the nature of the controversies in the two courts, and partly to the different ways in which the courts function. At law the issues are usually few, simple, clearly defined, and certain. In equity they are more often numerous, complicated, contingent, and uncertain. When certain facts are established at law, a judgment,

formal in character and definite in scope, is entered as a matter of course. There is little discretion vested in the court. In equity, the nature of the controversies requires the vesting of a large measure of discretion in the courts in applying general principles. General principles may be invoked by allegations of general facts, as at law, but it is frequently desirable and proper, in order to show that the case is one calling for the exercise of a favorable discretion and full measure of relief, to set out those subsidiary facts which give color to the more general facts. This is a pleading of material and issuable facts, as distinguished from pleading evidence. Though these subsidiary facts complicate the issues of fact, and make more difficult a proper application of legal principles, yet as both issues of fact and law are tried by the same person, one trained in the law and having ample time to hear, and to deliberate after hearing, the complication is not as serious an obstacle as at law, where an untrained jury tries the issues of fact. The granting of a divorce calls for the exercise of careful judgment, even where cruelty, adultery, and desertion are established. The interests of children and society are involved, as well as those of the husband and wife. The characters of both parties enter into determining the custody of children. The wealth, habits of living, and extravagances of both enter into determining whether alimony should be given, and, if any, how much. Defendant should not be heard to complain that plaintiff has given him advance information of these facts which she clearly has a right to prove.

Smith v. Smith, 27 S. E. 545, 50 S. C. 54, 65.

Knowles v. Gee, 8 Barb. (N. Y.) 300, 303.

For other cases see Decennial Digests, Husband and Wife ⚡296; Pleading ⚡11.

SECTION 2.—JOINDER OF REMEDIES

Q. 2. The bill of A, B, and C against X, Y, and Z discloses that at different times and for entirely distinct claims A, B, and C each obtained a several judgment against X, and that upon each judgment execution was returned unsatisfied; that while the claims were owing to A, B, and C, but before suits brought, X had at different times and under different circumstances conveyed property to Y and Z, the facts alleged as to each conveyance being sufficient to make it a conveyance in fraud of creditors. The bill did not show any concert of action between Y and Z, or that either knew of the conveyances to the other. Nothing was conveyed to them jointly or in common. Each of the defendants demurred to the bill on the ground it was multifarious, in that there was a

misjoinder of parties plaintiff and defendant, and a misjoinder of causes of action. What action should be taken on the demurrer?

A. It should be overruled. Multifariousness in a bill in equity consists in improperly joining in one bill distinct and independent matters, whether they pertain to claims of one plaintiff against one defendant, or distinct claims of different plaintiffs against different defendants. A bill is multifarious when it contains too much subject-matter, or too many parties, or both. There is no fixed and unbending rule as to what constitutes multifariousness—that is, too much subject-matter or too many parties—though certain principles are followed. Much is left to the sound discretion of the court under the peculiar circumstances of each case. The bill must relate to matters of the same nature, having some connection with each other, and in which the parties, plaintiffs and defendants, are all more or less concerned, though their rights in respect to the general subject of the case may be distinct. Due to the different conditions obtaining in equity, as pointed out in the answer to the preceding question, much more subject-matter can be handled in one suit than is possible at law, and the varying rights of the parties as between themselves can be untangled. There is nothing to be gained by uniting matters having nothing in common, and equity does not permit it. In the sense that subject-matter which may be the basis of separate suits may also be condensed into one suit, there may be a joinder of causes of action in equity; but after the union there is no such separation into counts as at law, and for all practical purposes this enlarged subject of the action is one equitable cause of action, in which the various parties properly joined have an interest. The possible scope of this united subject-matter is determined by the flexible principle of administrative convenience, which embodies convenience of the various parties and of the court. The elements considered are doing as complete justice as is reasonably practical; not unreasonably delaying a determination, by undertaking too much; saving the time of litigants, witnesses, and the court; saving costs. Other elements of kindred nature may enter into the decision. Unless there is some common point of law or fact, there is usually no convenience in combining diverse subject-matter.

Applying these principles, though A, B, and C have distinct claims against X, and neither is interested in any way in the claim of the other, still each has an interest, though a separate one, in X's property, subject to the payment of his debts, and in having that property sold and the proceeds brought into court. Though

X's dealings with Y have been entirely distinct from his dealings with Z, the result of both has been to scatter property in which others have an interest. Each defendant is interested, though separately, in defeating the claims of X's creditors. The solvency of X at the time of the respective conveyances, the validity of each judgment, intended fraud in either conveyance, are questions of interest to every party, particularly if one property is insufficient to pay both claims. These are matters which can be profitably tried in one suit.

Sheldon v. Keokuk Northern Line Packet Co. (C. C.) 8 F. 769, 770.

Brinkerhoff v. Brown, 6 John. Ch. (N. Y.) 139, 152-159.

For other cases see *Decennial Digests*, Action, §53(1); Equity §147, 148(1); Creditors' Suit §25.

Q. 3. P, a citizen of Wisconsin, filed her bill in the District Court of the United States for the Northern District of Illinois, against D, a citizen of Illinois, as administrator of the estate of X, deceased, and against Y, a citizen of Illinois, the sole surety on the bond of D, to obtain her share of the estate of her brother, X. The bill alleged that X had died intestate, leaving a large amount of personal property, and that plaintiff, his sister, and B, a brother residing in Illinois, were the sole distributees of his estate; that D, who had been appointed administrator, had grossly mismanaged the estate in his own interest, had made false accounts to the probate court, and by fraudulent misrepresentations had obtained from plaintiff a receipt in full for her distributive share upon payment of a less sum than she was entitled to receive. The bill prayed relief against the fraudulent proceedings, that D make a true final account, and that plaintiff be paid such additional sums as were found due her upon the accounting. D demurred to this bill on two grounds: (a) That B, a necessary party, had not been joined; and (b) that Y, an improper party, had been joined. Decide both grounds of demurrer.

A. Neither ground of demurrer is well taken. Parties in equity fall into three classes: (1) Formal parties, who have an interest in the subject-matter, which may be conveniently settled in the suit brought, but which may also be dealt with as conveniently in a separate suit; (2) necessary parties, who have a more direct interest in the subject-matter than formal parties, and whose joinder would normally be dictated by the balance of convenience, but whose interests are nevertheless severable, and possible of protection in a separate suit, if, for any reason, it is impractical to join them in the suit brought; (3) indispensable parties, whose inter-

est in the subject-matter is of such an intimate and indivisible character that a final decree cannot be made without affecting it, if the decree does equity as between the parties before the court. This classification is but another way of expressing the same rule of administrative convenience which is invoked when complaint is made that a bill is multifarious, and shows the same principle operating to fix both the widest and most limited extent of the equity suit.

Where the jurisdiction of a federal court is made to depend upon a diversity of citizenship of the parties, as in the principal case, it is defeated when one plaintiff and one defendant reside in the same state, though other plaintiffs and defendants have a diversity of citizenship. B, the brother of P, though he would be joined nominally as a defendant, would in fact be a plaintiff within the above rule. Joining him would therefore deprive the federal court of jurisdiction of the suit, and force P to bring her suit in the state court of Illinois. Though B's interest in the subject-matter is sufficiently close to make it desirable to have him brought in, the jurisdictional feature introduces a stronger reason for leaving him out. His interest is severable, and may be protected in this suit for litigation in another. Y's interest is more remote than that of B, and he might have been left out, at P's option; but his interest is of such a character that it may well be determined in this suit. It is to the interest of the surety to see that his principal's liability is fixed on a proper basis, and bringing him in extends him a privilege of participating in that inquiry. Y's relation to the suit would be closer, had there been an allegation that D was insolvent; but it has been held close enough, without that allegation, to bring him within the class of proper parties.

Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260.

Waterman v. Canal-Louisiana Bank Co., 30 S. Ct. 10, 215 U. S. 33, 54 L. Ed. 80.

For other cases see *Decennial Digests*, Equity ⚡96; *Executors and Administrators* ⚡438(1, 11).

SECTION 3.—FUNCTIONS OF AN EQUITY BILL

Q. 4. P's bill against the Rex Sales Company, to enjoin the infringement of P's patent and to recover damages, set forth sufficient facts to entitle P to the injunction and some damages, if they were true. In addition to these facts, P with much detail alleged the existence of certain books kept by defendant, and charged that they contained certain data which would tend to establish the truth of the main allegations of the bill; also alleged defendant

had written certain letters, and set out their contents, which, if the letters were genuine, would tend to establish the truth of certain allegations of the bill. The entire bill was under oath. D has moved to strike out the additional allegations above enumerated, on the ground they are superfluous and serve no purpose. Decide the motion.

A. It should be denied. As a pleading the bill was sufficient without these allegations; but a bill in equity, unlike a declaration at law, frequently serves the purpose of obtaining a discovery of material facts from the defendant, as well as alleging sufficient facts to show plaintiff entitled to relief. Unless it is waived, defendant must answer the bill under oath, and make specific answer to all charges and interrogations pertinent to the establishment of the right to relief, its kind, and extent. Thus the plaintiff, by his bill, seeks to obtain evidence to support his bill, and any detailed allegations necessary to show the evidence sought are proper to set out in the bill. The formal bills of a number of years ago were divided into several parts. The stating part, much like the declaration at law, set forth the facts entitling plaintiff to relief. Then followed the interrogating part, which contained the detailed facts essential as basis for the interrogatories put to defendant, and the interrogatories themselves. In more recent times a less formal type of bill permits a blending of these features of the bill in a single narrative, and as defendant is required to answer each charge of the bill, in detail and without evasion, formal interrogatories are frequently omitted, as not necessary. The allegations in question were proper for a discovery.

Mechanics' Bank v. Levy, 3 Paige (N. Y.) 606.

Methodist Episcopal Church v. Jacques, 1 John. Ch. (N. Y.) 65.

For other cases see Decennial Digests, Equity  137, 140, 179, 184, 185.

Q. 5. P's bill against D alleged the mortgage of lands by P to D, and that on a named date D, as mortgagee, had taken possession for a default in the payment of interest on the mortgage debt; that he had been living on a part of the land himself, and rented other portions; that he had failed to account to P. The bill prayed that D be required to account for sums received from the land, and, if a balance was still found due him on the mortgage, that upon the payment of such balance, which P holds himself in readiness to pay, D be required to surrender the mortgaged premises to P. D's answer alleged that, after D had entered as mortgagee, P, in consideration of the assignment of certain described mining and oil stock to him by D, released to D his equity of redemption

in said land. P is prepared to prove that the stock mentioned was worthless, and that D made fraudulent representations as to the character of the stock, dividends received on it, and its value; that P had tendered it back, but D had refused to receive it. How shall he plead to be entitled to make this proof?

A. He should amend his bill, inserting what is known as a charging paragraph, in which he will allege that D will rely on the defense of release of the equity of redemption in consideration of a transfer of stock to P, but that said defense is invalid because of fraud in the obtaining of said release, alleging the facts constituting the fraud. Under the early practice in chancery, P would have met this defense by a special replication, just as at law; but, under the later practice, special replications in equity fell into disuse. The general replication serves merely to deny the allegations in the answer. As pleadings in equity terminate with the replication, the way of meeting by avoidance affirmative defenses in the answer is to anticipate such defenses in the bill, and meet them there by appropriate allegations. The charging part of the bill serves this function.

Freichnecht v. Meyer, 39 N. J. Eq. 551.

For other cases see *Decennial Digests*, Execution ¶301.

SECTION 4.—THE THEORY OF THE PLEADING

Q. 6. P's bill against D alleged that P had sold D a described parcel of land for the sum of \$5,000, \$2,500 of which was paid at the time of P's deed to D, and the balance was secured by a mortgage, payable in three years, executed by D and delivered to P; that P had inadvertently lost the mortgage; that the three years for payment had expired, but D had paid nothing further. The bill prayed that the mortgage be established, and foreclosed, and for general relief. D's answer denied the existence of a mortgage. On trial, P was unable to establish by satisfactory evidence that D had ever executed a mortgage, but nevertheless asked that the court enter a decree establishing and foreclosing his vendor's lien. D objected that this was contrary to the theory of P's bill, to which P replied that the theory of the pleading in equity was immaterial, so long as facts were alleged sufficient to support the relief asked, and that this bill disclosed a sale of land and an unpaid balance on the purchase price. Should the court enter the decree asked?

A. According to the weight of authority, no. In equity, as at law, plaintiff must recover according to the theory of the plead-

ings. The reason given is the same in both jurisdictions: That to permit plaintiff to patch together isolated allegations of his pleading, which were apparently inserted to support the theory of his bill, and use them to establish another and contrary theory, dropping the allegations which were apparently relied on, would be to take a defendant by unfair surprise, converting an instrument supposed to be informative into a misinformative trap. Facts have different legal results, depending upon their association with other facts. An unpaid balance on the purchase price of land is a fact which may give rise to a vendor's lien, on principles borrowed from the civil law. To know the available defenses to this theory requires careful study. Associated with the further fact of the execution of a mortgage, the vendor's lien disappears entirely, and in its stead appears the mortgage lien, calling for different defenses. It is not enough that plaintiff give defendant notice that he will prove a fact as a fact, standing alone. That information is colorless. It is the association of facts only which gives true information. Specific prayers for relief call attention to the association of facts calling for that relief. The general prayer calls attention to nothing. Relief under it is therefore usually confined to relief incidental to that specifically prayed, relief of the same general character, or relief which the association of facts in the bill shows the plaintiff to be clearly entitled to. A plaintiff should, or should not, therefore, be permitted to depart from the theory of his pleading, depending upon the probability of surprise in the particular case, and the practicability of avoiding its consequences by a continuance and further hearing.

Baker v. Updike, 39 N. E. 587, 155 Ill. 54.

For other cases see *Decennial Digests, Equity* ¶327.

Q. 7. Suppose that, in the preceding question, P desired to avail himself of two theories of recovery; must he, as at law, use separate counts to set out the facts supporting each theory?

A. No; though he does something of the same character. He frames his bill with a double aspect; that is, alleges those facts of which he is positive, and when he comes to the facts, as to which he is uncertain, alleges they were either one way *or* the other, and concludes with alternative prayers, one fitting each hypothesis. The cases made on the different hypotheses must not, however, be inconsistent, though they may be variant.

Hardin v. Boyd, 5 S. Ct. 771, 113 U. S. 756, 28 L. Ed. 1141.

For other cases see *Decennial Digests, Equity* ¶288.

SECTION 5.—DEFENSIVE PLEADINGS

Q. 8. P's bill alleged that he was residuary legatee under the will of X, deceased, and as such entitled to certain described property, showing how this would come about under the will. It then alleged that D had taken the will from X's effects before it could be probated, and was now fraudulently concealing it, to keep P out of said property; that D had come into possession of said property as heir and next of kin of X, and was now about to dispose of it. The allegations of the secreting of the will were set out in detail, and the bill prayed that D be required to answer specifically all the charges in the bill. D filed a plea to this bill, in which he first denied that P was a legatee under the will of X, and then denied that he had taken any such will from the effects of X. P demurred to the plea. Do any defects appear in it?

A. Yes; the proper office of a plea in equity is to reduce the cause to a single point, which is determinative of all others, thus avoiding the necessity of making the discovery sought by the bill, and avoiding the expense of entering upon a trial of the evidence at large. It may deny a single material allegation of the bill, set out one affirmative defense in avoidance, or set out the defense which has been anticipated in the bill, and deny the facts in the bill pleaded to overcome that defense. In no event, however, must the plea present more than one defense, it being the function of an answer to set up plural defenses. The plea here violates the announced principle. In many jurisdictions, including the United States courts, pleas have been abolished in recent years; all defenses being required to be set out in the answer. In such a jurisdiction, this plea might be treated as an answer, and the demurrer to it is an exception for insufficiency, in which event it would probably be held insufficient, and D would be required to give the discovery as to the secreting of the will, etc. The fact whether P was or was not a legatee could not be ascertained until the will was produced.

Farley v. Kitson, 7 S. Ct. 534, 120 U. S. 303, 30 L. Ed. 684.

Federal equity rule 29.

For other cases see *Decennial Digests*, Equity ¶157.

SECTION 6.—SPLITTING CAUSES OF ACTION

Q. 9. P's bill in a federal court for New York alleged that D owned lots A and B, adjacent to each other, in a New York city; that he sold lot B to P, and agreed to convey it to him by warranty deed upon the payment of the final installment of the pur-

chase price; that P made said final payment, but D neglected and refused to execute said deed; that thereafter D erected a house on lot A, and extended the foundations and eaves thereof on one side ten inches over the boundary on lot B, and thus appropriated to his own use a strip of lot B ten inches wide and forty feet long; that P, being then a resident of Ohio, filed a bill in this court against D in which he alleged the above facts, and prayed that title to lot B, and particularly of that part appropriated by D, be decreed in P, and that D be required to execute to P a warranty deed to all of lot B; that a decree was entered in said suit, holding that P was entitled to all of lot B, and decreeing that D execute said deed; that D did execute said deed in pursuance of said decree, but has continued to occupy said strip covered by his house foundations and eaves, and has refused to remove them; that P cannot remove them without doing permanent injury to D's house. The bill prays that D be required to remove them. D demurred to this bill on the grounds: (1) That it appears on its face that P is now a resident of New York, and the necessary diversity of citizenship for jurisdiction does not exist; (2) that the relief sought could have been had in the former suit, and that a single cause of action cannot be split into multiple suits. Decide each ground of demurrer.

A. Neither ground of demurrer is well taken. This is an ancillary bill, to carry into effect a former decree deficient in some respect. It is a continuation of the former suit, and really a part of it. The provisions as to diversity of citizenship as a basis of jurisdiction have no application to ancillary proceedings, but apply only to original suits. Neither equity nor law will permit single demands to be split up and made the basis of vexatious litigation. On the other hand, equity courts will not refuse to do equity between parties because relief obtainable in a former suit was for some reason (not vexatious) not applied for or given. Bills to make former judgments and decrees more effective are a recognized head of equity jurisdiction.

Root v. Woolworth, 14 S. Ct. 136, 150 U. S. 401, 37 L. Ed. 1123.
For other cases see Decennial Digests, Equity §441.

PLEADING—CODE

By O. L. McCASKILL, Professor, University of Illinois College of Law

Section

1. The One Form of Civil Action.
 - (a) Abolishing Distinctions and Adhering to Theories.
 - (b) Joining and Splitting Causes of Action.
 - (c) Necessary Allegations—Form and Substance.
2. Defensive Pleadings.
3. Counterclaim.
4. The Real Party in Interest.

SECTION 1.—THE ONE FORM OF CIVIL ACTION

(a) *Abolishing Distinctions and Adhering to Theories*

Q. 1. P's complaint alleges that, in consideration of an initial payment of \$500 made by P to D and P's promise to pay the additional sum of \$3,500 in seven equal monthly installments, D agreed to convey to P a described parcel of land; that P paid the various installments as they became due, and upon the payment of the last installment requested a conveyance, but that D then refused and still refuses to convey; that after the making of said contract oil was discovered on said land, and, solely to avoid the obligation of his contract with P, D made a pretended conveyance of the land to X, but that said conveyance was without consideration and under a secret agreement with X that he would reconvey to D whenever requested. The complaint prays that the pretended conveyance to X be declared void, and that D be decreed to convey the land to P. X was not made a party to the suit. D has demurred to the complaint, on the ground it states insufficient facts to constitute a cause of action. Decide the demurrer.

A. The ruling depends upon the jurisdiction. The facts alleged show no right to the relief prayed. A conveyance to X is shown, and this conveyance cannot be avoided as fraudulent in a suit to which X is not a party. The court will not order D to convey a title standing in the name of another. The facts alleged show, however, that P has sustained damage by D's breach of contract. Although there is some conflict, the better reasoned Code decisions hold that at the demurrer stage of an action the nature of the cause of action disclosed by the complaint is of no importance. If any cause of action, legal or equitable, is disclosed on the facts alleged, the prayer for relief may be disregarded. By substituting one all-embracing form of civil action for the various forms of ac-

tion at law and the equity bill, the Codes have eliminated the formal distinctions between actions and suits as a ground of demurrer. In some jurisdictions, however, there is a section in the Codes providing that, where there is no answer, the judgment shall not be more favorable than that demanded in the complaint. As a demurrer is not an answer, this section has been construed to have the effect of limiting the cause of action in the complaint being tested by a demurrer to one to which the prayer for relief is appropriate. The result is to maintain many of the old formal distinctions between actions through the demurrer stage of a Code action, limiting the effect of the fundamental section abolishing distinctions to the later stages of the suit. In jurisdictions having this section, thus construed, the demurrer would be sustained. In others, it should be overruled. The point made in a few decisions, that to permit a switch from an equitable to a legal theory would deprive D of constitutional rights to a jury trial, is without merit. Rulings upon demurrers do not determine modes of trial, but whether defendant shall answer the complaint. After answer, there is ample opportunity to preserve rights to jury trial.

White v. Lyons, 42 Cal. 279.

Kelly v. Downing, 42 N. Y. 71, 77.

Rush v. Brown, 14 S. W. 735, 101 Mo. 586.

For other cases see Decennial Digests, Judgment ⚡107; Pleading ⚡49; Specific Performance ⚡114(6).

Q. 2. P's complaint against D is the same as in Question 1, except that nothing is alleged about D having parted with the land or oil having been discovered on it. D's answer alleges there were certain conditions in the contract to be performed by P, not set out in P's complaint, and that they had not been performed. On trial before the court without a jury, there was a conflict in the testimony as to when certain alterations appearing on the contract were made, and who made them, and D testified he had conveyed the land in question to X before the suit was brought. The court rendered judgment for P against D for \$4,200, being the amount of the purchase price, with interest, giving an opinion that P's version of the contract was the correct one; that D had conveyed to X before suit, making a judgment for specific performance impossible; but that, in the absence of other proof of damage, plaintiff was entitled to recover back his purchase money, with interest. Was there error in the award of a money judgment by the court?

A. Yes; many courts refuse to permit a plaintiff to make any change in the theory of his action at the trial, though there be allegations in the complaint which have been proved which establish a

cause of action. Defendant is held to have a right to prepare his defense on the theory adopted, and a switch to any other theory is held prejudicial as working a surprise on him. In many cases, the assumption of prejudice is unduly generous to defendant; in others, it is well founded. To the extent that theories of recovery are bound up with formal distinctions between law actions and equity suits, and between the common-law forms of action, holdings that defendant has a right to limit his preparation in defense to meeting the theory adopted by plaintiff seem out of harmony with the fundamental Code section, which seeks to abolish all distinctions of a formal character. The Codes place the emphasis upon the facts alleged, rather than upon the theories arising from the facts. So far as is reasonably practicable defendant should be prepared to meet all such facts and groupings of facts in the complaint, though short of the entire narrative, as indicate that plaintiff is entitled to some kind of relief. But, if the nature of the theory adopted prevents defendant from asserting rights he would have under another theory, then a change in theory on the trial may truly prejudice him. Such was the situation here. Constitutions have preserved the right to jury trial in the type of actions formerly known as legal. In an equity suit, though it involve some issues which are identical with those in a law action, there is no such right. The nature of the action fixes the mode of trial of all the issues arising in it. The prayer of P's complaint for equitable relief, supported by allegations appropriate to that relief, gave a character to the suit which would prevent defendant from effectively demanding a jury trial. His right to this mode of trial arose for the first time when the claim for equitable relief was abandoned. But he was not advised of this abandonment until after the court had itself decided all of the issues, and was therefore prejudiced. The Constitution and Code are harmonized by permitting a change in the theory of the action started, instead of requiring a new suit, but by adjusting the procedure to conform to the new theory, though this involve a retracing of steps, and a repetition of testimony already taken.

Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528.

Whittier, *The Theory of Pleading*, 8 Col. Law Rev. 523.

See question 6, *Pleading—Equity*.

For other cases see *Decennial Digests*, Equity ⚡378, 427(1); Jury ⚡13 (14).

Q. 3. P's complaint against D alleged that P and D owned adjoining city lots; that D had erected a building on his lot one wall of which extended over the boundary eight inches for a distance of

forty feet upon P's lot; that this wall supported the roof and other portions of the building on D's land, and could not be removed without bracing throughout the building. The complaint prayed for possession of the appropriated strip and damages. D's answer denied that any part of the building was on P's land. Trial was started before a jury, but, upon some of them becoming ill, P asked that the jury be dismissed, and that the court hear the case as one for a mandatory injunction to compel D to remove the obstruction. Over D's objection, the court adopted this procedure, and, at the conclusion of all the evidence, rendered judgment that D remove the wall and pay P \$350 damages. Was error committed?

A. No; this case differs from the preceding one, in that here the switch is from a legal to an equitable theory. The case as determined was an equitable one. Defendant had no right to a jury trial of it. The result was the same as though plaintiff had dismissed his action and started over on the equitable theory. Title to land and damages may be determined by the court in an equity suit. As the issues of fact were clearly set forth in the complaint, unless defendant is to be permitted to rely on matters of form alone, he cannot reasonably claim surprise. No other kind of prejudice is discoverable.

Cole v. Jerman, 59 A. 425, 77 Conn. 374, 383.

Emery v. Pease, 20 N. Y. 62.

For other cases see Decennial Digests, Account Stated ⚡18(1); Action ⚡37; Dismissal and Nonsuit ⚡58(1); Pleading ⚡49.

Q. 4. P's complaint against D alleged that, in consideration of the purchase by P from D of an automobile, the latter warranted said car to be free from hidden mechanical defects, and to be in good running condition; that said car was not in good running condition; that it had a cracked water jacket, a broken crank shaft, and badly scored cylinders, and was practically worthless; that these defects were hidden, were known to D at the time of sale, and unknown to P, and that D falsely and fraudulently made said warranty with intent to deceive P, to his damage, etc. D's answer was the general denial. Upon trial P proved the breach of warranty, but failed to prove D knew of the defects. Should P, without an amendment of his complaint, be permitted to recover damages for the breach of warranty?

A. Whether this complaint is founded upon a theory of breach of contract of warranty or a deceit, treating the warranties as representations, is difficult to determine. If it be conceded that, because the tort allegations are appropriate to the relief asked, they

give character to the action, plaintiff should still be permitted to abandon that theory, and rely upon the theory of a breach of warranty, unless defendant is prejudiced thereby in some other way than by taking from him purely formal privileges. In many jurisdictions a provisional remedy of arrest is given in tort, but not in contract actions, and likewise a judgment in a tort action may be enforced by imprisonment; imprisonment for debt being abolished only in contract actions. If an arrest has been made in an action begun as a tort action, but permitted to be changed to a contract action, there may have been an abuse of the provisional remedy, and a liability for a false arrest may be thought not to be a sufficient deterrent of such abuses. The dismissal of the action follows as an additional penalty. Where, however, as in the present case, no arrest was made in fact, it is difficult to find support for a dismissal of the action in a possible abuse of the arrest process. A different situation, however exists as to the judgment. Unless the complaint is amended by striking out the deceit allegations, or unless the fact they were disregarded is made to appear otherwise on the record, as by a special verdict or a special finding, the judgment in the action will take on the character of the complaint, and plaintiff will obtain the benefit of a type of execution to which he is not entitled. This prejudice to defendant should prevent the change in theory, unless one of the modes for his protection above noted is taken.

Gartner v. Corwine, 48 N. E. 945, 57 Ohio St. 246.

Ross v. Mather, 51 N. Y. 108, 10 Am. Rep. 562.

For other cases see *Decennial Digests*, Action ⚡27(1); Pleading ⚡49; Sales ⚡437(3).

Q. 5. P and D both reside in state A. P owns land in state B, the value of which lies in the timber on it. P contends that D has cut and turned into lumber many of his valuable trees. He desires, if possible, to litigate the question of his damage in state A. May it be done?

A. Yes; but, if state A is a jurisdiction which places emphasis on the theory of the complaint, P will have to be careful in drafting his pleading. An action for damages for trespass to lands is generally considered a local action, to be brought only in the state where the lands are located. In the common-law action of trespass *quare clausum fregit*, a recovery could be had for all damages done in connection with the entry on the land, including a conversion of chattels, they being considered as incidents to the trespass. A recovery could be had in *trover* for the conversion of

trees which had been cut, but in this action plaintiff could not recover for the entry upon the land, nor the cutting of the trees. In a Code state, which treats a trespass to lands in another state as a local action, of which it has no jurisdiction, a complaint which alleges an entry by defendant on lands in another state, and a cutting and carrying away and converting of trees growing on the land, to plaintiff's damage, should be treated as a complaint to recover damages for the conversion of cut trees, the allegations of entry on the land and cutting being merely preliminary allegations explaining the conversion, since this is the only theory upon which a recovery can be had. Such a construction places emphasis on substantive rights, rather than upon the old distinctions between trespass and trover. Yet no less a court than the Supreme Court of the United States, in cases coming up from Code jurisdictions, has made plaintiff's right to recover in such cases turn upon whether the allegations in his complaint stress the entry upon the land or the conversion of the cut trees as the gravamen of the action. Thus have all the evils of the formal boundaries between common-law actions been carried into the Codes by a rigid requirement that plaintiff adhere to the theory of his complaint.

Ellenwood v. Marietta Chair Co., 15 S. Ct. 771, 158 U. S. 105, 39 L. Ed. 913.

Stone v. U. S., 17 S. Ct. 778, 167 U. S. 178, 48 L. Ed. 127.

Bruheim v. Stratton, 129 N. W. 1092, 145 Wis. 271.

For other cases see *Decennial Digests*, Courts ⚡7, 269; *Pleading* ⚡35, 249 (4); *United States* ⚡132.

Q. 6. P's complaint against D alleged that D was indebted to P, in the sum of \$500 for goods, wares, and merchandise sold and delivered by P to D, at D's request, and, in consideration thereof, D promised to pay P the said sum of \$500 upon request, but, though often requested, had failed to pay the same, or any part thereof, to P's damage in the sum of \$525. D's demurrer to this complaint, on the ground it did not state facts sufficient to constitute a cause of action, was overruled, and D answered with a general denial. On trial, over D's objection, P was permitted to prove that D had taken two cows, worth \$500, from P's barn without P's consent, and that these cows were owned and possessed by P. Did the court err in either or both of these decisions?

A. Both rulings would be sustained in practically every jurisdiction. The complaint is in the form of the common count in assumpsit for goods sold. The use of the common counts has been criticized in a few Code jurisdictions on the ground they do not plainly and concisely state the real nature of plaintiff's cause of

action, but are vague and uncertain, having little informative value. The defect, however, is considered as one of form rather than substance, not to be reached by a general demurrer. Under this count at common law, plaintiff could prove a conversion, on the theory that a converter, at plaintiff's option, could be treated as a purchaser at the reasonable value of the chattels converted. Plaintiff was said to waive the tort in such cases, suing in assumpsit on the implied promise to pay the purchase price. The notion of a fictitious purchase was indulged, to permit an extension of the action of assumpsit. The fiction has been continued under the Codes, with the like effect as at common law of preventing a variance between allegations of a sale and proof of a conversion.

Thomson v. Town of Elton, 85 N. W. 425, 109 Wis. 589, 596.

Galvin v. Mac Mining & Milling Co., 37 P. 366, 14 Mont. 508.

Wilson, Writs v. Rights, 18 Mich. Law Rev. 255, 271-277.

For other cases see Decennial Digests, Assumpsit, Action of $\S$ 8; Money Received $\S$ 17(1).

(b) Joining and Splitting Causes of Action

Q. 7. P's complaint against D alleges that at a stated time and place, in the presence of a number of persons, D forcibly and against the will of P seized and imprisoned P, and at the same time and place, in the presence and hearing of said persons, and while seizing and imprisoning P, D falsely and maliciously said of and concerning P that he, P, was a thief, that he had stolen D's diamond ring, and now had it concealed on his person; that by reason of said acts P was greatly humiliated and disgraced, and damaged in person and reputation. The complaint prayed \$5,000 damages. D has moved to compel P to state separately his causes of action. Should the motion be granted?

A. Under Codes requiring a separate statement of causes of action joined in a complaint, the motion should be granted. The facts alleged show a slander and a false imprisonment without legal process. At common law damages for a slander were recovered in an action of case, whereas damages for a false imprisonment without legal process were recovered in an action of trespass. Instead of one right, the violation of which was redressed by one writ, these were considered as two rights, to be redressed by separate writs. Even where the violation of what were considered as distinct rights could be redressed by a single writ it was thought desirable, for the purpose of presenting clear and distinct issues, and to prevent a confusion of legal principles, to require plaintiff in his declaration to group separately those facts which pertained

to the violation of each right. Each group of facts thus made, for pleading purposes, was called a distinct cause of action. Though the Codes sought to break down the distinctions between the common-law actions, they did not seek to disturb the concepts of single rights and single causes of action, developed in connection therewith, but, by requiring plaintiff to continue to state separately all causes of action joined, and by failing to give any new definition of a cause of action, indicated that it was desirable to continue the old concepts as to the character of a cause of action for pleading purposes. The facts relating to the slander should therefore be separated from the facts showing the false imprisonment, that defendant may present his defenses to them separately, and that the principles relating to each group of facts be not confused.

Stewart v. Balderston, 10 Kan. 131, 134.

Harris v. Avery, 5 Kan. 146.

McCaskill, *Actions and Causes of Action*, 34 Yale Law J. 614.

Cf. question 32, *Pleading—Common-Law*.

For other cases see *Decennial Digests*, *Action* §38(4), 48(2); *Pleading* §52(1), 368.

Q. 8. Assume that P has separately stated the causes of action set forth in the complaint in Question 6, and that D has by demurrer, or motion in the nature of a demurrer, raised the objection that these causes of action have been improperly joined in the same action; what ruling should be made?

A. The objection should be overruled, but the decisions are in conflict. A subdivision of the Code section on joinder of causes of action provides that causes of action may be joined which arise out of the same transaction, or transactions connected with the same subject of action. The terms "transaction" and "subject of action" have been so variously interpreted, even in the same jurisdiction, that it is difficult to say what they mean. The courts which deny a joinder of causes of action like that above seem to think that a transaction must be confined to those events which point to a liability under one set of legal principles, and that, if facts are alleged which call into operation different legal principles, pointing to different liabilities, they necessarily embody more than one transaction. Unlike "cause of action," the term "transaction" had no distinctly legal connotation when the Codes were written. As a lay term, having no technical meaning associated with litigation, it should not be bounded by legal principles pointing to a single liability. To give it such a meaning is to confuse it with the cause of action which arises out of it. It is rather the layman's picture of progressive closely related happenings, having a beginning and

end. No one but a lawyer would find two such units in the narration in the question. The old dividing lines between forms of action, which prevented joinder of causes of action enforced under different writs, have unconsciously prevented many lawyers from seeing the possibility of a transaction which bridges the old gaps; yet it was the purpose of the Code to bridge just such gaps, and reduce unnecessary litigation. If the causes of action, around which the legal principles are grouped, are separated, so as to prevent confusion, it is not impractical to join as many as arise out of one closely connected series of happenings, and even out of several such transactions, if there is something in them all making it convenient and desirable that the causes of action be dealt with together, such as common evidence or common questions of law. Several causes of action arising out of several transactions, which have this tie of administrative convenience, may well be said to have some relation to the same subject of action.

De Wolfe v. Abraham, 45 N. E. 455, 151 N. Y. 186.

Harris v. Avery, 5 Kan. 148.

McArthur v. Moffett, 128 N. W. 445, 143 Wis. 564, 33 L. R. A. (N. S.) 264.

Sherlock v. Manwaren, 203 N. Y. S. 709, 208 App. Div. 538, 540.

McCaskill, *Actions and Causes of Action*, 34 Yale Law J. 614, 643-648.

For other cases see *Decennial Digests*, Action ⚡38(4, 6), 45(3), 48(2), 50(4, 6); *Pleading* ⚡52(2).

Q. 9. P's complaint against D contains two counts. The first alleges that P sold and delivered to D two refrigerating machines at an agreed named price, to be paid within two months after delivery, and that D had not paid the agreed sum, though the time for payment had expired. The second count alleged a sale and delivery of the same two machines on the same terms; that D was dissatisfied with them, claiming them not to be according to representations made; that P thereupon agreed to take them back, and sent for them, but that D refused to permit P to take them, and continued to use them as his own, thereby converting them to his own use; that they were of the value stated in the contract of sale. D has moved to compel P to elect on which cause of action he will proceed, claiming a misjoinder of causes of action in contract and tort, and that the causes of action are inconsistent. How would you rule?

A. I would overrule both grounds of the motion. Tort and contract causes of action could not be joined at common law. The Code section on joinder of causes of action, while still suggesting many of the common-law groupings for purposes of joinder, as grouping contract actions in one class and tort actions in other

classes, contains the general clause permitting the joinder of causes of action, whatever their character, if they arise from one transaction, or from transactions connected with the same subject of action. Many of the Codes add a requirement that the causes of action joined must be consistent. P has but one right of recovery against D, founded upon but one true set of facts; but in Code jurisdictions, as at common law, where there is danger of a variance between pleading and proof, or of a court or jury taking a different view of the evidence from that taken by plaintiff, the plaintiff is permitted to set out each theory of recovery in a separate count, just as though the facts under each theory were distinct occurrences. The group of facts pertinent to each theory call into operation distinct principles of law, as much as though the facts alleged under each theory were all true and established distinct liabilities. For pleading purposes, therefore, the facts pertinent to each theory have been treated as distinct causes of action. P has therefore joined two causes of action, and cannot claim he has stated but one cause of action founded on different grounds. Courts so holding fail to distinguish between the division of tentative facts for purposes of pleading and the facts ultimately found true, which determine the nature of the relief given. Where it is apparent that one recovery is sought, founded upon alternative theories or causes of action, it follows that the causes of action arise from a single transaction. It is immaterial, therefore, that one sounds in tort and the other in contract. They are joinable under the general clause, unless inconsistent. Distinct liabilities, founded upon distinct facts, could never be inconsistent causes of action. Inconsistency must refer to tentative, or hypothetical, theories of liability, pleaded as though true. The provision cannot be escaped by saying that only the grounds of liability are inconsistent, but not the causes of action. But every group of facts, pleaded as true to support a distinct theory of liability, is inconsistent logically with other groups of facts, pleaded as true to support another theory. If they co-exist, they establish distinct liabilities. It is presumed, from the very purpose of pleading the facts differently, that only one set of facts can be true ultimately. Yet these logically inconsistent hypotheses may frequently coexist for the purposes stated. What the law permits to coexist cannot, therefore, for pleading purposes, be inconsistent, however inconsistent logically. There is much confusion, vacillation, and contradiction in the decisions as to what constitutes consistency. The concept most generally followed, though fallacious, is that, if one set of allegations disproves an-

other set, they are inconsistent; i. e., the logical consistency test. Under this latter test of consistency, the causes of action here joined would be inconsistent, for an allegation of title in plaintiff to the machines cannot coexist with an allegation of title in defendant. But if pleadings are to be treated as practical, rather than strictly logical instruments, the inquiry should be whether there is any policy preventing P from joining these theories. Where the facts are presumably all in his personal knowledge, and there is no need for pleading in multiple counts to protect him against the uncertainties of proof, he may well be required to elect to affirm or disaffirm the contract of sale at the outset. Here it cannot be known what aspect defendant's evidence will put on the case, an election should not be required, and the causes of action should be held to be consistent.

Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co., 29 A. 76, 63 Conn. 551, 25 L. R. A. 856.

McClure v. Wilson, 43 N. Y. S. 209, 13 App. Div. 274, 278.

Whitney v. Chicago & N. W. R. R. Co., 27 Wis. 327.

Note, 24 Abb. N. C. (N. Y.) 326.

McCaskill, Actions and Causes of Action, 34 Yale Law J. 614-643.

Compare question 7, Pleading—Equity, and question 32, Pleading—Common-Law.

For other cases see Decennial Digests, Action ⚡48(1); Pleading ⚡369(1).

Q. 10. P's complaint against D alleges that D, who owns land adjoining P's, has so constructed a building on his own land that 6 inches of its foundation, for a distance of 40 feet, rest upon P's land; that, in an action previously brought against D by P, the latter had a judgment for possession of the land; that execution thereon was placed in the hands of the sheriff, and that the sheriff returned the same as incapable of being executed by him without trespassing on D's land, and without going to great expense in bracing the building; that D had refused to give P possession since said judgment, and had refused to remove said foundation walls, or to permit P to do so. It prayed that D be decreed to remove the obstruction from P's land. To this complaint D demurred, contending that the complaint on its face shows that P is attempting to split a single cause of action, which cannot be done, and that the judgment in the first action is a bar to the present one for that reason. Is defendant's point well taken?

A. In two jurisdictions it has been held that D's objection is well taken, the decisions being based upon the supposed effect of the Codes in converting into a single cause of action what were two distinct causes of action under the old procedure. Both courts overlook the possibility of joining these remedies in one action in

equity before the Codes, but that the equity courts never insisted they must be joined, and hence never applied the rule against splitting a single cause of action to such a situation. The rule against splitting subject-matter capable of being administered in one suit was common to the law and equity courts, and was based upon the principle that defendant should not be *unduly* vexed with unnecessary suits. In determining what was undue vexation, there was frequently much latitude to plaintiffs where some good reason existed for separate suits. The doctrine was never invoked in favor of a recalcitrant defendant seeking to defeat the judgments of courts upon technical grounds. The whole history of ancillary remedies in equity is against the interpretation of these courts (see Question 9, Pleading—Equity). The ordinary creditor's bill to make effective a money judgment, which persists under the Codes as a supplementary remedy, is destructive of the principle sought to be applied. If a plaintiff, as in the old equity suit, commingles his claims for all kinds of relief, he thereby waives his right to a jury trial. If he desires to avail himself of that right, he must separate his claim for legal relief. To hold that, if he claims his right to a jury trial, he forfeits his right to equitable relief, makes the rule against splitting a cause of action an instrument for defeating jury trials, as well as an instrument for aiding stubborn defendants in making judgments ineffective. This inequitable result is avoided, and all the benefits of the Code preserved, by retaining the old concepts of the scope of a single cause of action, which may be enforced in a separate action, and by giving attention to the fact that the Code sections on joinder of causes of action are permissive, instead of compulsory.

Hahl v. Sugo, 62 N. E. 135, 169 N. Y. 109, 61 L. R. A. 226, 88 Am. St. Rep. 539.

Gilbert v. Boak Fish Co., 90 N. W. 767, 86 Minn. 365, 58 L. R. A. 735.

Sadler v. Great Western Ry., [1896] App. Cas. 450, 455.

Hirschberg v. Flusser, 101 A. 191, 87 N. J. Eq. 588.

Brunsdon v. Humphrey, L. R. 14 Q. B. D. 141, 145.

Sutherland v. City of Brooklyn, 51 N. E. 433, 156 N. Y. 605.

Reilly v. Sicilian Asphalt Paving Co., 62 N. E. 772, 170 N. Y. 40, 57 L. R. A. 176, 88 Am. St. Rep. 636.

For other cases see Decennial Digests, Injunction ⚡50; Judgment ⚡592, 597, 610; Taxation ⚡683.

Q. 11. The complaint of A, B, and C against the D Railway Company alleges that the plaintiffs respectively own and possess adjoining tracts of land similarly situated with reference to defendant's railroad; that defendant, on land purchased by it for a right of way, and over which drainage water from the plaintiffs' several

tracts of land flowed, erected a high embankment, upon which it built its tracks in such a manner that all of the natural drainage water from the plaintiffs' lands was collected in a pond or lake, and backed up upon each and every one of the several tracts owned by plaintiffs, destroying the usefulness of large portions of each tract, to the damage of each of the plaintiffs severally in the sum of \$5,000; that said embankment was permanent in character; that the erection of drains and outlets through it to permit the escape of drainage water was practicable. It prayed that defendant be enjoined from maintaining the embankment in its present form without drains and outlets, and that defendant be decreed to pay each of plaintiffs their several damages. Defendant has objected to this complaint on the ground of misjoinder of plaintiffs and of causes of action. What should be the ruling?

A. The decisions are in conflict, but probably the better view is that the joinder should be permitted, that all grounds for an injunction may be considered together, subject to an order of severance thereafter if it appears to the court that the damage issues will be so diverse as to make it undesirable to consider them together. All courts hold that, if the relief sought were equitable only, this would be a proper joinder; but many hold that the seeking of additional relief in the form of damages necessarily works a joinder of distinct causes of action, affecting distinct parties, and that a joinder cannot be had for that reason. Most courts agree that one of these parties could seek both reliefs in one suit, that the damages would be incidental to the injunctive relief, and that the plaintiff would have but one equitable cause of action in a suit so constituted. The feeling that all cannot join may be due to a desire not to curtail jury trials of questions of damages by a liberal interpretation of equitable powers; it may be due to a concept that, as a judgment for damages in a law action before the Codes could not have a split character, it cannot have such a character under the Codes, though a section seems to expressly authorize it; it may be due to giving the word "affect," in the clause requiring causes of action joined to affect all the parties, the limited meaning given it by common-law courts before the Codes, instead of the more flexible meaning given in courts of equity, or by confining the flexible meaning to equity cases; it may be due to an inability to perceive the flexible and comprehensive nature of a single equitable cause of action affecting different parties in different ways; or it may be to a combination of two or more of these elements.

The section on joinder of plaintiffs permits a joinder of all per-

sons having an interest in the subject of action and in obtaining the judgment demanded. We know that it was never essential in an equity action that all of the plaintiffs should have an interest in every part of the judgment. Different measures of the same kind of relief, or different kinds of relief, might be given, and given them severally. The subject of action of an equity suit was a flexible concept governed by principles of administrative convenience. It might be a tangible thing, such as land, or it might be a combination of all of the elements contributing to produce a litigation. There is reason to believe that the framers of the Code intended to introduce this flexible concept in all the sections dealing with joinder problems, joinder of parties, joinder of causes of action, and joinder of counterclaims, and that it should apply to all kinds of actions. If the facts alleged in the present complaint can be brought within the flexible limits of a single equitable cause of action, and many courts permit it, it is unnecessary to consider the effect of the section on joinder of causes of action. If they must be broken into different causes of action, still they may be joined, if the flexible meaning of "subject of action" and of the word "affect" are adopted. If the several claims for damages are to be regarded as distinct legal causes of action, an unfortunate interpretation, the almost universal tendency is to give the strict interpretation of the common-law courts to the word "affect," and this would necessitate distinct suits. As one of the declared policies behind the Codes is to obviate unnecessary litigation, and as the entire subject-matter here can be conveniently administered in one suit, with such references of distinct issues as may seem desirable, the joinder should be permitted.

Younkin v. Milwaukee Light, Heat & Traction Co., 87 N. W. 861, 112 Wis. 15.
Lynch v. Metropolitan El. R. Co., 29 N. E. 315, 129 N. Y. 274, 15 L. R. A. 287,
 26 Am. St. Rep. 523.

Barnes v. Midland R. Terminal Co., 112 N. E. 926, 218 N. Y. 91, 100.

McCaskill, *Actions and Causes of Action*, 34 Yale Law J. 614, 626.

Clark, *The Code Cause of Action*, 33 Yale Law J. 817.

Compare questions 1 and 2, Pleading—Equity.

For other cases see *Decennial Digests*, *Eminent Domain* ⚡289; *Jury* ⚡13(9); *Parties* ⚡88(1); *Reference* ⚡73.

(c) *Necessary Allegations—Form and Substance*

Q. 12. In an action of an equitable character, many of the facts essential to establish plaintiff's right to relief are known only to defendant, or are contained in documents under his control. Is there any form of pleading plaintiff may adopt to force defendant to disclose these facts in his answer?

A. He may allege the facts as he believes them to exist *upon information and belief*, and swear to the truthfulness of his allegations, thus forcing defendant to swear to his answer. He cannot, however, as under the equity system of pleading, allege evidential facts and obtain from defendant a full disclosure as to them (see Question 4, Pleading—Equity). In working out a system of pleading for the one form of civil action, the framers of the Codes borrowed some features from each of the former systems. The verified pleading, as a tool in producing truthful allegations, avoiding fictions on the one hand, and sham defenses on the other, was retained, but as an instrument for obtaining discovery it was abandoned. As in common-law pleadings, and in the stating part of the equity bill, plaintiff is confined to allegations of ultimate issuable facts, which defendant in turn meets with plain denials or other ultimate issuable facts in avoidance. Discovery under the Codes is obtained by other methods than through the pleadings.

State ex rel. v. Cooley, 60 N. W. 338, 58 Minn. 514.

Steinberg v. Saltzman, 110 N. W. 198, 130 Wis. 419.

Knowles v. Gee, 8 Barb. (N. Y.) 300.

For other cases see Decennial Digests, Mandamus ⇨ 104(2); Pleading ⇨ 11, 14.

Q. 13. P's complaint against D for breach of an implied contractual obligation shows on its face that the cause of action matured more than six years before the bringing of the suit. The statute of limitations against such actions is six years. D has demurred to P's complaint, on the ground it states no cause of action. What should be the ruling?

A. There is a conflict of authority. Code courts are agreed that the statute of limitations is a defense, to be affirmatively pleaded by defendant, when the complaint does not show its existence. When the complaint reveals its possibility, different answers have been given. Allegations anticipating defenses were treated as surplusage in common-law declarations; the proper practice being to meet a defense with a replication (see Question 38, Pleading—Common-Law). In equity, where there was no true replication, the proper practice was to anticipate and meet defenses in the bill (see Question 5, Pleading—Equity). Most Code courts, following the common-law practice, hold it improper to anticipate defenses in the complaint. Many of them will, however, sustain a demurrer to the complaint, unless it is shown that the defense is avoided, thus indirectly encouraging what they declare should not be done. Though a demurrer, as well as an affirmative answer, may indicate

the defense is not waived, plaintiff must be given some opportunity to rely on any special facts which avoid the effect of the defense. Under Codes which have cut off all pleadings after the answer, the choice is between setting them out in the complaint, so that an issue is formed in advance of trial, or of leaving the issue on this defense uncertain until the trial. That plaintiff may obtain the advantage of this uncertainty, by framing his complaint so as not to suggest the defense, is pretty generally settled. Certainty of issues is sacrificed in the interest of speedy trials. Whether he may tender a definite issue through an anticipation of the defense is less certain. If he shows the defense, without showing how it is met, he runs the risk of having a demurrer sustained to his complaint in some jurisdictions, but not in others.

Sands v. St. John, 36 Barb. (N. Y.) 628, 633, 640.

Clark v. Harwood, 8 How. Prac. (N. Y.) 470, 472.

For other cases see *Decennial Digests*, Pleading $\S$ 11, 177(4), 180(1).

SECTION 2.—DEFENSIVE PLEADINGS

Q. 14. To P's complaint, charging D with negligently causing injuries to his person, D has pleaded the general denial only. On trial he seeks to prove that after receiving the injury P executed a release of liability. Should the proof be received under the pleadings?

A. No; though this defense could have been shown under the general issue in the action of case at common law (see Question 45, Pleading—Common-Law) and though the general denial, like the general issue, presents more than one issue, unlike the general issue in some of the common-law actions, it is exactly what it purports to be, a traverse or denial only. The defense of release of liability, like all other affirmative defenses under the Codes, must be pleaded if it is to be availed of.

Coles v. Soulsby, 21 Cal. 47, 51.

For other cases see *Decennial Digests*, Release $\S$ 45.

Note.—The answers to questions 35, 36, 39, 40, 41, 44, and 47 under Pleading—Common-Law are likewise applicable to pleading under the Codes, and reference is made to them for a development of other pleading problems under the Codes.

SECTION 3.—COUNTERCLAIMS

Q. 15. P has served D with a complaint charging D with breach of the terms of a written contract pleaded, and claiming damages. As D's attorney, you are satisfied that the written contract does not represent the true agreement, because of a mutual mistake of the parties, and that D has not broken the true agreement. How should these facts be pleaded to permit evidence of them?

A. They should be pleaded as a counterclaim to P's complaint, though many courts have permitted the evidence under an affirmative defense. In this case the distinction between a defense and a counterclaim is not a mere formality. The counterclaim seeks affirmative relief, while a defense does not. To prevent future litigation over the terms of the contract, its terms should be reformed and settled in this action. As a defense to an action of a legal character, the rules of evidence and mode of trial applicable to such actions would obtain, and a jury would hear parol evidence to vary the terms of a writing, a practice which is destructive of certainty in contracts. Such evidence was permitted in equity as a chancellor trained in the law could be trusted to preserve the required certainty. Under the Codes, the blending of legal and equitable remedies should not work a destruction of rules of evidence designed to protect substantial rights. The benefits of the Code procedure are obtained, and all rights fully preserved, by requiring defendants who offer such evidence to seek the affirmative relief of a reformation through a cross-action, the mode of trial of which will be determined by its character if it were an original suit.

Born v. Schrenkeisen, 17 N. E. 339, 110 N. Y. 55, 60.

Lombard v. Cowham, 34 Wis. 486, 493.

Gill v. Pelkey, 43 N. E. 991, 54 Ohio St. 348, 357, 363.

Susquehanna Steamship Co. v. A. O. Andersen & Co., 146 N. E. 381, 239 N. Y. 285.

Hinton, *Equitable Defenses under Modern Codes*, 18 Mich. Law Rev. 717.

Cook, *Equitable Defenses*, 32 Yale Law J. 645.

11 Cornell Law Quart. 396.

For other cases see *Decennial Digests*, Action ⚡25(4); Ejectment ⚡28; Equity ⚡330(1); Jury ⚡13(18); Trial ⚡3.

SECTION 4.—THE REAL PARTY IN INTEREST

Q. 16. P's complaint alleges facts showing that D became indebted to X for merchandise, and that before the action was brought X had assigned this claim to P. D's answer alleges that the assignment by X to P was for collection purposes only, and that X, not P, is the real party in interest. Does the answer present a defense?

A. There is a conflict of authority, but the majority view is that it does not. The Codes generally require that suits shall be brought by the real party in interest. No statutory description of this person is given, however, and various tests for identifying him have been suggested by courts and text-writers. The most common is that he is the person beneficially interested in the subject-matter of the suit. This is not an infallible test, however, as beneficiaries of express trusts are seldom permitted to sue to protect the trust es-

tate, though they are the only persons beneficially interested therein. In recognizing the right of the trustee alone to sue in such cases, the courts give effect to the desires of the creators of trusts. These cases show that it is possible to put the right to sue in one person and the beneficial interest in the result of the suit in another. When the courts recognize a power in one to put the right to sue in another, they declare that the latter is the real party in interest. Any statement that the substantive law alone identifies this party is too sweeping, for it can hardly be doubted that convenience in judicial administration, which involves a balancing of ultimate rights, simplicity of procedure, and economy of remedies, has influenced the courts in determining who is the real party in interest. Under the principle just mentioned, most courts recognize the power of placing the right to sue in another by assignment, though this be for collection purposes only, considering it advisable to let the assignor and assignee settle their agreement between themselves.

Sheridan v. Mayor, etc., of City of New York, 68 N. Y. 30.

Stewart v. Price, 67 P. 553, 64 Kan. 191, annotated in 64 L. R. A. 581.

Clark & Hutchins, The Real Party in Interest, 34 Yale Law J. 259.

For other cases see *Decennial Digests, Assignments* ¶68, 121.

Q. 17. Where A, having an assignable claim against B, assigns half of it to P, who is the proper person to bring the suit?

A. Partial assignments were recognized in equity, but not at law. The Codes, following the principles of the common-law courts, usually permit A to sue alone, but practically never permit P to sue alone, if the defendant objects. P is, however, permitted to bring the suit if A is made a party plaintiff or defendant. Because of the policy protecting defendant from two suits on a single claim, P is not generally recognized as the real party in interest, though he is sometimes called such, where he joins A, or where defendant fails to object to the splitting of the single demand. As defendant, B is protected against two suits when A sues, and A is generally considered to be the real party in interest.

Cable v. St. Louis Marine Ry. & Dock Co., 21 Mo. 133.

Chambers v. Lancaster, 54 N. E. 707, 160 N. Y. 342, 348.

Clark & Hutchins, The Real Party in Interest, 34 Yale Law J. 259, 266.

3 Cornell Law Quart. 131.

For other cases see *Decennial Digests, Assignments* ¶119; *Parties* 6(1).

PUBLIC UTILITIES

By HENRY ROTTSCHAEFER, Professor of Law, University of Minnesota

Section

1. Nature of Public Callings.
2. The Duty to Serve.
3. Public Regulation of Duty to Serve.
4. Discrimination.
5. Rates.
6. Certificate of Convenience and Necessity.

SECTION 1.—NATURE OF PUBLIC CALLINGS

Q. 1. A Co., which has neither a legal monopoly, nor any special franchise, nor the power of eminent domain, owns and operates a radio broadcasting station. Its business consists in permitting persons to broadcast therefrom for hire. Its station is the only one within the state. B, a state politician, who wished to broadcast a political speech, applied to A Co. for the use of its station, offering to pay the price received by A Co. from other state politicians who had used the station, and to comply with all of A Co.'s regulations. A Co. refused. There is no statute of the state imposing on A Co. any duty to serve the public. B brings mandamus to compel A Co. to permit him to broadcast his speech. Decide the case.

A. B is entitled to relief only if A Co. owes him a duty to permit the use of the station for said purpose. The source of that duty must be the common law of the state, since there is no statute imposing it. The business of A Co. was unknown at the time the common law of public callings developed. To apply it to A Co. requires a judicial extension of the field of public callings. Do we find in this business those factors on which the imposition of the special liabilities and duties of public callings was based? The generally recognized factors are legal monopoly, the grant of special franchises, and the grant of the power of eminent domain. The existence of virtual monopoly, and the similarity of the business to those included in the field at the common law are occasionally used as bases for extension of the field. The usual factors do not exist in A Co.'s case; the less recognized factors do. Since the latter have received but a limited recognition as bases for extending the field, A Co. will probably be held not to be a public calling. Hence it can refuse to serve B.

Judgment for A Co.

Western Union Tel. Co. v. State, 78 N. E. 100, 165 Ind. 492, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880.

State ex rel. Star Pub. Co. v. Associated Press, 60 S. W. 91, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368.

For other cases see Decennial Digests, Monopolies  12(3), 24(1); Newspapers  7; Telegraphs and Telephones  44.

Q. 2. The statute of state A provides that whenever any business, by reason of its nature, extent or the existence of a virtual monopoly therein, is such that the public must use the same or its services, or such as to make its operation of public consequence, or to affect the community at large as to the supply, demand, price, or rate of its product or services, said business shall be a public business, subject to the control of the Public Service Commission as to all its practices and charges. The statute also imposes on every public business the duty to render its services or offer its product to the public on reasonable and nondiscriminatory terms. B Co. is a gas company, which is also incidentally engaged in manufacturing and selling ice in X city in said state. B Co. is the sole distributor of ice in said city. The Public Service Commission is about to make an order prescribing a schedule of prices for ice to be charged by B Co. to the residents of X city. B Co. sues to prohibit the commission from so doing. Decide the case.

A. B Co. is entitled to relief only if the statute subjecting its ice business to price regulation is invalid. The due process clause of the Fourteenth Amendment limits the state's power by legislation to extend the field of authoritative price control. That form of regulation is valid only if the business is one affected with a public interest, or in which the property used therein has been devoted to a public use. There is no single test for determining when either or both of these factors exist. Something more is required than that the public welfare is affected by the prices charged. A sufficient public interest exists if the service is practically an indispensable one, and if the public might be subject to exorbitant prices and arbitrary control but for regulation. The existence of a virtual monopoly is a sufficient basis on which to predicate the existence of the second of these elements. Ice is, under modern conditions and standards of city life, a necessity; and, since B Co. has a virtual monopoly there exist those factors on which the legislative right to subject the business to price control depends. B Co. is not entitled to the relief sought.

Oklahoma Light & Power Co. v. Corporation Com'n, 220 P. 54, 96 Okl. 19.

Chas. Wolff Packing Co. v. Court of Industrial Relations, 43 S. Ct. 630, 262 U. S. 522, 67 L. Ed. 1103, 27 A. L. R. 1280.

For other cases see Decennial Digests, Constitutional Law  296(1); Public Service Commissions  6.

Q. 3. A was the owner of a farm on which there was a well. He entered into contracts to supply water to various of his neighbors at rates specified in the contracts, which were to be in force for three years. He continued to supply said persons after the expiration of said time, but the contracts were not renewed. Shortly before the expiration of said contracts, A had applied to the state Public Service Commission for, and procured, an order permitting him to charge rates in excess of the contract rates from and after the termination of said contracts. After their termination, A became involved in a dispute with B, one of the persons he was serving, and cut off B's supply. The dispute did not relate to any matter involving the supplying of water by A to B. B obtained an order from the commission ordering A to restore the service. The statute under which the commission acted gave it authority to make such order. A sues to enjoin the enforcement of said order. Decide the case.

A. The commission's order gives effect to a duty imposed on A by the law under which the commission acts. The validity of the order thus depends on the validity of the state statute imposing said duty to serve on demand. The business of supplying water to the public is of the kind which can be made a public calling and hence the duty to serve all of the public on demand can be imposed upon it. To apply that duty to any particular person supplying water requires that he be within the class of those who have undertaken to supply the public generally. Due process prevents a state by legislation from putting a person in that class unless he has done something having that effect. There must be a holding out to serve the public generally. Any act can be given that effect which is inconsistent with any other conclusion than that the person has so held himself out. A's act in applying to, and procuring from, the Public Service Commission the rate order is such an act. Hence A has held himself out to supply the public with water, and the statute can validly apply to him. Hence the order based thereon is valid. A is not entitled to the relief prayed for.

Van Hoosear v. Railroad Commission, 194 P. 1003, 184 Cal. 553.

Michigan Public Utilities Com'n v. Duke, 45 S. Ct. 191, 266 U. S. 570, 69 L. Ed. 445, 36 A. L. R. 1105.

For other cases see Decennial Digests, Constitutional Law ¶297; Waters and Water Courses ¶217.

Q. 4. A Co. is a natural gas company serving X city. Its pipe line runs within a short distance of Y city, but it has never supplied the latter. A Co. is a public utility within the jurisdiction of the state Public Service Commission. Said commission has authority to

grant public utilities special franchises within any city. A Co. is ordered by said commission to furnish service to Y city. A Co. sues to enjoin the enforcement of said order. Decide the case.

A. A Co., being a public utility, can be compelled within reasonable limitations to serve all persons within the scope of its holding out. Its duty to serve is, however, limited by the scope of its public profession. A holding out to serve city X is not one to serve city Y. To impose on it the duty to serve those not within the scope of its profession is invalid, as a taking of property without due process of law. The order in question does this, and is invalid. A Co. is entitled to an injunction.

Oklahoma Natural Gas Co. v. Corporation Com'n, 211 P. 401, 88 Okl. 51, 31 A. L. R. 330.

State v. Southern Elkhorn Tel. Co., 183 N. W. 562, 106 Neb. 342.

For other cases see Decennial Digests, Corporations $\S$ 382½; Gas $\S$ 13 (3); Telegraphs and Telephones $\S$ 2, 26½.

SECTION 2.—THE DUTY TO SERVE

Q. 5. A, a public hackman, suffered injuries while being ejected by the servants of B Railroad from its station grounds, to which A had resorted to solicit business from incoming passengers. A was ordered to leave the premises before he was ejected and no more force than necessary was used in ejecting him. B Railroad had granted another hack company the exclusive privilege of soliciting incoming passengers within its station grounds. What are A's rights against B Railroad? What would be your answer if A had been ejected while engaged in meeting a passenger on B Railroad, who had requested him to do so to take charge of his baggage?

A. A railroad is required to furnish proper and adequate depot facilities. This is a duty owed by it to those of the public that use its railroad as a part of the service owed them. There is no duty in the premises to others. It can make no unreasonable discrimination in this matter between those to whom it owes said duty. The railroad's public duty is not to supply facilities where public hackmen can solicit the patronage of incoming passengers. Any duty that B Railroad may owe A must be directly or indirectly derived from those it owes the public under its duty as a common carrier. It owes the public no duty to furnish a place where hackmen may solicit it. There is conflict as to whether it owes the public a duty to give it the benefit of competition between hackmen, if it decides to furnish the public facilities for engaging hackmen at all. Hence, in the first case, A would have rights against B Railroad in some states, and not

in others. In the second case A has a right, as an incident to the passenger's right, to be on the premises to meet the passenger under the stated circumstances, and his ejection was a wrongful act for which B Railroad is liable.

Godbout v. St. Paul Union Depot Co., 81 N. W. 835, 79 Minn. 188, 47 L. R. A. 532.

Kansas City Terminal Co. v. James, 251 S. W. 53, 298 Mo. 497.

For other cases see *Decennial Digests, Carriers* ⇨ 14, 16.

Q. 6. A, a sleeping car passenger in a sleeping car operated by B railroad, was assaulted during the night by a man who was the only other passenger in the car. She rang the call bell and screamed, but it was ten minutes before the porter arrived. Said porter had been absent from the car, visiting the porter of another car. A sues B Railroad. Decide the case.

A. A railroad company is not an insurer of the safety of passengers. This applies where the injury is inflicted by the act of a fellow passenger. Its duty is to exercise reasonable care in protecting its passengers, and the basis of its liability is negligence. A high degree of care is required in the protection of sleeping car passengers during the night. This includes the duty to maintain a careful watch over them during that period. The porter's absence from the car for the reasons stated constituted a violation of that duty. Hence B Railroad is liable to A.

St. Louis, I. M. & S. R. Co. v. Hatch, 94 S. W. 671, 116 Tenn. 580.

Hall v. Seaboard Air Line R. Co., 93 So. 151, 84 Fla. 9.

For other cases see *Decennial Digests, Carriers* ⇨ 280(1), 283(1, 2), 284(1), 411.

Q. 7. The A Railroad accepted from B for transportation certain goods. The goods were destroyed in a wreck caused by a collision with an automobile truck, due wholly to the truck driver's negligence. A Railroad had posted regulations limiting the amount recoverable in such cases to a stated sum. The same provisions were contained in the bill of lading delivered to B at time he delivered the goods for shipment. B knew of the regulation, but did not know that the bill of lading contained said provisions. A Railroad publicly offered to carry all goods subject to its full common-law liability in consideration of reasonable higher rates. B knew this fact. The actual value of the destroyed goods exceeded the amount recoverable by B under the provisions of the regulations and bill of lading. What are B's rights? What would your answer be if the destruction had occurred through A Railroad's negligence?

A. The common-law liability of a common carrier of goods was that of an insurer, except against losses due to a limited number of causes such as acts of God, of the public enemy, or of the shipper, or due to the inherent nature of the goods. The carrier can by contract exempt itself from this liability or limit the amount recoverable in case of loss. Such contracts are valid only if shipper is accorded a reasonable choice of procuring transportation of his goods with full common-law liability. B's acceptance of a bill of lading at the time of delivery of the goods to A Railroad, made with a knowledge of the regulations in the premises, constituted a contract limiting liability, which was valid in view of B's freedom of choice to obtain transportation of his goods subject to full common-law liability. B is limited to recovering the stated value. The rule would be otherwise if the loss had occurred through A Railroad's negligence since public policy prevents a common carrier from either exempting itself from such liability or limiting the amount recoverable therefor.

McGrath v. Northern Pac. Ry. Co., 141 N. W. 164, 121 Minn. 258, L. R. A. 1915D, 644.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627.

For other cases see Decennial Digests, Carriers, ¶150, 230(5).

Q. 8. A delivered a message to B Co., a telegraph company, for transmission by it. The contract for transmission provided that B Co. would not be liable for damages unless a written claim therefor was presented to it within ten days after the message was filed for transmission. B Co. negligently failed to deliver the message. A did not learn of this failure until eight days after date of filing for transmission. His written claim for damages did not reach B Co. till the eleventh day after such filing date. A sues B Co. What are his rights?

A. A common carrier, such as B Co., can by contract impose reasonable conditions limiting the right to sue it for violations of its duty as a common carrier. Requiring the filing of a written claim for damages therefor is valid if the period allowed is reasonable. The period allowed is not reasonable unless it gives the injured party a reasonable opportunity by the exercise of due diligence to meet the requirement that a written claim be filed. The period in question is unreasonable, in so far as it is computed from the time that the message is filed, instead of from the time the cause of action arose. Hence A can sue B Co., even though he failed to file the claim within the period stated in the contract.

Western Union Tel. Co. v. Hicks (Tex. Com. App.) 265 S. W. 381.

Erie R. Co. v. Shuart, 39 S. Ct. 519, 250 U. S. 465, 63 L. Ed. 1088.

For other cases see Decennial Digests, Carriers ¶218(3, 10); Telegraphs and Telephones ¶54(4).

Q. 9. P, a poultry shipper, ordered poultry cars from D Railroad. D Railroad owned no such cars, and had published this fact as part of its tariff and schedule, offering, however, to procure them from the owners for shippers on request. D Railroad, exercising due diligence, failed to procure the cars in time, as a result of which delay P's goods depreciated in value. D Railroad operated in a territory in which poultry raising was an industry of considerable importance. What are P's rights against D railroad?

A. D Railroad owed a common-law duty to provide adequate car facilities for the prompt transportation of the reasonable freight offerings of its territory, and to supply the same to shippers within a reasonable time on reasonable demand. This includes, not only the duty to furnish facilities in sufficient quantity, but also that of providing facilities of a character suitable for transporting the kind of goods it holds itself out to carry. The exact scope of this latter duty depends in part upon prevailing railroad practices. The facts that poultry cars are in common use, that D Railroad has held itself out to carry live poultry, and that the raising of poultry is a considerable industry in its territory impose on D Railroad a duty to provide such cars and furnish them promptly on reasonable demand. This duty cannot be avoided by inserting in its tariffs a notice that it does not own such cars. D railroad is liable to P for the violation of this duty.

Davis v. McKinley, 255 S. W. 523, 200 Ky. 699.

Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 F. 705, 165 C. C. A. 299.

James v. Davis (C. C. A.) 280 F. 780.

For other cases see *Decennial Digests*, Carriers ⇨40, 149½.

SECTION 3.—PUBLIC REGULATION OF DUTY TO SERVE

Q. 10. R Co. is a street railway company, operating in city X. Its equipment is adequate to meet the ordinary needs of the public at all hours of the day, except during the morning and evening rush hours. The Public Service Commission of the state, which had jurisdiction in the premises, ordered R Co. to provide additional equipment sufficient to provide seats for substantially all persons at all times, except only in times of emergency, or of extraordinary or unusual occasions. Compliance with the order would have required R Co. to provide additional equipment, which would be idle most of the time. R Co. sues to enjoin the enforcement of said order. Decide the case.

A. R Co. owes a public duty to provide adequate facilities for the ordinary and usual demands for service of the public it serves. The

state can regulate the performance of this duty. It cannot, however, under the guise of such regulation, impose unreasonable burdens. The demands for service during rush hours constitute neither an emergency nor an extraordinary or unusual occasion, but are the normal and usual incidents of street railway operation. To require seats for substantially all passengers at those times is to require what is practically impossible. The order is unreasonable, in so far as it fails to except from its scope operation at those hours, the more so because compliance would require equipment that would be idle most of the time. Hence the order is invalid, and R Co. is entitled to an injunction.

Puget Sound Traction, Light & Power Co. v. Reynolds (D. C.) 223 F. 371.

State v. Atkinson, 192 S. W. 86, 269 Mo. 634, L. R. A. 1918A, 46, Ann., Cas. 1917E, 987.

For other cases see Decennial Digests, Carriers ⇨11, 12(6); Street Railroads ⇨70.

Q. 11. R Co. is a railroad corporation organized under the laws of state A, which specifically require railroads incorporated thereunder to transport persons and property. The regulation of railroads is vested in a Railroad Commission. R Co. operates a short branch line as a feeder for its main line. Said branch line extends from its junction with the main line to C, a growing town of 1,500 inhabitants. R Co. has never operated any passenger train over said branch. The state Railroad Commission has ordered it to operate over said branch one passenger train each way daily except Sunday. The operation of said passenger trains will entail a small loss. Said loss will not, however, render the entire operations of said branch unremunerative, nor will it have that effect upon R Co.'s entire intrastate business. Unless said passenger trains are operated, the inhabitants of D will be practically shut off from the outside world, although its business interests require some means of communication therewith. What are R Co.'s rights?

A. The order in question does not require R Co. to embark upon a service which it has not held itself out to perform, since it is organized under a law requiring it to transport both goods and persons. The order only requires it to perform its public duty. This can be required, in the absence of contract, only if the requirement is reasonable. Its reasonableness depends upon a consideration of the interests of both the public and the railroad. The facts show that the reasonable public needs demand this limited passenger service. The state cannot, in the absence of contract, require service at a loss, since this would take the railroad's property without due process of

law. This does not, however, invalidate an order requiring a service that by itself entails a loss, if other factors make it not unreasonable. The facts that the total branch line and intrastate operations would remain profitable despite the loss resulting from compliance with the order, and the character and function of the branch line as a feeder for R Co.'s system, make it not unreasonable to require said passenger service, even at a small loss. Hence R Co. must obey said order.

Chesapeake & O. Ry. Co. v. Public Service Com'n, 37 S. Ct. 234, 242 U. S. 603, 61 L. Ed. 520.

Mississippi Railroad Com'n v. Mobile & O. R. Co., 37 S. Ct. 602, 244 U. S. 388, 61 L. Ed. 1216.

For other cases see *Decennial Digests, Constitutional Law* §241, 297; *Railroads* §227.

Q. 12. A state Railroad Commission, acting within its jurisdiction, ordered A Railroad to make with B Railroad a physical connection, the cost of which was to be equally divided between the two railroads. The order also required each railroad to accept from the other at such connection freight originating on its line destined to points on the other's line, and that in case of carload freight the accepting carrier should be required to accept such freight in the cars tendered by the other. The order made due provision for compensation in all matters where compensation was required. A connection was made within the limits of X, a city extending over a wide area, in which the hauls within the city ranged up to 10 miles. A Railroad refused to accept from B Railroad at such connection a carload of coal originating at Y, a city served by both, and destined for a consignee in X, whose plant was on A Railroad's tracks within X. The order related to intrastate commerce only. Can A Railroad be compelled to accept said car?

A. The common law required a common carrier to accept for transportation goods offered by a connecting carrier, but imposed no duty to provide physical connections to facilitate the interchange of traffic of that type. The state can subject to reasonable regulation the performance of the duty to accept goods from other carriers. Requiring physical connections, whose cost is to be equally borne by the two railroads, is a reasonable regulation thereof. Requiring a railroad to accept carload freight in the original cars is also reasonable as an incident to the efficient performance of said duty, even when the carrier compelled to accept them has available cars. The order is not invalid, in that it requires an interchange service entirely within a single city, since the size of the city makes the service required of A Railroad a real transportation service, and does not

require it to permit the use of its terminal facilities by a competitor. Hence it is reasonable, and A Railroad can be compelled to obey it.

Grand Trunk R. Co. v. Michigan Railroad Com'n, 34 S. Ct. 152, 231 U. S. 457, 58 L. Ed. 310.

Chicago, M. & St. P. R. Co. v. Iowa, 34 S. Ct. 592, 233 U. S. 334, 58 L. Ed. 988.

For other cases see Decennial Digests, Carriers ¶15; Constitutional Law, ¶297.

Q. 13. A state Railroad Commission, acting under statutory authority, ordered A Railroad to construct upon its right of way a side track to serve B, a shipper whose place of business adjoined such right of way. The construction and operation of such side track were practicable, and the demand for such facilities by B was reasonable. The order required B to bear the construction costs. B is in fact the only shipper who can be served by said side track. What are A Railroad's rights? What would they be, if the order had required it to construct a private siding on B's property?

A. The common law imposed on railroads no duty to deliver or receive freight except at their regularly established stations. Railroads have, however, developed a practice of so doing on industrial tracks connecting industries with their main line. The system of such tracks constitutes a part of their terminal facilities, as much as do their depots and yard tracks. The order in question only compels A Railroad to perform its duty to deliver in a particular way, and is valid, if reasonable. The facts that B was required to bear the construction costs and that the demand for the service was reasonable make the order itself reasonable. It is immaterial that B is the only shipper directly served, since the track in question becomes a part of A Railroad's plant, that may be used by it for its general railroad purposes. A Railroad can be compelled to obey the order. The decision would be otherwise, if the order had required it to construct on B's property a private siding.

State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Com'n, 137 P. 1057, 77 Wash. 529, L. R. A. 1918B, 786, Ann. Cas. 1915D, 202.

Missouri Pac. R. Co. v. Nebraska, 30 S. Ct. 461, 217 U. S. 196, 54 L. Ed. 727, 18 Ann. Cas. 989.

For other cases see Decennial Digests, Constitutional Law ¶297; Railroads ¶225.

Q. 14. A Co., a gas company, had an exclusive franchise to operate within X city. The franchise contained no terms specifically dealing with its duty to make extensions. The proper authorities ordered it to extend its mains and service into a growing district of the city. The revenues that it would obtain from the new business that would immediately come to it from the extension would exceed the operating costs thereof, but would be insufficient to enable it to earn

a fair return on the capital cost of the extension. Its entire business would still be remunerative, and the facts indicated that said new business itself would soon become so. Can A Co. successfully resist enforcement of said order?

A. The acceptance of the franchise constitutes a holding out to afford reasonable service to the whole of X city. This imposes on A Co. the duty to render such service. The order in question is valid, in so far as it compels the performance of that duty. Its validity thus depends on whether the circumstances make it reasonable to require the extension in question. The facts that the extension is to be made in a growing district, and that it can be made without entailing any financial loss to A Co., indicate that the requirement is reasonable. The fact that it will involve a short period during which the capital outlay required to be made by the order will earn less than a fair return is a factor that militates against this conclusion, but is not sufficient to require its modification. A Co. cannot successfully resist the enforcement of the order.

New York v. McCall, 38 S. Ct. 122, 245 U. S. 345, 62 L. Ed. 337.

Oklahoma Gas & Electric Co. v. State, 209 P. 777, 87 Okl. 174.

For other cases see Decennial Digests, Constitutional Law ¶296(1), 318; Gas ¶9.

Q. 15. R Co., a railroad corporation organized under the laws of state A, operated a railroad entirely within said state. Nothing in its charter specifically required it to continue operating, but a state statute in force at the time R Co. procured its charter required railroads organized under the laws of the state to operate a specified number of trains daily. Its business had become unprofitable, due to a change in the character of the territory in which it operated. It had operated at a loss for several years, and there was no prospect that it could be again operated at a profit within any foreseeable future time. R Co. sues to enjoin the officials of state A from preventing it from dismantling its railroad. The officials claim that the acceptance of the charter at a time when the state statute required railroads incorporated by state A to operate a specified number of trains daily imposed on R Co. a contract duty not to discontinue operations. What are R Co.'s rights?

A. State A, through its officials, is threatening to compel R Co. to continue indefinitely operating at a loss. The statute of state A, in so far as it compels this, is unconstitutional. To compel a railroad to go on at a loss, in the absence of a contract obligating it to continue, deprives it of its property without due process of law. The fact that the statute in force at the time R Co. received its charter imposed a duty to operate does not make that provision a part of its

charter contract in such a sense that it must be construed as a promise by R Co. to continue operating in all cases. There is, therefore, no contract duty so to continue. Hence R Co. is entitled to an injunction.

Railroad Com'n v. East Texas R. Co., 44 S. Ct. 247, 264 U. S. 79, 68 L. Ed. 569.

Brooks-Scanlon Co. v. Railroad Com'n, 40 S. Ct. 183, 251 U. S. 396, 64 L. Ed. 323.

For other cases see Decennial Digests, Constitutional Law §297; Railroads §57, 214, 223.

Q. 16. B Railroad, a corporation of state A, operated a railroad that lay wholly within said state. It abandoned the operation of a nonprofitable branch line, but continued operating the remainder of its road. The remainder could be operated at a profit, and the operating loss on the abandoned branch did not make its entire operations unprofitable. B Railroad refused to comply with an order of the state Railroad Commission to resume operations on the abandoned branch. What are B Railroad's rights?

A. There is a distinction between a complete withdrawal from the public service and the partial abandonment thereof. A state cannot prevent the former, if the business can be conducted only at a loss. A railroad that has undertaken to serve the public cannot, however, limit its performance of that duty to those activities that produce a profit. A state can ordinarily require it to perform the unprofitable parts of its service, if the business as a whole is profitable. There is some tendency to exclude from this rule cases in which the types of service are so distinct as to constitute substantially different services. This is not the situation in the instant case. Hence B Railroad can be compelled to resume operating the abandoned branch as long as its whole business will continue profitable.

Pittsburgh & Shawmut Coal Co. v. Delaware & N. R. Co. (D. C.) 289 F. 133.
Mt. Carmel Public Utility & Storage Co. v. Public Utilities Commission, 130 N. E. 693, 297 Ill. 303, 21 A. L. R. 571.

For other cases see Decennial Digests, Constitutional Law §242; Corporations §382½, 391; Eminent Domain §2(1); Railroads §214.

Q. 17. P sues D Railroad for being ejected from its train for refusing to pay a cash fare in excess of the ticket fare. D Railroad's rules required its conductors to collect from passengers offering cash fares a sum in excess of the ticket fare. The excess was repaid to the passenger upon presentation at any ticket office of a receipt which the conductor was required to give such passenger. P's failure to present a ticket was due to the inability of D Railroad's ticket seller to supply him with one on his request because of the exhaustion of the supply. No more force than necessary was used to eject P. What are P's rights?

A. Railroads and other public service companies are entitled to make reasonable regulations for the conduct of their affairs. A regulation is reasonable, if it tends to protect a legitimate interest of the railroad without imposing on the public an undue burden. The regulation in question tends to protect the railroad against frauds by its conductors in failing to return cash fares, and it does not impose on the public any unreasonable burden. Hence it is reasonable. However, a regulation reasonable in itself may be unreasonable as applied to a given situation. The enforcement of the regulation in question on A, who has, because of B Railroad's own default, been prevented from purchasing a ticket, is unreasonable. Hence his ejection was illegal, and A is entitled to recover.

Ammons v. Southern R. Co., 51 S. E. 127, 138 N. C. 555, 3 Ann. Cas. 886.

Nourse v. Los Angeles, 143 P. 801, 25 Cal. App. 384.

For other cases see Decennial Digests, Carriers ⇨248, 357; Waters and Water Courses ⇨203(10).

SECTION 4.—DISCRIMINATION

Q. 18. B Co., a steamship company, extended to shippers of cotton the privilege of making advance bookings for space on a particular vessel. It extended this privilege to no other class of shippers. Cotton thus booked is given priority of service over other goods delivered to it ahead of such cotton, but subsequent to the date on which said booking is made. A, a shipper of lumber, delivered to B Co. certain lumber for transportation. B Co. failed to transport it promptly, because its space was required for cotton booked before, but delivered to B Co. after A's delivery to it of his lumber. Cotton is the most important product of the territory served by B Co. A sues B Co. for loss resulting from the delay in shipping his lumber. What are his rights? What would his rights be if the privilege had been extended to perishable fruits only?

A. B Co. is a common carrier, and cannot make unreasonable discriminations between those whom it is required to serve. This duty not to discriminate unreasonably extends, not only to rates, but to every phase of its public duties. Differences in treatment constitute unreasonable discriminations, unless there exists some reasonable basis therefor. There is nothing in the nature of cotton that requires its more expeditious shipment than lumber. Its position as the most important product of the territory served by B Co. gives it no right to be favored at the expense of other products. B Co. has violated its duty not to make unreasonable discriminations against A, and is liable to A for the injury resulting therefrom. The decision would be otherwise, if the preference had

been extended to perishable fruit, since its character makes it reasonable to provide for its shipment ahead of nonperishable commodities.

Ocean S. S. Co. of Savannah v. Savannah Locomotive Works & Supply Co., 63 S. E. 577, 131 Ga. 831, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044.

Interstate Commerce Com'n v. Delaware, L. & W. R. Co., 31 S. Ct. 392, 220 U. S. 235, 55 L. Ed. 448.

For other cases see *Decennial Digests, Carriers* 32(1, 3); *Shipment* 101.

Q. 19. A, engaged in producing oil, owns his own tank cars. B, a competitor, owns no tank cars. R Co., a railroad, charges a rate of \$10 per tank car for transporting oil from X to Y. It pays A a rental of \$2 per car for each day that it uses one of A's tank cars in transporting oil for A. It uses A's cars for said purpose only. R Co. owns no tank cars, but hires such cars from an independent tank car company at a rental of \$1.25 per car for each day that it uses a tank car. The result of these arrangements is that B is unable to compete with A and is forced to discontinue. B sues R Co. for damages therefor. What are his rights?

A. The allowance made by R Co. to A for furnishing his own tank cars is in substance a payment by it for the use of such cars. The amount thus paid is considerably in excess of the current market rental of such cars, as shown by the rentals paid by R Co. to the independent tank line company. The excess is in effect a repayment to A of part of the rate charged by R Co., and produces a discrimination in rates, as between A and B, for transporting the same commodity between the same points. This is an unreasonable discrimination, since the service is the same in both instances. Hence it is invalid, and R Co. is liable to B for the damages caused him thereby.

Sullivan v. Minneapolis & R. R. Ry. Co., 149 N. W. 134, 127 Minn. 180.

Pennsylvania R. R. v. International Coal Min. Co., 33 S. Ct. 893, 230 U. S. 184, 57 L. Ed. 1446, Ann. Cas. 1915A, 315.

Davis v. Portland Seed Co., 44 S. Ct. 380, 264 U. S. 403, 68 L. Ed. 762.

For other cases see *Decennial Digests, Carriers* 13(1), 28, 36, 201.

SECTION 5.—RATES

Q. 20. A state statute provided that the state Railroad Commission should have the power to prescribe just and reasonable rates if, after hearing, it should find existing rates to be unjust or unreasonable. Said commission, after hearing, ordered B railroad to reduce an intrastate rate on fertilizers, and prescribed a rate therefor. The order contained no express finding that the existing rates were unjust or unreasonable, nor did the commission in any man-

ner make such express finding. It also indicated that the sole reasons on which it had relied in fixing the rate prescribed by it were the importance of a cheaper fertilizer for building up a particular locality, and the indirect benefit thereof to B Railroad. No other factors existed which would justify the prescribed rate. Discuss the validity of said rate order.

A. The order is invalid for two reasons: When an administrative board, such as the Railroad Commission, is required by the statutes under which it acts to make a finding of facts as a condition precedent to making an order, the order is invalid unless there is an express finding of such facts. The commission's failure to make an express finding that the existing rates were unjust or unreasonable invalidates its order. It is also invalid because the rate prescribed by it is unreasonable. The remote and speculative benefit resulting to B Railroad from the increased traffic it might secure through the building up of a particular locality is not a factor on which, standing alone, a rate can be based. A rate must be reasonable both to the public and the carrier. The prescribed rate is not reasonable to the carrier, and is invalid.

Wichita R. & Light Co. v. Public Utilities Com'n, 43 S. Ct. 51, 260 U. S. 48, 67 L. Ed. 124.

North Hennepin Producers' Ass'n v. Chicago, St. P., M. & O. R. Co., 200 N. W. 808, 160 Minn. 506.

For other cases see Decennial Digests, Carriers ⚡12(5); Electricity ⚡11; Public Service Commissions ⚡17, 23.

Q. 21. A shipped certain goods in interstate commerce by B Railroad, which charged him the rate stated in its tariff filed with the Interstate Commerce Commission. A sued B Railroad to recover damages, claiming that the rate charged was unreasonable. There had been no determination by the Commission as to the reasonableness or unreasonableness of said rate. Is A entitled to maintain his action? Would he be entitled to maintain it, if said Commission had held said rate unreasonable in a proceeding before it between B Railroad and C?

A. The Interstate Commerce Act gives a right of action to persons injured by violations of its provisions. To charge an unreasonable rate is a violation of its provisions. Where, however, a right of action involves an administrative question, courts will not entertain a suit thereon until the Interstate Commerce Commission has passed on the matter. This rule has been adopted to prevent the impairment of the effective realization of the policy against discrimination. The question whether a given rate is reasonable or otherwise is an administrative one. Hence A is not entitled to

maintain his suit in court. If, however, the Commission has once passed on the question, courts will entertain suits by any person whose case can be determined on the same basis of fact. Hence A could sue, if the Commission had held said rate unreasonable in a proceeding between B Railroad and C.

Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 27 S. Ct. 350, 204 U. S. 426, 51 L. Ed. 553, 9 Ann. Cas. 1075.

A. J. Phillips Co. v. Grand Trunk W. R. Co., 35 S. Ct. 444, 236 U. S. 662, 59 L. Ed. 774.

For other cases see *Decennial Digests, Carriers* ¶34; *Commerce* ¶89.

Q. 22. A shipped goods by B Railroad in interstate commerce. The goods were consigned to himself. B Railroad delivered the goods to A upon payment by him of the freight charges demanded. By mistake of B Railroad's agent, the charges demanded and paid were but half of the rate for said movement stated in its tariff filed with the Interstate Commerce Commission. B Railroad sues A for the balance of said rate. Suit is brought before the statute of limitations has run against the claim. Decide the case. What would be B Railroad's rights, if it had contracted to ship for A at the rate received?

A. The freight rate on an interstate shipment is that stated in the tariff filed with the Commission. It is fixed by law at that sum, and no act or omission of the carrier, except the running of the statute of limitations, can estop or preclude it from enforcing payment of the full amount by the person liable therefor. Hence B Railroad can recover the balance from A. It could do so, even if it had contracted to ship at the rate actually paid, since such contract is illegal. Its illegality, however, merely prevents A from basing any rights on it, but does not defeat B Railroad's right to recover the filed rate, which is the only legal rate.

Pittsburgh, C., C. & St. L. R. Co. v. Fink, 40 S. Ct. 27, 250 U. S. 577, 63 L. Ed. 1151.

Louisville & N. R. Co. v. Central Iron & Coal Co., 44 S. Ct. 441, 265 U. S. 59, 68 L. Ed. 900.

For other cases see *Decennial Digests, Carriers* ¶32(1), 194.

Q. 23. The state Public Utilities Commission has prescribed a schedule of rates for A Co., a water company serving town X. After operating thereunder for one year, A Co. brings an action to enjoin their further enforcement against it. The trial court adopted as the rate base A Co.'s actual investment in its plant used for rendering its service, and excluded A Co.'s evidence of its value based on current prices, which was considerably in excess of such investment. The court also excluded from the property presently used for rendering the service certain sources of supply acquired

by A Co. to meet future demands. The evidence established that these sources would not be required for 25 years. The court adopted as the fair rate of return 5 per cent., although the general market rate for investments in water companies was 6 per cent. What errors, if any, did this court commit?

A. The due process clause of the Fourteenth Amendment prevents a state from fixing rates at a level that effects a confiscation of a utility's property. There is such confiscation if the rates do not permit it to earn a fair rate of return on the fair present value of the property devoted to the public use. Actual investment is not the protected fair value, although it may be considered as evidence thereof. The adoption of actual investment as the rate base was error. Values based on current prices are evidence of the protected value, and the exclusion thereof was error. The property protected is that presently devoted to the public use. This includes that held for meeting increased demands for the service likely to be made during a reasonable future period. Twenty-five years is not such period, and the exclusion of sources of supply that would not be required for 25 years was not error. The adoption of 5 per cent. as a return at a time when the market rate on similar investments was 6 per cent. was error.

Southwestern Bell Tel. Co. v. Public Service Com'n of Missouri, 43 S. Ct. 544, 262 U. S. 276, 67 L. Ed. 981, 31 A. L. R. 807.

Georgia Ry. & P. Co. v. Railroad Com'n, 43 S. Ct. 680, 262 U. S. 625, 67 L. Ed. 1144.

For other cases see *Decennial Digests, Constitutional Law*, ¶298(1); *Public Service Commissions* ¶7.

Q. 24. A state statute fixed the rate for the intrastate transportation of coal. This coal traffic constituted a considerable portion of B Railroad's freight business. The rates prescribed were sufficient to cover the operating costs chargeable to this traffic, but insufficient to enable B Railroad to earn a fair return on the fair value of the property used in connection therewith. B Railroad's entire intrastate freight business showed a fair return on the fair value of the property used therein. Is the coal rate valid?

A. The rule that a railroad cannot be forced to carry at confiscatory rates applies to rates on specific commodities, wherever such action would be unreasonable and arbitrary. It is clearly so as applied to a commodity whose carriage constitutes a considerable portion of the carrier's total intrastate freight business, unless there exists a practice in the light of which it could be regarded as reasonable. The rates on such a specific class of traffic must permit a return on the fair value of the property used in rendering the service, and a state is not permitted to require the coal in this case

to be carried at a rate which will throw a part of the burden incurred in moving it on other traffic. The limits of this refinement in applying the confiscation rule have not yet been clearly determined. The rate in question is invalid.

Northern Pac. R. Co. v. North Dakota, 35 S. Ct. 429, 236 U. S. 585, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1.
Norfolk & W. R. Co. v. Conley, 35 S. Ct. 437, 236 U. S. 605, 59 L. Ed. 745.
 For other cases see *Decennial Digests, Carriers* ¶12(5); *Constitutional Law*, ¶298(2).

Q. 25. A Co. operated a street railway system in town X in state B, under a charter containing a maximum rate provision. Such charter and this provision constituted contracts which town X had power to make under the laws of state B. Increased costs made it impossible for A Co. to operate under said rates, except at a loss. Suit by town X to enjoin A Co. from increasing its rates beyond the prescribed maximum to an amount sufficient to make its operations fairly remunerative. What rights has town X?

A. The rule that prevents the public from enforcing confiscatory rates has no application, where a utility has contracted to furnish a service at a given rate. It is essential to the existence of a contract as to rates that the political subdivision of the state that purports to make such contract shall have had the power to do so under the laws of the state. Town X had such power, and hence there is a valid rate contract binding both it and A Co. While A Co. could not be forced to continue operating at a loss, it can be kept to its contract rate if it insists upon continuing to serve. Town X is entitled to an injunction against A Co., prohibiting it from increasing its rates above the franchise maximum.

Columbus Railway, Light & Power Co. v. Columbus, 39 S. Ct. 349, 249 U. S. 399, 63 L. Ed. 669, 6 A. L. R. 1648.

Town of Pocahontas v. Central Power & Light Co., 244 S. W. 712, 152 Ark. 276.

For other cases see *Decennial Digests, Carriers* ¶12(9); *Electricity* ¶11; *Gas* ¶14(1).

Q. 26. Assume in Question 25 that the Public Utilities Commission of state B, acting within its authority under a statute enacted subsequent to the date when the franchise contract was made, had authorized A Co. to charge rates in excess of the franchise maximum. What would then be the rights of town X?

A. Town X is an agency or instrumentality of state B, and its power to make a binding rate contract is subject to the paramount authority of the state. The statute that conferred upon the Public Utilities Commission power to regulate rates is an assertion by state B of its paramount authority in the premises. Town X has

no rights against state B that prevent the latter from modifying the contract that its own agency has made. Hence A Co. is entitled to put into effect the rate authorized by the commission, even though in excess of the franchise maximum, and town X cannot successfully resist it in doing so.

Hoynes v. Chicago & O. P. Elevated R. R. Co., 128 N. E. 587, 294 Ill. 413.

Union Dry Goods Co. v. Georgia Public Service Corp., 39 S. Ct. 117, 248 U. S. 372, 63 L. Ed. 309, 9 A. L. R. 1420.

For other cases see Decennial Digests, Carriers ⌘2, 12(9); Constitutional Law, ⌘154(2), 298(7); Municipal Corporations ⌘590; Street Railroads ⌘24(1).

SECTION 6.—CERTIFICATE OF CONVENIENCE AND NECESSITY

Q. 27. A state statute provided that no person or corporation should, after its enactment, begin the operation of any automobile for the transportation of persons for compensation as a common carrier on any public highway of the state without first having obtained from the state Railroad Commission a certificate declaring that public convenience and necessity required such operation. Said commission denied A's application for operating a bus line over the public highways as a common carrier, on the grounds that the existing railroads furnished adequate transportation facilities between the points selected by A as the termini of his route. No question of interstate commerce was involved. Discuss A's contention that the statute, and the order which was within the commission's statutory powers, deprive him of property without due process of law.

A. The police power of the state may be exerted to foster the development of an adequate transportation system for the state, and conserve that which it reasonably deems best adapted to rendering such service. The judgment of fact that the public interest demands the maintenance of an efficient system of railroad transportation is a reasonable one. Hence the state can adjust its regulatory policy so as to promote that end. The exclusion of motor transport competition, unless conditions of public convenience and necessity require such method of transportation, is a reasonable means for securing that end. Hence it is a reasonable exercise of the state's police power, and the resulting limitation on the right to engage in a lawful business does not deprive any person of liberty or property without due process of law.

Motor Transit Co. v. Railroad Commission of State of California, 209 P. 586, 189 Cal. 573.

Pirie v. Public Utilities Commission, 209 P. 640, 72 Colo. 65.

For other cases see Decennial Digests, Carriers ⌘10; Constitutional Law, ⌘81, 295.

QUASI CONTRACTS

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Section

1. Benefits Conferred under Invalid Contract or Marriage.
2. Benefits Conferred by Party in Default.
3. Benefits Conferred under Illegal Contracts.
4. Benefits Conferred under Mistake.
5. Benefits Conferred by a Trespasser.
6. Benefits Conferred under Constraint.

SECTION 1.—BENEFITS CONFERRED UNDER INVALID CONTRACT OR MARRIAGE

Q. 1. A induced B to marry him, and live with him as his wife, by falsely representing that his decree for separation "from bed and board forever" was an absolute divorce from his first wife. After A's death, B learned the real facts and became aware that their marriage was void. B sues A's estate for compensation for her services to A. Should she recover?

A. Yes; in the absence of contract, services to each other by persons living in family relationship are generally presumed to be gratuitous. *Disbrow v. Durand*, 24 A. 545, 54 N. J. Law, 343, 33 Am. St. Rep. 678. But where reciprocal benefits fail, because the marriage relation is itself nonexistent, due to mistake as to the fact of marriage, it is considered just that the supposed husband, who receives the value of the reputed wife's services, should pay therefor. *Fox v. Dawson's Curator*, 8 Mart. (O. S. La.) 94; *Higgins v. Breen*, 9 Mo. 497. See 21 Mich. Law Rev. 21. This obligation, where recognized, is properly held to survive against the estate. *Sanders v. Ragan*, 90 S. E. 777, 172 N. C. 612, L. R. A. 1917B, 681; 32 Yale Law J. 507, 308.

Some authorities hold the contrary, reasoning that, since no payment was contemplated by the parties, the law cannot imply an agreement to pay. *Cooper v. Cooper*, 17 N. E. 892, 147 Mass. 370, 9 Am. St. Rep. 721. They overlook, however, that the obligation to make restitution does not rest on contract, but on broader considerations of justice and equity, to prevent unjust enrichment at the expense of another. *Mitchell v. Walker*, 30 N. C. 243; *Moses v. Macferlan*, 2 Burr. 1005. See 21 Yale Law J. 533. Recent authorities, moreover, hold that, where the mistaken belief of marriage was caused by the other party's fraud, the obligation to pay for the value of services rendered thereunder is justly imposed by law, irrespective of what the correct rule may be in case both par-

ties were in good faith equally mistaken. In *re Fox's Estate*, 190 N. W. 90, 178 Wis. 369, 31 A. L. R. 420.

For other cases see *Decennial Digests*, Action ⚡28; Executors and Administrators ⚡206(1); Payment ⚡85(1); Work and Labor ⚡7(7).

Q.2. A state statute prescribes that no contract for street improvements shall be made by any city, or department or committee thereof, unless an appropriation shall have been previously made concerning such expenditure, and in that case only with the lowest responsible bidder after publication of notice, etc. The mayor and the street commissioner of A city, without the observance of the statutory requirements, requested B to pave with bricks a certain part of a certain street for a certain price. B, supposing mistakenly that these parties were properly acting on behalf of the city, undertook the work. When B, after completion of the work, submitted his bill for payment, it was turned down on the advice of the city attorney, on the ground that the contract was unauthorized. What, if any, are B's rights?

A. B cannot recover against the city on the contract. According to the weight of authority, he cannot recover in quasi contract either. He is entitled to take up the bricks and use them for his own purposes. A municipal corporation is not liable on a contract entered into in disregard of the legislative command. *Reams v. Cooley*, 152 P. 293, 171 Cal. 150, Ann. Cas. 1917A, 1260; *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 59 N. W. 513, 40 Neb. 775, 42 Am. St. Rep. 696. Likewise a municipal corporation is not bound by a contract made in its name by one of its officers, who had no authority to enter into such a contract on behalf of the corporation. *Floyd County v. Allen*, 126 S. W. 124, 137 Ky. 575, 27 L. R. A. (N. S.) 1125; *McCormick v. City of Niles*, 90 N. E. 803, 81 Ohio St. 246, 27 L. R. A. (N. S.) 1117.

There is much conflict of authority as to how far a municipal corporation is liable quasi contractually for benefits received under an invalid contract. According to the weight of authority, no such liability is imposed where the making of the contract is forbidden by law. *McDonald v. Mayor, etc., of City of New York*, 68 N. Y. 23, 23 Am. Rep. 144; *Fountain v. City of Sacramento*, 82 P. 637, 1 Cal. App. 461; *Bluthenthal v. Town of Headland*, 31 So. 87, 132 Ala. 249, 90 Am. St. Rep. 904. The reason for this apparently harsh rule is the recognized necessity of protecting municipal bodies against graft, through collusion by interested contractors with city officials. Otherwise, the average taxpayer would have relatively little protection against speciously manipulated

raids on the city treasury. As said in *Fountain v. City of Sacramento*, supra: "Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed, especially where the loss falls upon one who has knowingly taken upon himself the risk of loss."

A vigorous minority among the authorities allows quasi contractual recovery under such circumstances, trusting to the judicial limitation of recovery to no more than value received, rather than the contract price as protection against municipal graft. *Nebraska Bitulithic Co. v. City of Omaha*, 121 N. W. 443, 84 Neb. 375. Quasi contractual recovery is also often sustained on such analysis of the facts as to present a case of an invalid contract not expressly prohibited by statute where power to contract exists. *Allen v. Intendant and Councilmen of La Fayette*, 8 So. 30, 89 Ala. 641, 9 L. R. A. 497; *Thomson v. Town of Elton*, 85 N. W. 425, 109 Wis. 589.

It is well settled that, where property has been supplied to a city under an invalid contract, and the city refuses to pay therefor, the city cannot retain the property against the contractor, where it is still in existence and capable of return. *Chapman v. Douglas County*, 2 S. Ct. 62, 107 U. S. 348, 27 L. Ed. 378; *City of Bardwell v. Southern Engine & Boiler Works*, 113 S. W. 97, 130 Ky. 222, 20 L. R. A. (N. S.) 110; *Fancher v. Grant Co.*, 210 P. 237, 28 N. M. 179.

Further distinctions on various particular grounds are often suggested in dealing with the extremely conflicting cases. 4 Col. Law Rev. 67; 17 Harv. Law Rev. 343; Woodward, *Quasi Contracts*, § 161. It is apparent, however, that behind the details involved in the various minute suggested distinctions is the large fundamental question of how far it is expedient, in the interest of attempting to compensate individuals who have honestly supplied labor and materials, to open the doors to possible successful graft on the municipal treasury at the expense of taxpayers. See 9 Mich. Law Rev. 671.

For other cases see *Decennial Digests*, Counties ☞127; Highways ☞113(1); Municipal Corporations ☞247, 249, 254, 350, 869, 878; Schools and School Districts ☞86(2).

Q. 3. A orally contracted to convey Blackacre to B, on the promise of B to pay \$5,000 and of C to pay \$1,000. A conveyed to B, who accepted the deed, but did not pay just then. A now sues each. Both B and C set up the statute of frauds. What judgment as to each?

A. A recovers the value of the land from the vendee, B. A recovers nothing from C. Where an oral contract with the vendee for the sale of land has been executed by a conveyance, the vendee must usually pay the agreed purchase price, either on the ground that the part of the contract within the statute has been executed (*Wilkinson v. Scott*, 17 Mass. 249; *Ascutney Bank v. Ormsby*, 28 Vt. 721; *Byers v. Locke*, 29 P. 119, 93 Cal. 493, 27 Am. St. Rep. 212), or that acceptance of the deed constitutes a waiver of the statute (*Kratz v. Stocke*, 42 Mo. 351), or that to avoid unjust enrichment the vendee must pay the reasonable value and the contract price is its readiest measure (22 Mich. Law Rev. 494).

Where, as here, however, the vendee has not contracted to pay the entire purchase price, the vendee must either pay the reasonable value or make specific restitution by a reconveyance. There is great doubt of the vendee's right without the vendor's consent to make specific restitution. *Hawley v. Moody*, 24 Vt. 603; *Woodward*, Quasi Contracts, § 96. To avoid unjust enrichment here, the vendee must pay the reasonable value of the property, rather than merely pay his own share of the contract price, which would not fully compensate the vendor. *Cromwell v. Norton*, 79 N. E. 433, 193 Mass. 291, 118 Am. St. Rep. 499; *Kemp v. Kemp*, 142 N. E. 779, 248 Mass. 354; *Lasater v. Premont* (Tex. Civ. App.) 209 S. W. 753 (dictum).

C can be required to pay, if the conveyance to B has benefited C by relieving him from obligations. *Birch v. Baker*, 90 A. 297, 85 N. J. Law, 660, L. R. A. 1916D, 485. So if B were merely C's nominee to hold the land for C's benefit. *Malzer v. Schisler*, 136 P. 14, 67 Or. 356, 51 L. R. A. (N. S.) 77. Where one is named as transferee at the direction of another, the courts will sometimes presume that the benefit of the transaction inured to the latter. *Clement v. Rowe*, 146 N. W. 700, 33 S. D. 499. Without benefit to C, however, he is not liable. Allowing recovery on a contract unenforceable under the statute of frauds, against one who denies its making and has received no benefits thereunder, though the contract has been executed in favor of someone else, is not within the equities either of part performance or of restitution, and would open wide the door to the grossest frauds. See concurring opinion of White, J., in *Birch v. Baker*, *supra*, repeated in his dissent in *Andrews v. Westaway*, 122 A. 729, 99 N. J. Law, 220; 22 Mich. Law Rev. 494.

For other cases see Decennial Digests, *Frauds*, Statute of ~~§~~74(1), 129 (3), 132, 133, 138(3).

SECTION 2.—BENEFITS CONFERRED BY PARTY IN DEFAULT

Q. 4. A contracted to thresh all of B's grain. After threshing the wheat and oats, A refused to thresh the flax. A sues B for the value of the threshing actually done. Has A a cause of action?

A. According to the weight of authority, no; on the merits, and according to recent cases, yes. According to the weight of authority, a party who fails substantially to perform an entire contract cannot recover in quantum meruit for the value of mere partial performance. It is thought unwise to impair the security of contractual obligations by such encouragement to breaches of contract. *Stark v. Parker*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442. An exception is usually made, however, where the buyer of goods has received partial delivery under the contract. *Richards v. Shaw*, 67 Ill. 222; Uniform Sales Act, § 44, subd. 1. Another exception is usually made in case of uncompleted building contracts, where the plaintiff builder's default is not willful. *Pinches v. Swedish Church*, 10 A. 264, 55 Conn. 183.

Several jurisdictions have in recent years made a similar exception for service contracts. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, held that one who voluntarily abandons a contract of service may recover to the extent of the benefit derived by his employer from his part performance, after deducting the damages resulting from the plaintiff's breach. Though much criticized (see, for instance, *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Woodward*, *Quasi Contracts*, §§ 167-172; *Ashley*, 24 Yale Law J. 544), this decision is in recent cases often followed, where the question is still open, because it is felt to be just to hold that "the laborer is worthy of his hire," even at the expense of some impairment of the security of contractual obligations. *Bedow v. Tonkin*, 59 N. W. 222, 5 S. D. 432; *Lynn v. Seby*, 151 N. W. 31, 29 N. D. 420, L. R. A. 1916E, 788. As the usual threshing contracts are in this aspect like ordinary service contracts, the same rule should be applied to both. *McMillan v. Malloy*, 4 N. W. 1004, 10 Neb. 228, 35 Am. Rep. 471; *Lynn v. Seby*, 151 N. W. 31, 29 N. D. 420, L. R. A. 1916E, 788. But see *Johnson v. Fehsefeldt*, 118 N. W. 797, 106 Minn. 202, 20 L. R. A. (N. S.) 1069.

For other cases see *Decennial Digests*, *Contracts* ⚡296, 319(1); *Master and Servant* ⚡73(4), 75; *Sales* ⚡62; *Work and Labor* ⚡14(1, 3).

Q. 5. In 1915 the A Company contracted to manufacture and deliver to the B Company in weekly installments 50,000,000 bul-

lets, B to advance certain moneys and materials to enable A to start performing more rapidly. These advances were to be repaid by B's making a certain deduction periodically from the invoiced contract price of bullets delivered. B in turn intended to use the bullets in filling orders from the French government. B made the advances, and A started making and delivering bullets as fast as it could, but because of lack of skill or experience, or proper equipment, or because of lack of adequate finances, it was impossible for A to make the deliveries as required by the contract. B, going bankrupt, became unable to pay the stipulated contract price. B's trustee in bankruptcy sues A to recover for B's advances of money and materials. Should he recover?

A. Yes. Where both parties to a contract are unable or unwilling to perform, and the performances of the promises were the price or exchange for one another, neither party can recover from the other on the contract. *Gerli v. Poidebard Silk Mfg. Co.*, 31 A. 401, 57 N. J. Law, 432, 30 L. R. A. 61, 51 Am. St. Rep. 611; *Williston on Contracts*, § 882. On rescission of a contract by one party for default of the other, money paid or goods delivered by the rescinding party must be compensated for. *Dakota Stock & Grazing Co. v. Price*, 34 N. W. 97, 22 Neb. 96; *Ankeny v. Clark*, 13 S. Ct. 617, 148 U. S. 345, 37 L. Ed. 475. On rescission by one for default of the other, money paid or goods delivered by that other must be compensated for, unless the contract expressly or impliedly includes forfeiture provisions. *Pierce v. Staub*, 62 A. 760, 78 Conn. 459, 3 L. R. A. (N. S.) 785, 112 Am. St. Rep. 163. Where a contract is terminated by the mutual default of both parties, the consideration for advances thereunder fails to the same extent as where it is terminated by the rescission of one for the default of the other, and the advances cannot, therefore, in equity and good conscience be retained. *Remington Arms Union Metallic Cartridge Co. v. Gaynor Mfg. Co.*, 120 A. 572, 98 Conn. 721. See 33 Yale Law J. 101.

Nor can A escape liability by setting up the contention that it is not guilty of breach, because impossibility prevented its performance. A promise impossible of performance may be binding, subjecting the promisor to liability for breach. *Sage v. Hampe*, 35 S. Ct. 94, 235 U. S. 99, 59 L. Ed. 147 (dictum). Difficulty of performance in itself will not generally excuse the promisor. *Day v. United States*, 38 S. Ct. 57, 245 U. S. 159, 62 L. Ed. 219. However it may be where unanticipated change in conditions due to war destroys the basis of the contract (cf. *Home Builders v. Busk*,

182 N. W. 589, 106 Neb. 86; *Mawhinney v. Millbrook Woolen Mills*, 132 N. E. 93, 231 N. Y. 290, 15 A. L. R. 1506; 35 Law Quart. Rev. 84; 32 Harv. Law Rev. 789), such difficulties do not excuse performance by the promisor where, as under the facts here, they fall fairly within the range of risks contemplated, even though the particular form of impediment actually encountered may not have been consciously adverted to (*Northern Pac. Ry. Co. v. American Trading Co.*, 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269).

Furthermore, even where defendant's performance is prevented by impossibility under such circumstances that his failure to perform is not an actionable breach, the plaintiff, who in reliance on the contract and in expectation of performance has conferred a benefit on the defendant, is generally entitled to restitution. *Butterfield v. Byron*, 27 N. E. 667, 153 Mass. 517, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Kelly v. Bliss*, 11 N. W. 488, 54 Wis. 187. Exceptional situations, where this rule is varied, as where the enforcement of restitution is impracticable, because unapportionable (*Whincup v. Hughes*, L. R. 6 C. P. 78), or where the facts indicate that the plaintiff assumed the risk (*Woodward*, *Quasi Contracts*, §§ 112-114, 131), manifestly are not involved in the facts of the present case.

For other cases see *Decennial Digests*, *Contracts* ¶309(1), 317, 319(2); *Sales* ¶98, 116, 123, 128, 172, 391(5, 7); *Vendor and Purchaser* ¶126.

SECTION 3.—BENEFITS CONFERRED UNDER ILLEGAL CONTRACTS

Q. 6. A statute passed to prevent automobile thefts made it an offense punishable by a fine of from \$10 to \$1,000, or confinement in the county jail for not more than one year, or both, for a person to sell a second-hand automobile without having the collector's license fee receipt for that year and transferring it, and without executing a bill of sale, and made it a similar offense for a person to buy one without demanding and receiving those papers. In an action on a promissory note given for part of the purchase price of a second-hand automobile, the buyer, who had unsuccessfully tendered back the automobile, set up as a defense, and also as basis for demand for affirmative relief as to \$1,000 paid by the buyer, that the seller did not have a license fee receipt at the time of sale, or at all, and did not assign one, and did not give a bill of sale. Assuming such to be the fact, what should be the judgment?

A. There can be no recovery in favor of either. The courts refuse redress to parties against each other in respect of illegal transactions, to discourage such transactions by making parties who

enter thereon do so at their own risk. Thus no relief is afforded on the illegal contract itself. *Wheeler v. Russell*, 17 Mass. 258; *Shifner v. Gordon*, 12 East, 304; *Holland v. Sheehan*, 122 N. W. 1, 108 Minn. 362, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687. Similarly, no restitution is enforced, without further facts appearing, in favor of one who has conferred a benefit thereunder. *Detroit Edison Co. v. Wyatt Coal Co.* (C. C. A.) 293 F. 489; *Janzen v. Crum* (N. D.) 197 N. W. 138; *Howson v. Hancock*, 8 T. R. 577.

This rule is sometimes criticized on the ground that law breakers as a class, who do not fear criminal penalties, can be but slightly deterred, if at all, by threatened civil inconveniences, and that great inequality and injustice is done in its application, when one guilty party is in effect rewarded to the extent that the other suffers by being denied a remedy. *Wigmore*, in 25 Am. Law Rev. 712, note, and *Woodward*, *Quasi Contracts*, § 135. Apart from the recognition of some exceptions resting on special grounds, however, the courts are showing no tendency to relax the rule, conceiving that deterrent effects are practically present if the commercial profitability of such transactions is impaired by the withdrawal of legal redress therefrom.

One exception is established, in case of *mala prohibita*, where one party repents and withdraws before performance of the illegal act contracted for. *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *Boyd v. Boyd*, 230 P. 541, 112 Or. 658. Another exception is made, in case of *mala prohibita*, where the parties are not in *pari delicto*. *White v. President, etc., of Franklin Bank*, 22 Pick. (Mass.) 181; *Meyer v. Barde*, 228 P. 121, 112 Or. 197. This exception, broadly speaking, applies where some other policy involved is in legal estimation more important than denying relief to parties engaging in illegal transactions. Thus an agent who receives money for his principal growing out of an illegal transaction is liable as agent for money had and received. *In re Lowe's Estate*, 175 N. W. 1015, 104 Neb. 147. So interest paid under an illegal contract for usury is recoverable. *Brown v. McIntosh*, 39 N. J. Law, 22. So one who has parted with money or property under an illegal contract induced by fraud or force is permitted to recover it, despite the illegality. *National Bank & Loan Co. v. Petrie*, 23 S. Ct. 512, 189 U. S. 423, 47 L. Ed. 879.

The buyer of the automobile under the facts of the above question cannot bring himself within these exceptions. The illegal sale has already taken place. Furthermore, the legislative prohibition here is not aimed primarily against one of the parties, but

is intended to protect the public by preventing automobile thefts. The danger of successful theft of motor vehicles is so great, and the importance of suppressing it so vital, that legislation to suppress it must be broadly construed, according to the purport of its language to accomplish that result, even though at the risk of occasional hardship to people who may perchance have acted in good faith without knowing the law. Otherwise deliberate violators in such cases will, when caught, take refuge behind the protective veil of asserted good faith, and make enforcement of the law for the protection of the public well-nigh impracticable. See *People v. Johnson*, 123 N. E. 543, 288 Ill. 442, 4 A. L. R. 1535; *Hays v. Schuler*, 193 P. 311, 107 Kan. 635, 11 A. L. R. 1433; *Foster v. Beall* (Tex. Civ. App.) 242 S. W. 1117.

For other cases see *Decennial Digests*, Contracts Ⓒ138(1, 3), 139; Criminal Law Ⓒ21, 33; Gaming Ⓒ28(1); Municipal Corporations Ⓒ661(2); Usury Ⓒ102(1).

SECTION 4.—BENEFITS CONFERRED UNDER MISTAKE

Q. 7. A stole B's automobile and mortgaged it to C. Later A sold it to D, who paid a part of the purchase price to C in discharge of A's note and mortgage, and paid the balance directly to A. Both C and D acted in good faith. A disappeared. B later recovered the automobile from D. D sues C for return of the money paid over to him by D. Can D recover?

A. No. Money paid under a mistake of fact, no further qualifying circumstances appearing, is recoverable, as not voluntarily paid, and against conscience for the recipient to profit by retaining. *Baltimore & Su. R. Co. v. Faunce*, 6 Gill (Md.) 68, 46 Am. Dec. 655; *Kelly v. Solari*, 9 Mees. & W. (Exch.) 54. Where, however, the recipient so changes his position that compelling restitution would subject him to loss, for instance, where he surrenders valuable securities, it is held not unconscientious to retain the money. *Walker v. Conant*, 37 N. W. 292, 69 Mich. 321, 13 Am. St. Rep. 391; 8 Col. Law Rev. 404. Similarly, where money obtained by fraud is paid in satisfaction of a debt owing by an impostor, the original defrauded party cannot follow the money into the recipient's hands and recover it on the ground of mistake. *Behring v. Somerville*, 44 A. 641, 63 N. J. Law, 568, 49 L. R. A. 578. Money paid for his account will be held to be money of the impostor, even though paid directly by the defrauded party to the recipient, whose claim against the impostor the payment discharges. *Ex parte Richard & Thalheimer*, 61 So. 819, 180 Ala. 580.

While there is confusion in the authorities as to what amounts to such change of position as to justify the recipient's retention of money paid by mistake (see, for instance, *Grand Lodge, A. O. U. W. v. Towne*, 161 N. W. 403, 136 Minn. 72, L. R. A. 1917E, 344; 7 Minn. Law Rev. 171; *Costigan, Change of Position as a Defense*, 20 Harv. Law Rev. 205, 216), the tendency is to hold that, as between two parties equally meritorious, the loss from mistake must be left to lie where it falls (*Atlantic Coast Line Ry. Co. v. Jacob S. Schirmer & Sons*, 69 S. E. 439, 87 S. C. 309; *Ex parte Richard & Thalheimer*, 61 So. 819, 180 Ala. 580). The broad fundamental reason is that it is unwise to unsettle past transactions merely to shift the loss from mistake from one innocent party to another. *Gaffner v. American Finance Co.*, 206 P. 916, 120 Wash. 76, 28 A. L. R. 624; 32 Yale Law J. 199, 200.

For other cases see *Decennial Digests, Courts* ⇨210; *Money Received* ⇨6(8), 9; *Payment* ⇨85(1, 6, 7, 8).

SECTION 5.—BENEFITS CONFERRED BY A TRESPASSER

Q. 8. A placed a barn on a vacant lot he knew he did not own. B, the owner, conveyed the lot to C. Later A secured from B a quitclaim deed. The local statute provides that a defendant in ejectment "may recover from the plaintiff (owner) for permanent improvements made by him or those under whom he claims, holding under color of title in good faith adversely to the plaintiff." C brings ejectment against A, who cross-claims for the value of the barn. Is A entitled on his cross-claim?

A. No. A mere trespasser cannot, by improving the land, impair the security of the owner's title, by charging him the value of such improvement or requiring restitution therefor as a condition to his ejectment. *Childress v. Wright*, 2 Cold. (Tenn.) 350; *Putnam v. Tyler*, 12 A. 43, 117 Pa. 570; *Perley v. City of Cambridge*, 108 N. E. 494, 220 Mass. 507, L. R. A. 1915E, 432. If the trespasser's possession continues, however, for the period recognized as sufficient in the statute of limitations, the interest of security to present possessors productively using the land requires that by-gones be forgotten and title vest in the possessor, to the exclusion of the occasional owner who neglects to assert his claim. *Hughes v. Graves*, 39 Vt. 359, 94 Am. Dec. 331.

Between these two extremes a few modifications have been made, in the attempt to give due recognition to the conflicting interests involved. Thus, where the owner sues to recover the value of his possession from the occupier, in an action for mesne profits, the

bona fide occupier is permitted to recoup the value of his improvements on the land. *Parsons v. Moses*, 16 Iowa, 440. So, if the owner seeks equitable relief against the occupier, courts of equity require him to "do equity" by making restitution to the bona fide occupant for his improvements. *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Ensign v. Batterson*, 36 A. 51, 68 Conn. 298; 10 Harv. Law Rev. 453. In many states, moreover, Legislatures, recognizing the expediency of rewarding the bona fide occupier, who improves the land, even though the statutory period of limitation has not lapsed to vest title by adverse possession, have provided "betterment acts" of the type appearing in the facts of the present questions given above.

It has been held in a few cases that active relief in favor of the bona fide occupier should be given on a broader basis, to compensate him for improvements enhancing the value of another's land, to prevent the owner's enrichment at his expense. *Bright v. Boyd*, 1 Story, 478, 494, Fed. Cas. No. 1,875. This doctrine, when recognized, is apt to be narrowly applied, to prevent its too freely undermining the security of land titles; its operation being confined to cases where some sort of fault is attributable to the owner under the circumstances presented. *Parker v. Daly*, 114 P. 926, 115 P. 723, 58 Or. 564, 34 L. R. A. (N. S.) 545. On the other hand, the great weight of authority rejects this broad basis of relief to the improving occupier altogether, regarding the security of the landowner's title as intrinsically too important to be lightly impaired through attempts to compensate innocently intending wrongdoers, who have improved the land. Relief to the occupier for his improvements is therefore usually denied, unless he brings himself within the narrow class of cases, already briefly described, where some modifications of the severe general rule have been recognized. *Williams v. Vanderbilt*, 34 N. E. 476, 145 Ill. 238, 21 L. R. A. 489, 36 Am. St. Rep. 486; *Armstrong v. Ashley*, 27 S. Ct. 270, 204 U. S. 272, 51 L. Ed. 482.

It follows that, in the case in hand, A is entitled to no relief. As C is suing for possession, not for equitable relief or for mesne profits, A cannot come within the modifications appropriate to those cases. The "betterment act," too, applies only to occupants who make improvements claiming in good faith under color of title, and is not intended in effect to duplicate the function of the statute of limitations, by profiting those who use the land as mere trespassers, at the expense of impairing the security of the true owner's title. As A, at the time he made the improvements, knew

he had no right to the land, he cannot bring himself within the betterment statute. *McKenzie v. Gussner*, 134 N. W. 33, 22 N. D. 445, 37 L. R. A. (N. S.) 918. Short of the vesting of title by adverse possession, therefore, no alternative relief charging the owner with the value of improvements is available to a party who puts improvements on land he knows belongs to another. *Foltz v. Alford*, 143 S. W. 905, 102 Ark. 191, Ann. Cas. 1914A, 236.

For other cases see Decennial Digests, Adverse Possession ⌘106(3, 5); Ejectment ⌘143; Fixtures ⌘25; Improvements ⌘3, 4(1, 2, 4, 5); Mechanics' Liens ⌘191, 192.

SECTION 6.—BENEFITS CONFERRED UNDER CONSTRAINT

Q. 9. A state statute prescribed a schedule of maximum rates to be charged for hauling intrastate shipments of coal. The carriers declined to comply with it, but their violation was successfully enjoined in the state court. On supersedeas, the statutory rates did not go into operation until the Supreme Court of the United States affirmed the state court. The Supreme Court's decree was stated to be "without prejudice to the right of the railroad company to reopen, * * * if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates." No bond to guard against damage in consequence of the litigation was required. After putting the rates in operation for a year or more, the railroad reopened the question. The state court again held the rates to be reasonable, but on appeal the Supreme Court of the United States held them to be confiscatory. The shipper brings an action against the carrier to recover charges collected in excess of the statutory rate on shipments made before the first injunction, while the carrier was refusing to give effect to the schedule. The carrier brings an action against the shipper on account of certain shipments while the statutory rate was in actual operation, to recover the difference between the statutory rate collected and a reasonable rate. How should these cases be disposed of?

A. The shipper recovers against the carrier. The carrier recovers nothing from the shipper. It is well settled that illegal freights exacted from shippers by public service corporations may be recovered as money paid under compulsion. *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226; *Heiserman v. Burlington, C. R. & N. Ry. Co.*, 18 N. W. 903, 63 Iowa, 732. It is therefore clear that, if the statutory rate was the legal rate during the period before the injunctions, the shipper can recover. The effect of the Supreme Court decree "without prejudice" in the first case was

only to leave the future operation of the rates open to inquiry, looking forward to the future, and providing for conditions which might then arise. *Missouri v. Chicago, B. & Q. R. Co.*, 36 S. Ct. 715, 241 U. S. 533, 60 L. Ed. 1148. As the statutory rate was therefore the legal rate for the period covered by the first litigation, excessive charges during this period are recoverable, although the statutory rates are confiscatory as applied to facts shown to exist during a later period, as established in the second Supreme Court adjudication. *Merrick v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 160 N. W. 140, 35 N. D. 331. Compare same case in 41 S. Ct. 142, 254 U. S. 376, 65 L. Ed. 312.

The carrier's case for recovery against the shipper on account of later shipments, while the statutory rate was in operation and its operation was confiscatory, as found in the second Supreme Court adjudication, depends on different principles. Even on the contention that the second adjudication on the rates superseded the first, no recovery in favor of the carrier can be allowed as to transactions entered into in pursuance of the first decision, for a change in interpretation of the law cannot be permitted to impair rights already vested thereunder. *Center School Township v. State ex rel. Board of School Commissioners*, 49 N. E. 961, 150 Ind. 168; *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968. Sustaining the same result are also the cases which hold that judicial decisions of the courts make the law, as distinguished from being merely evidence of it and that the payment or service was, therefore, in truth legal at the time it was made, and, there being no mistake, it cannot be recovered. See *Kuhn v. Fairmont Coal Co.*, 30 S. Ct. 140, 215 U. S. 349, 54 L. Ed. 228. Gray's *Nature and Sources of the Law*, §§ 465-512, 535-550. This is substantially the effect, too, of the Supreme Court's holding that the "without prejudice" injunction only left the future operation of the rates open to inquiry. *Missouri v. Chicago, B. & Q. Ry. Co.*, 36 S. Ct. 715, 241 U. S. 533, 60 L. Ed. 1148.

The carrier's recovery can be denied, further, on the ground that its service was rendered, not in ignorance of the confiscatory character of the rates, for it always contended they were confiscatory, but merely in ignorance of the means of proving the facts it knew. *Windbiel v. Carroll*, 16 Hun (N. Y.) 101; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co.*, 168 N. W. 684, 40 N. D. 69, 12 A. L. R. 744. The carrier's recovery can be denied, further, on the ground that the only mistake involved really was a mistake of law as to what was the legal rate at the time, and that

a mistake of law affords no legal ground for restitution. This doctrine is usually attacked as unsound by commentators (cf. Woodward *Quasi Contracts*, §§ 36, 42; Stadden, 7 Col. Law Rev. 476; see, also, 9 Va. Law Rev. 126-132, 220-227, and 22 Col. Law Rev. 166-169), is subject to many exceptions (*Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375, and is in some jurisdictions rejected altogether (*Northrop's Ex'rs v. Graves*, 19 Conn. 548, 50 Am. Dec. 264). Its persistent vogue, despite all these strictures, probably is due to the fact that it strongly favors security of transactions. See *Erkens v. Nicolin*, 40 N. W. 567, 39 Minn. 461; *Valley Ry. Co. v. Lake Erie Iron Co.*, 18 N. E. 486, 46 Ohio St. 44, 1 L. R. A. 412.

While it is true that all of the grounds on which the carrier's recovery is here denied are under the authorities somewhat contentious in their applications, they afford such abundant substantial support for a decision by the state court that that court's decision denying recovery cannot be set aside in the Supreme Court of the United States. *Enterprise Irr. Dist. v. Farmers' Mutual Canal Co.*, 37 S. Ct. 318, 243 U. S. 157, 61 L. Ed. 644; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co.*, 41 S. Ct. 140, 254 U. S. 370, 65 L. Ed. 310.

For other cases see *Decennial Digests*, Carriers ⇨18(5), 188, 196, 200; Courts ⇨97(4), 100(1, 3), 367, 368, 394(10, 15); Judgment ⇨565; Payments ⇨84(1, 2), 85(2, 6); Statutes ⇨63.

Q. 10. The plaintiff, mortgagor, had an opportunity to sell advantageously the mortgaged land, if free from incumbrance. The mortgage had been partly reduced by payments on account, but the defendant, mortgagee, denied the payments and required plaintiff to pay the amount named in the mortgage before he would give a discharge, enabling the plaintiff to sell as desired. Plaintiff paid the whole amount under protest, and now sues to recover the excess as paid under duress. Is he entitled to recover?

A. No. Money secured by duress, unlawfully overcoming another's will, is recoverable in order to prevent unjust enrichment. *Astley v. Reynolds*, 2 Str. 916. What should be recognized as duress has varied. Originally only actual or threatened imprisonment or serious violence to the person constituted duress. *Skeate v. Beal*, 11 A. & E. 983. In later times, under the influence of equity, various forms of economic and social pressure have been recognized as duress, if sufficient to overcome the mind and will of a person of ordinary firmness, thus broadening, but still retaining, an objec-

tive standard. *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134; *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360), 88 Am. Dec. 76; 26 Harv. Law Rev. 255. In recent years there has been a tendency, especially strong in some courts, to go still farther, and recognize as duress any unlawful pressure which actually overcomes the will of the person affected, thus substantially going to a subjective standard. *Galusha v. Sherman*, 81 N. W. 495, 105 Wis. 263, 47 L. R. A. 417; *Silsbee v. Webber*, 50 N. E. 555, 171 Mass. 378; Pound in 28 Harv. Law Rev. 257-9.

The question whether duress is to be ascertained by objective or by subjective standards is usually concealed in the attempt to lay down rules upon certain classes of facts. Thus it is usually held that money paid on a claim to avoid legal proceedings is not recoverable for duress; no compulsion being recognized in the alternative of a court hearing. *Parker v. Lancaster*, 24 A. 952, 84 Me. 512. Threat of seizure of property, or actual seizure, however, are usually recognized as compulsion, because of the interference with immediate possession and enjoyment of the property owner. *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178. If attachment of goods in legal proceedings need not involve substantial interference with possession, as where it can be speedily dissolved by substitution of a statutory bond, there is said to be no duress. *Remington Union Metallic Cartridge Co. v. Feeney Tool Co.*, 115 A. 629, 97 Conn. 129, 18 A. L. R. 1230. Similarly, the mere assertion of an invalid lien on property, but not interfering with the owner's possession or use thereof, is not duress, justifying a recovery of money paid to discharge it, instead of litigating its validity. *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689.

On the other hand, many decisions, especially in the more recent years, under the guise of recognizing the presence of special circumstances, and considering whether parties are in equal position, are tending to apply subjective standards in ascertaining whether there was duress in any particular case. Thus, where the owner, on whose land an invalid lien is claimed, shows his necessity of borrowing money on the security of the land to stave off pressing creditors, money paid to discharge such lien is recoverable, as paid under duress. *Joannin v. Ogilvie*, 52 N. W. 217, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581. So money paid to avoid attachment of a store for an invalid claim is recoverable as paid under duress, where the attachment would, if levied, alarm other creditors, shut off further credit, and precipitate bankruptcy proceedings. *Weber v. Kirkendall*, 57 N. W. 1026, 39 Neb. 195. So

money paid on an invalid claim for water, to avoid summary cutting off of the water supply indispensable to continuance in business, is recoverable as paid under duress. *Panton v. Duluth Gas & Water Co.*, 52 N. W. 527, 50 Minn. 175, 36 Am. St. Rep. 635.

In the present case, manifestly there is no duress if tested by the objective standard. The plaintiff chose to pay, not because he had to, but because he desired to secure the benefit of an advantageous bargain. Thus, even under the subjective standard of duress, the authorities, while not discussing the question in these terms, have not gone farther than to allow recovery for money paid by compulsion in order to preserve the property, business, etc., of parties not in equal position with their oppressors. To that extent security of transactions has been sacrificed. Where parties stand on an equal footing, however, they can guard themselves at the outset, without the necessity of thus impairing the security of transactions for their protection. *James C. McGuire & Co. v. H. G. Vogel Co.*, 149 N. Y. S. 756, 164 App. Div. 173; 28 Harv. Law Rev. 332. So, where it is not a question of preserving what a party already has, but of enabling him to get more by making an advantageous sale, parties are regarded as standing in substantially equal position, and it is not thought worth while to impair security of transactions by reopening such settlements for the greater protection of either party. *Crittenden v. Royce*, 124 A. 215, 100 Conn. 617; 34 Yale Law J. 449.

For other cases see *Decennial Digests*, Contracts 95(1, 3); Deeds 71; Payment 82(2, 4), 86, 87(2, 3, 5).

REAL PROPERTY—TITLES

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Section

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2. Prescription.
3. Surrender.
4. Conveyance under the Statute of Uses.
5. Conveyance under Modern Statutes.
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14. Covenants for Title.
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16. Operation of the Recording Acts.

SECTION 1.—ADVERSE POSSESSION

Q. 1. A took possession of a vacant tract of land belonging to O, and occupied it as if he were owner. While still in possession, A died, leaving a will by which he devised that tract to his widow during her widowhood, and, in case of her death or remarriage, then to his son P in fee simple. The widow continued in possession and married D, who remained in possession after his wife's death. P now sues D to recover possession. What should be the result?

A. If A had been really the owner of the premises, instead of being merely an adverse possessor, it is clear that upon the widow's remarriage her right to occupy would have ceased, and P would have been entitled thereto. This would follow from the fact that the widow's interest under the will was a life estate, terminable upon marriage, the right of possession upon which event would be in the remainderman, the son, to whom his mother and stepfather would have to yield.

Are the rights of P any different because A was merely an adverse possessor? In other words, may D take advantage of the fact that there is some one, O, who has a better right to the premises than either P or D? Occupancy as owner in effect amounts to ownership, at least as against subsequent intruders. Possession is protected as against those who cannot show a better right to occupancy, and such subsequent intruders will not be permitted to rely upon the weakness in the position of the one disturbed by them. A con-

trary rule would lead to intolerable conditions. An orderly state of society demands the protection of possession to the extent indicated.

Applying these principles, then, to the facts presented, it seems clear that as to D the ownership and right of possession must be deemed to have been in A, regardless of the fact that O, if he were to proceed within the time limited by the statute, could oust A or any one claiming under him. As to D, then, A's will was perfectly effective, and P has succeeded to the present right of possession. Another way of putting the same view: If D had dispossessed A, the latter could have recovered from him, on the basis of the prior possession being protected against intermeddlers. This superior right in A against D has passed by A's will to P. P should therefore recover against D.

Asher v. Whitlock (1865) L. R. 1 Q. B. 1.

For other cases see *Decennial Digests*, Ejectment ⇨ 16.

Q. 2. A took possession of a parcel of land belonging to O, built a house thereon, and occupied and used the premises as if he were the owner for 22 years. A then left the house and land, telling O, that he (A) had no right or claim thereto. O later contracted to sell and convey the property to X, who objected to completing the purchase on the claim that O's title was not clear. O sues to quiet title. What result?

A. The facts stated indicate that A's possession was adverse, and it continued so long that under ordinary circumstances O would be barred by the statute of limitations of his remedies for recovery of possession. Being barred of his remedies, according to the usual American view, however it may have been under earlier statutes of limitations in England, O has lost his ownership and A has become owner.

If A became owner by his long-continued adverse possession, he cannot lose such ownership by mere renunciation. However ownership is acquired, it can be extinguished only in the ways recognized as sufficient under the law, for example, by death, deed, adverse possession in another, etc. Abandonment or renunciation is not one of these ways. This would indicate that the evidence as to A's statement would be inadmissible, and that O's suit should fail.

The statement made by A on leaving the premises might, however, be admissible as tending to show that at no time did A occupy with the requisite claim to acquire ownership under the statute of limitations. Occupancy, to ripen into ownership, must be under claim of title. This claim is ordinarily deduced from the fact and na-

ture of the possession. While the statement referred to would seem to be admissible, it is unlikely that it would alone be convincing as to A's lack of claim during the 22 years.

School Dist. No. 4 in *Winthrop v. Benson*, 31 Me. 381, 52 Am. Dec. 618. For other cases see Decennial Digests, Adverse Possession ¶109.

Q. 3. A went into possession of land, believing it to be part of the public domain, and intending by occupancy and observance of the other requisites provided by Congress for homesteading to acquire ownership from the government. In fact, but unknown to A, the land occupied by him belonged to O. After A had been in possession for more than the period allowed by the statutes of the state wherein the land was situated, O sued to recover possession. What, if any, defense has A?

A. If A has any defense on these facts, it seems obvious that it must be on the basis of the statute of limitations. O has in fact waited longer than allowed by the statute. But was A's possession of such character that the statute has protected him? Can his possession be considered as adverse, in view of the fact that he supposed the land to belong to the United States and occupied the tract because of that belief?

If the claim on the part of the occupant, in order that the possession may be deemed adverse, must be in defiance of the whole world, then truly the occupation of A in the situation presented was not adverse. It seems that some courts would hold to this view. The better view, and the one more commonly accepted, however, necessitates a possession that may be deemed hostile, not necessarily to everybody, but to the one whose rights are to be affected by the lapse of time. In other words, the possession must be such that it may be said not to be in subordination to the interest to be barred. A possession under such circumstances that there is a concession of a paramount right in another is not as to such other adverse, however it may be as to those as to whom the concession does not apply. Thus the possession of one who enters under a lease is not, without more, adverse to the lessor, though as to others it may well be. Likewise one who enters land under a contract to purchase may count the period of such occupancy as adverse to the true owner, though the possession is permissive, and so not adverse to the contract vendor.

Boe v. Arnold, 102 P. 290, 54 Or. 52.

For other cases see Decennial Digests, Adverse Possession ¶60(1).

Q. 4. A and O were neighbors, with lands adjoining. In building a line fence between O and himself, A by mistake as to the true line

inclosed a small strip of O's land. Thereafter each occupied to the fence, and indulged in the usual acts of ownership up to that line. On making a survey, the error in the location of the fence was discovered, and O sued A to recover possession of that part of his land occupied by A. The defense was based on the statute of limitations; the occupancy to the fence by A having continued for the statutory period. What should be the result?

A. The answer to this question depends upon whether the possession by A of O's land under the facts stated was adverse. A believed the land he occupied to be his. His mistake, however, did not limit his claim; he occupied the premises as his own. If it could be established that he limited his claim to the true line, if it should develop that the fence was not thereon, it would seem, then, that his possession was in subordination to O. In the facts given there is nothing upon which to judge the nature of A's claim, except the fact of occupancy treating the land as his own. This, at least *prima facie*, should establish the requisite claim, leaving it to be shown by the other side that the possession was in fact subordinate to O.

Although the foregoing seems the preferable view, and the one more generally accepted, it is considered by some courts that occupancy under mistaken belief of ownership cannot be adverse; there being lacking, it is said, the essential element of hostility. Under this view, to warrant a conclusion of adverse possession, A would have to show, either that he occupied his neighbor's land knowingly, or that he intended to claim as his own and for himself up to the fence, whether on the true line or not.

Situations such as the one presented by the facts stated are not to be confused with those in which there is an occupancy of the land of another under a mistaken belief, as, for example, the existence of a license, which operates to prevent a claim of title. Possession, however long continued, cannot ripen into ownership under the statute of limitations, if the possessor believed he was a licensee, though in truth there was no license.

Wissinger v. Reed, 125 P. 1030, 69 Wash. 684.

11 Mich. Law Rev. 57.

For other cases see Decennial Digests, Adverse Possession ¶65(1).

Q. 5. After occupying adversely land of O for ten years, A sold and conveyed the premises to B, who entered and occupied for four years more. D then dispossessed B, and remained in possession for seven years. O then sued D to recover possession, and the defense was based on the statute of limitations. Should D be protected in his possession?

A. Assuming, what the statement of facts appears to warrant, that the possessions of A, B, and D were all adverse, and further assuming that the time allowed by the statute for bringing actions to recover possession of land is not longer than 21 years, it would seem *prima facie* that O has waited too long. If the periods of possession of the three may be added together in bar of O's claim, then surely judgment must go against O. Are these successive possessions such that they may be tacked?

In one view, the cutting off of long-delayed claims to possession is based primarily upon a desire to bar stale demands; only incidentally, on this theory, is the possessor's claim of ownership protected and quieted. It is said that courts are established as agencies for the administration of justice, and that it is too much to expect courts to mete out justice if complaining parties are allowed to wait so long that the real facts become conjectural; in the interest of orderly and effective administration of justice, then, statutes of limitations are enacted. Thus the emphasis should be put upon the staleness of the demand claimed to be barred by delay. Applying this view to the facts stated, the conclusion seems inescapable that O has waited too long, and D should not be dispossessed, at least at O's suit. This conclusion would be reached by the English courts, and apparently in a few American jurisdictions.

The contrary view, generally prevailing in the United States, places the emphasis upon protection of a long-continued assertion of ownership; it is said that the law of adverse possession is in the interest of quieting titles. On this theory it is obvious that, for one adverse possessor to gain strength from the occupancy and assertion of right by a prior possessor, the one who holds later must somehow take in succession to the earlier occupant; there must be a privity in interest, such as is established, for example, by a voluntary passing on by one to the other of whatever rights the transferor may have. Applying this view to the facts here, it is seen that the periods of occupancy by A and B may be added, but that by D may not. Since the one claiming the benefit of the statute is D, who came in as a stranger, not as a successor in interest to B, only the last seven years may be counted in D's favor against O. This result is frequently explained rather artificially on the theory that upon D's dispossession of B, though there never was a moment of time during which the land was without an occupant, the possession of O constructively reattached momentarily, the wrongful entry of D thus being in theory a dispossession of O. If there really was a period of

vacancy between successive independent wrongful possessors, then in either view the periods of occupancy could not be tacked.

Wishart v. McKnight, 59 N. E. 1028, 178 Mass. 356, 86 Am. St. Rep. 486.

Illinois Steel Co. v. Paczocha, 119 N. W. 550, 139 Wis. 23.

Ballantine, Title by Adverse Possession, 32 Harv. Law Rev. 135.

For other cases see *Decennial Digests*, Adverse Possession ⇨43(2, 3, 4).

SECTION 2.—PRESCRIPTION

Q. 6. In 1870 the owner of a tract of land on a corner erected a building, which occupied the premises to the street lines. The basement was used as a store, and as a means of access there was a stairway leading from the street to the entrance to the store-room. The opening for this stairway was 50½ feet long, and extended into the sidewalk 5.67 feet. The street side of the areaway was laid up to the level of the sidewalk with a wall, which was crowned with a stone coping. On top of this coping was built an iron fence. This stairway had been used continuously since 1870; there being no evidence of any understanding regarding it between the city and the owners, nor of any objection ever being made by the city. In 1924 the city authorities notified the then owner of the building to remove the stairway. A bill was filed by the owner to enjoin the city from enforcing the order. What are the rights of the parties?

A. The stairway being within the limits of the street, it would seem that the city was entitled to have it removed, unless somehow the owner has acquired as against the city a right to keep the stairway there. The only theory on which such right might have been acquired, on the facts, appears to be prescription. Ordinarily lapse of time will not be allowed to prejudice the rights of the public. This includes the governmental subdivisions, such as cities. Occasionally by specific statutory provision, or possibly by decision, the normal rule, as stated, is not followed, and long-continued possession or user may ripen into rights effective even against public corporations, such as the state, counties, and municipalities. If the usual rule applies here, the owner has no chance of success; but, if this problem arises in a state where the prescriptive period may run against a city, another question must be considered.

As possession, to ripen into ownership under the statute of limitations, must be adverse, so user, to ripen into an easement by prescription, must be hostile, or, what is another way of expressing the same idea, adverse. The user in the case presented began more than 50 years ago; there is no evidence apparently that per-

mission was ever asked so to use the street and none given; on the contrary, the user seems to have been as if the owners and occupants of the building had a right to have the stairway there. Not uncommonly it is laid down that, when such user is shown to have continued for the prescriptive period, and there is no evidence in the way of explanation of its beginning, it is to be presumed that the user was as of right, viz. adverse.

Engleman v. Kalamazoo, 201 N. W. 880, 229 Mich. 603.

For other cases see *Decennial Digests*, Easements $\S$ 8(1), 36(1).

Q. 7. A owned and occupied land through which flowed a stream. He erected a dam for the purpose of creating a head of water to run a mill. This obstruction in the flow of the water resulted in the flooding of a large area of land upstream, some belonging to A and some to X. Though A never secured any permission from X, this pond was continued for 25 years, during which time a number of people bought from X small tracts abutting the pond, and the district became rather attractive for summer residences. The operation of the mill became unprofitable, and A discontinued operations. The dam was allowed to get out of repair, and in a period of high water it washed out. This left the summer cottages considerably removed from the water, and the owners insisted, either that A rebuild the dam and keep it there, or that A at least permit them to do so. A refuses either to rebuild or to permit the cottage owners to enter upon his land. They sue to secure alternative relief on the lines stated. What result?

A. In so far as there has been a use by A of the lands of others by flooding, it would seem that an easement to flood such lands has been acquired by prescription. The use has been open, continuous, and apparently as of right for more than the prescriptive period, and nothing is indicated as to possible difficulties by reason of the servient land being at any time owned by persons under disability. However it may be as to an easement acquired by A, it is extremely doubtful whether any right in the nature of an easement has been acquired by lapse of time by the upland proprietors against A, to compel him to continue the flooding. No easement can be acquired by prescription, without acquiescence on the part of the servient owner. By acquiescence, by the better view, is meant the failure to take steps either to interrupt the user or to prosecute a cause of action therefor. Here there has been no user *against A*; hence the prescriptive period has not run.

Conceivably it might be urged that by long-continued mutual acquiescence in the artificial water level there is a species of mu-

tual estoppel to return to the natural state of the water. Estoppels of the kind here urged, however, rest upon one having changed his position, relying upon some representation or holding out by the one estopped. It is difficult to see how A's construction and operation of the mill and dam, thus ponding the water above, could be looked upon as an indication of perpetual continuance, upon which the upper owners would be warranted in relying.

Kray v. Muggli, 86 N. W. 882, 84 Minn. 90, 54 L. R. A. 473, 87 Am. St. Rep. 332.

Goodrich v. McMillan, 187 N. W. 368, 217 Mich. 630, 26 A. L. R. 801.

For other cases see *Decennial Digests, Waters and Water Courses* 58, 167(1).

Q. 8. After A had been making an open, adverse use of a way over the land of X for 10 years (the prescriptive period being 15 years), X wrote a letter to A, advising him that the use had been noticed, and that X had no objection thereto; on the contrary, he gladly gave A permission so to use the way. No notice was taken of this letter by A, and after there had been the full prescriptive period of use A sued to quiet his right to the right of way. What result? Suppose X, instead of extending permission, protested?

A. User, to ripen into an easement, must not only be adverse, but must be continuous, for the prescriptive period. A break in the continuity may come either from a voluntary cessation by the claimant or by an interruption by the servient owner. If the user begins under permission, express or implied, it can never ripen into a prescriptive right. Here by hypothesis the user for 10 years was adverse. If A had asked for the permission, or had acceded to it when offered, no doubt the user no longer would have been adverse. But there is nothing in these facts to indicate that A accepted the tendered permission; it would, then, seem proper to conclude that ever thereafter the user was adverse, as before.

Not infrequently it is asserted that protestations by the servient owner will operate as an interruption, for it is claimed that this shows lack of acquiescence. It would seem that mere protests should not amount to a break in the continuity, any more than an unsolicited and unaccepted tender of permission. Acquiescence in this connection means, not a state of mind, but a failure to act. An action in court is the clearest sort of interruption. The doing of acts which, if the claimant of the easement then really owned the right asserted by the use, would give such claimant a cause of action for interference, also amounts to an interruption. Protests alone ordinarily would not warrant such an action. The courts that hold otherwise on this are led astray by the notion of the pre-

sumed grant, on which prescriptive rights are commonly based. It is argued that the protests negative the presumption of a grant. The answer to this is that the grant is a pure fiction, one that was indulged in to bring the law of prescription more nearly up to date.

Lehigh Valley R. Co. v. McFarlan, 43 N. J. Law, 605.

Dartnell v. Bidwell, 98 A. 743, 115 Me. 227, 5 A. L. R. 1320.

For other cases see Decennial Digests, Easements $\S$ 7(6).

SECTION 3.—SURRENDER

Q. 9. T was in possession of premises under a written lease from L for ten years, of which only three had elapsed. On agreement between L and T to end the relationship, the signatures were torn from the written lease, and shortly thereafter T vacated the premises. Disappointed in securing a new tenant, L now claims rent according to the terms of the lease from T for periods following T's removal. What are L's rights?

A. By the lease from L to T, the latter acquired an estate for ten years in the premises; he became, so to speak, owner thereof for ten years. This interest he can get back to L only by a conveyance, in a manner complying with the requirements of the law. For a conveyance of such an interest between such parties the appropriate mode is a surrender. The effort of the parties in this situation was, in short, to effect a surrender by mutual agreement, followed by mutilation of the lease, and the question is whether, on such facts, a surrender may be found. If there was no surrender, T was still owner of his interest, a lessee of the premises.

At common law the only surrenders that had to be by writing were those of incorporeal interests. As to such a writing was essential, because, in truth, the conveyance of such interests had to be by deed. The requirement of a written document in surrenders comes from the celebrated Statute of Frauds, which contained a provision in substance that no interest in land may be created, transferred, or surrendered, except by a properly executed writing or by act and operation of law. This requirement is found in similar language in most, if not all, of our states. On the facts given there was no surrender in writing; rather there was the destruction of a writing, and, however clearly the intention of the parties may thus appear to have been expressed, one cannot find the essentials of a surrender, unless it be by operation of law.

If, after T left the premises, L had resumed possession, no doubt there would have resulted a surrender by operation of law; for, if L's resumption of possession was lawful, the leasehold interest

in T somehow must have been gotten out of the way. Unless, then, there was an actual change of possession in pursuance of the oral agreement, and the facts as stated indicate there was not, the interests in L and T continued as before. In theory the rent was incident to L's reversion, which has not been destroyed, and the rent should be recoverable.

Tabor v. Tabor, 99 N. W. 4, 136 Mich. 255.

Ward v. Lumley, 5 Hurlst. & N. 87.

For other cases see *Decennial Digests, Deeds* ¶181.

Q. 10. Premises were under lease from L to T for 10 years at a rental of \$1,000 per annum. When there were 8 years of the term left, by mutual agreement a new lease was executed by L to T, the rental being \$1,200 per year, and the tenancy terminable by either party at any time upon giving 30 days' notice. After one year under the new lease had gone by, L gave T the stipulated 30-day notice, at the expiration of which T refused to leave. What are L's rights as to forcing T to vacate?

A. Under the second lease, which appears to have been the voluntary, deliberate act of the parties to the first lease, there was created a new estate or interest, inconsistent with the continuance of the first. That T cannot be L's tenant, holding the unexpired portion of a 10-year term, and at the same time hold under the second lease, which created an estate at will, seems clear. The second estate having been deliberately created, it must be assumed that the first one has been extinguished; it must have gone back to the reversioner. This is one of the simplest situations out of which arises a surrender by operation of law. If the second lease for some reason had not resulted in creating the interest obviously intended, the result no doubt would be otherwise. As it stands, L should succeed in his attempt to oust T.

Evans v. McKanna, 56 N. W. 527, 89 Iowa, 362.

For other cases see *Decennial Digests, Landlord and Tenant* ¶109(1).

Q. 11. L, owner in fee of premises, leased them to T for a term of 99 years. T went into possession and occupied the property for 5 years. He then negotiated a new lease with L for 99 years at a lower rental, and this was executed by both parties. After T had paid rent for several years on the new basis, L died and his widow sought to oust T. This woman, unknown to T, had married L during the 5 years while T was holding under the first lease, and she had not signed the second lease. If it be assumed that under the law of the state a lease by a husband alone is ineffective

against his widow, what should be T's rights to continue the possession as against the widow?

A. If T's right to the possession depends upon the second lease alone, on the assumption stated, it seems clear that he could not prevail. His hope lies in being able to rely again upon the first lease. The execution of the second lease by L, and the acceptance thereof by T, can be effective only by considering the first term out of the way. The second lease was not void; if it had been, it could be entirely ignored, and it would have had no effect on the then existing term. The second lease, at most, was subject to avoidance by T; it did not with certainty confer upon him the intended interest, and he took it in ignorance of L's change in position by his marriage. If L had lived the 99 years, there would be no question; for T would have had his expectations under the second lease realized.

Until L's death the tenancy was under the second lease, and that means that the first term had been gotten out of the way by a surrender by operation of law. But the new lease, not creating the interest anticipated the surrender of the first term, must be deemed subject to a condition nullifying it, if the second lease is avoided or fails to secure T in the expected interest. Surrenders by operation of law, no more than surrenders in fact, need be absolute; here the condition is implied, in order to get at a just result in the protection of T.

Zick v. London Tramways, Ltd., [1908] 2 K. B. 126.

For other cases see *Decennial Digests, Landlord and Tenant* ¶109.

SECTION 4.—CONVEYANCE UNDER STATUTE OF USES

Q. 12. O, seised of Blackacre in fee, executed a document as follows: "In consideration of one dollar I hereby transfer Blackacre to P and his heirs, to have and to hold the premises, in trust, however, for C and his heirs." What would be the effect of this transaction—

(a) In 1530?

(b) In 1540?

(c) In 1800?

A. The transaction appears to be a bargain and sale. There is the requisite valuable consideration recited, and there are words sufficient to show the intention. It is not necessary to a bargain and sale that either of the words "bargain" or "sale" be used. It is a bargain and sale to P in fee simple, with an attempted limitation of a trust or equitable interest to C. Since a bargain and sale

independently of the Statute of Uses created only a use, or equitable ownership in the bargainee, the facts as stated amount to a giving of the equitable ownership to P and his heirs by force of the bargain and sale for value, followed by a further gift of the equitable interest to C in fee. How can the equitable ownership, whether it be called a use or a trust, be given to one and at the same time to another independently? The attempt to give the equitable ownership to C, then, would seem to be inconsistent with the clear giving of the same interest to P. One or the other must give way. The provision giving it to C, being superadded, would seem on a sound construction to be repugnant; hence void and ineffective.

(a) In 1530, then, the use or equitable ownership would be in P in fee, the legal ownership and seisin in fee being in O. P's interests, being purely equitable, would be cognizable and protected only in a court of equity.

(b) In 1540, the Statute of Uses being then in effect, the equitable ownership in P is turned into a corresponding legal estate. This is a proper case for operation of the statute, which provides in effect that, whenever one is seised of land to the use of another, the latter shall be deemed seised and possessed of a corresponding legal estate. Here O was seised to the use of P in fee. As indicated above, C had nothing; hence his situation is the same in 1540 as in 1530. It is assumed that the bargain and sale from O to P was in accordance with the Statute of Enrollments.

(c) In 1800, in a court of equity, it would be held that P was legal owner by force of the Statute of Uses, as stated above; but now the limitation to C is no longer looked upon as void, but as creating a trust.

As time went on after the Statute of Uses, no doubt gradually, the fact that a bargain and sale operated as a conveyance of legal ownership by two steps—(1) the creation of the use; (2) plus the action of the statute thereon—became obscured. It is natural that a bargain and sale should have come to be considered as simply a convenient mode of effectuating a change in legal ownership. In such view, it would not appear, as it did earlier, that there were really two inconsistent limitations of the equitable ownership, and a court of equity might reasonably compel P to observe C's interest. Thus the second use, in the case of a use upon a use, came to be enforced as a trust. If it be suggested that in this view the Statute of Uses should operate to draw the legal ownership from P to C, the answer is that it had long been settled that the second use was unaffected by the statute.

Q. 13. The owner in fee of premises desires to dispose thereof in such way that A shall become legal and equitable owner in fee simple, but, if A should die without leaving children living at his death, then the legal and equitable ownership is to vest in B and his heirs. Point out how this could be done—

(a) In 1530.

(b) In 1540.

A. The desire of the landowner here is to give a fee simple to A, with a contingent future estate to B and his heirs. At common law there were difficulties, due chiefly to the dominance of seisin in connection with land ownership, in the way of creating future estates. Transfers of freehold interests, normally in the early days accomplished by livery of seisin, could be made, for example, only to take effect at once. Seisin, because of the tenurial concept, could never be in abeyance, and livery of seisin in its very nature was a present transaction. Another common-law doctrine bearing on the scope of possible future estates was the necessity of a re-entry to bring to an unnatural end an estate created. This re-entry cut off the seisin, but thereby it became vested in the re-enterer.

Thus, if a common-law conveyance, for example, a feoffment, were made to A and his heirs, but on the happening of some event the estate to be in B, on the happening of the specified event A's estate in fee could be ended only by a re-entry by the feoffor or his heirs. But, as stated, the seisin is thus in the re-enterer, and a new livery would have to be made to B. Therefore, if B ever got anything, it would be by a new transfer, and not by virtue of the original conveyance to A, etc. The result of it all was that remainders could be limited at common law to take effect only on the *natural* termination of the particular estate.

When the use, however, had developed to the point of equitable ownership, out of which various estates could be carved it was recognized that, since seisin had nothing to do with the use, it was possible to create therein future estates, unknown or impossible to the common law. For example, by a feoffment to X and his heirs, to the use of A and his heirs, but on A's death, without leaving living children him surviving, then to the use of B and his heirs, on the happening of the event the use could shift automatically to B.

(a) In 1530, the use was still merely equitable ownership, and the only way to create legal ownerships was by common-law con-

veyances. At that time, therefore, it was impossible to create legal ownerships according to the desire expressed.

(b) In 1540, equitable ownerships being susceptible of being converted under the Statute of Uses into legal ownership, if the desired estates can first be created in the use, the Statute of Uses, acting thereon, may turn them into corresponding legal interests.

If, then, after the statute, a common-law conveyance were made to X and his heirs, to the use of A and his heirs, but, in case A shall die leaving no living children surviving, then to B and his heirs, the equitable estates of A and B are turned into corresponding legal estates, and B's interest is recognizable at law, as well as theretofore in equity. The same result, of course, could be attained by creating the equitable estates in A and B by way of a bargain and sale, or covenant to stand seised. The vital point is that the Statute of Uses simply took uses as they were, and in the situations contemplated by the statute converted them into corresponding legal estates. In this way the possible field of future estates was much enlarged.

Q. 14. By agreement under seal between O and R (the brother of O), it was agreed that a certain tract of land therein described, belonging to O in fee, should become the property of R and his heirs on O's death. After the death of O, claim to the premises was made by R, and the children of O contested. What result?

A. The agreement between O and R, in its provision for disposition of the land on O's death, has one of the earmarks of a will. However, it does not appear that the instrument was executed as wills must be; so R's claim on that basis is rejected. It is perfectly evident that O intended R to have the ownership, and, if the instrument cannot effectuate the intention of the parties in one way, perhaps it may in another. The parties being near relatives, and the instrument being under seal, coupled with the further fact that O seems to have been seised in fee, at once suggests considering the document as a "covenant to stand seised."

Prior to the Statute of Uses, R at most could have had no more than an equitable interest, the use; for on the facts stated there was no effective conveyance that could operate by force of the common law to vest legal ownership in R. Besides, the estate in R was not to arise until the death of O, and it was a firmly settled rule of the common law that by a conveyance operating under the common law no freehold estate could be limited to arise in futuro. But there was no difficulty in providing for uses to spring

up in the future. Prior to the statute, then, O would be deemed seised, as before, but to the use of R in fee to arise on O's death. This is the type of situation on which the Statute of Uses operates, turning the use into a corresponding legal estate. Since the statute, then, assuming it to be operative in the jurisdiction where this land is, R would succeed.

Murray v. Kerney, 81 A. 6, 115 Md. 514, 38 L. R. A. (N. S.) 937.

For other cases see Decennial Digests, Deeds 24.

Q. 15. By A's will, Blackacre and certain shares of stock in a corporation were devised and bequeathed to T and his heirs, "to have and to hold the same forever, Blackacre to be leased on the most advantageous terms, and the rents therefrom and the dividends from the stock to be collected by T and turned over from time to time to C and his heirs." By contract C agreed to sell the land and stock to P, who when he examined the title found the situation as stated. He then refused to perform, on the ground that C could not give legal title, and C sues for breach of P's contract.

A. If C's contract called for getting the legal ownership to P, it seems that the contract was impossible of performance by C, and P should not be liable for failure to do his part. By A's will, legal ownership clearly went to T, but for the benefit of C, who would, therefore, stand as equitable owner. There has been no transfer from T to C, and, unless the latter has acquired legal ownership by the Statute of Uses or similar legislation, C was left with a mere equity.

It will be observed that T did not merely hold "for C"; he was to lease the premises "advantageously," and after collecting the rents and dividends turn them over to C. This imposed upon T an active duty. The Statute of Uses has not been considered as "executing" active uses or trusts. The reason usually given is that, if the legal ownership were drawn out of the trustee, he could not perform the duties imposed upon him. This may be a sufficient reason, but historically the true explanation probably is to the effect that active trusts and passive uses, the latter being considered the beneficial ownership, were looked upon, even long before the statute, as distinct, and the intention of Parliament was to affect only the passive, equitable ownership, by drawing to it the legal ownership, leaving the case of the active trust just where it had been—an interest or claim protected against the trustee in chancery.

As to the shares of stock another reason contributes to the same result. The statute converted equitable ownership into legal only when some one was "seised" to the use of another; there being no seisin in the case of personal property, T would continue legal owner of the stock for the equitable benefit of C.

Ure v. Ure, 56 N. E. 1087, 185 Ill. 216.

For other cases see Decennial Digests, Trusts ¶131.

Q. 16. A permitted his daughter, C, to live on Blackacre, which by A's will was devised to C. A bought an adjoining tract and had it deeded to himself. He then permitted C to occupy that also, allowing her to make use thereof, to lease it, collect the rents, etc., as if she were the owner. Shortly before her father's death, C wrote to him, asking for financial assistance. He replied by letter, saying, *inter alia*: "I have given you the Leazenby land [the adjoining tract], and it is yours forever for your own personal benefit, and I think that is help enough now." After his death a son, who claimed as residuary devisee under a will made before A acquired the Leazenby tract, claimed that land. C brought action to quiet title in her. What result?

A. Unless an instrument so informal as the letter from the father to the daughter may effectuate a conveyance, it would seem, superficially, at least, that A died the owner of the premises in dispute. Aside from the informality of the document, it is gravely questionable whether the language therein is sufficient to accomplish a transfer. There is no conveying expression, nothing to indicate a present transferring intent; rather the language indicates a recital of something already done.

It may well be argued, however, that by the letter the father declared himself a holder of his legal ownership for the benefit of C, thus constituting himself a trustee for her benefit, in a way not unlike a covenant to stand seised, though here there was no formal covenant. The letter appears to contain sufficient to satisfy the Statute of Frauds, which requires trusts to be manifested or declared by a writing. If, then, owners of land may by voluntary declaration constitute themselves trustees for others, there would seem to be no objection to a conclusion that A was holding in trust for C. As to the efficacy of such voluntary declarations there are diverse views, though probably the notion that they are effective to create a trust is coming to be recognized as preferable.

If it may be concluded that the declaration of trust was effective, there being no active duties of management, etc., imposed upon the trustee, the Statute of Uses or its equivalent should turn C's

equitable interest into a corresponding legal estate. In this view, then, C should prevail over her brother.

Neal v. Bryant, 235 S. W. 1075, 291 Mo. 81.

McWilliams v. Britton, 188 N. W. 44, 48 N. D. 975.

13 Ill. Law Rev. 667.

For other cases see Decennial Digests, Trusts $\S$ 44(1), 131.

SECTION 5.—CONVEYANCE UNDER MODERN STATUTES

Q. 17. By will, upon the death of the owner, certain lands in California became the property of S, a resident of Germany. S had a son, T, living in Idaho, to whom she wrote frequent letters. The letters written shortly after S acquired ownership expressed an intention that the California property should go to the son. Then came a letter stating: "I am giving you that property, and you now send me the remainder of the cash, and then you have a nice share." Thereafter the letters contained language showing that the mother looked upon the son as the owner. During the war the Alien Property Custodian seized the California land as the property of an alien enemy, S. The son, T, who was a citizen of the United States, sued for the return of the property and an accounting, claiming to be the owner.

A. The letters clearly indicate a donative intent and express a transfer of ownership. Are they effective? The quoted letter contains no description of the premises, so alone it could not operate as a conveyance. Perhaps the other letters, or taking them all together, the connection between them being shown by their terms, identify the property. That it must be identified is fundamental.

The letters are not under seal; hence do not amount to a deed in the technical sense. But quite generally it is now provided that conveyances even of interests in fee may be made without a sealed instrument. This has been a statutory development, and varies in the states. Also there is nothing indicating that the transfer was to the son "and his heirs"; hence it may be thought that, other difficulties aside, no more than a life estate was given. This requirement, too, has been widely modified, and now quite commonly statutes provide that conveyances shall be deemed in fee, unless a contrary intent appears.

Again, there appears to have been no attestation or acknowledgment. These, however, are usually not essential to an effectual conveyance; ordinarily they are prerequisite to effective recording. Only rarely are they required to make a good transfer as between the parties. All in all, it may be that the son acquired own-

ership, so that he should prevail as against the Custodian. The answer depends on the status of the California law.

Metzger v. Miller (D. C.) 291 F. 780.

For other cases see *Decennial Digests*, Deeds $\S$ 26.

SECTION 6.—DELIVERY OF DEEDS

Q. 18. O, the owner of several parcels of land, desirous of making arrangements for division of his property among his children, had deeds prepared by which each child might become owner of the allotted portion. In the presence of the scrivener O handed one deed to G, one of the children, saying "That one is yours; how do you like it?" After G had read the deed, O took it back and kept it, along with the others, in a tin box. Later on O made out a new set of deeds, by one of which he purported to convey the tract described in the earlier deed to G to the latter's sister, S. This deed was recorded by O, and turned over to S. After O's death, G claimed the land under her deed, and S sued to quiet title. Should S get the desired decree?

A. S being a mere donee, she could not hope to prevail, if the deed to G became operative at the time O handed it to her. The only question, on the facts stated, regarding the effectiveness of the deed to G, is in respect of delivery, for no instrument becomes a deed, and effective as a conveyance, until delivery. The deed is the fruition of negotiations and preparation, sometimes long drawn out. Until delivery the whole matter is merely preparatory; delivery is the final step that marks the passing from preparation to accomplishment, and it may be looked upon as the manifestation by word or act, or both, on the part of the executing party, that at least as to him a legal act has been accomplished.

Whether there has been such manifestation is, of course, a matter of evidence. No doubt the most common way of showing the completion of the transaction—delivery—is by handing the instrument to the grantee, or to some one for the grantee. A deed in the hands of the grantee *prima facie* has been delivered; in the hands of the grantor, presumptively it has not. These presumptions, however, are not conclusive. If in the problem case, on all the evidence, the fair conclusion is that the instrument was handed to G, not to be operative, but only to read, there has been no delivery. If, for instance, the scrivener were to testify that it was O's purpose to keep the deeds from being operative until his death, or until he did some other act, such testimony, if in the form of declarations by O, would clearly be admissible, and, it is believed,

would be convincing that there had been no delivery. On the other hand, if it were to be concluded on the whole showing that O handed the deed to G as a manifestation of his intention that the thing was finished, a legal act accomplished, it would have to be held that the deed was good and ownership vested in G.

Sample v. Geathard, 117 N. E. 718, 281 Ill. 79.

For other cases see Decennial Digests, Deeds $\S$ 56(2).

Q. 19. Parrott, owner of lands and personalty, had a scrivener draw a will disposing of the personal property and deeds in favor of children covering the land. After the instruments had been prepared, Parrott signed them and had witnesses sign the attestation clauses. The deeds were also acknowledged. He then handed the papers to the scrivener, with directions to place them in the custody of the cashier of the village bank, "with directions that said deeds should be safely kept and delivered, at the decease of said Parrott, to his heirs." The cashier placed the instruments in an envelope marked "John Parrott, Private Papers." After the death of his wife, Parrott called upon the cashier for the papers, and the cashier gave them to him. After making a new will, all the documents were returned to the cashier. On Parrott's death, the deeds were handed over to the grantees. Were the deeds effective?

A. The only possible question appears to be one of delivery. The deeds were handed to a third party for the grantees, and this would indicate an effective delivery. But the cashier, the custodian of the papers, permitted the grantor to retake them. Does this not indicate that the grantor had not divested himself of control over the instruments? Could he not have destroyed the deeds while they were in his hands?

Whether the grantor divested himself of control should be tested as of the time of the deposit with the cashier. Did he then retain any strings on the deeds? According to the stated facts, he sent the documents to the cashier, to be held for the grantees, and to be delivered to them on his death. The cashier might very well have said to him, when he asked for the papers: "You may have the will, but the deeds I am charged to hold for the grantees." That, in truth, is what he should have done. The fact that the grantor was improperly allowed to have the deeds cannot prejudice a delivery already made and effective.

Patrick v. Parrott, 110 N. E. 725, 92 Ohio St. 184.

Doe d. Garnons v. Kinglet, 3 Barn. & C. 671.

For other cases see Decennial Digests, Deeds $\S$ 61.

Q. 20. A deed covering certain lands of O was fully prepared for him. After signing and sealing the instrument, he handed it to X, with the direction: "In case I die without having executed a will, deliver this to the grantee named therein." Upon O's death, intestate, X handed the deed to the grantee, who had it recorded. Heirs of O contest the effectiveness of the instrument as a conveyance. What result?

A. If the instrument had been turned over to X, to be given to the grantee on O's death, without more, no doubt there would have been a delivery, and the grantee would have acquired ownership. Whether such ownership would vest in the grantee *before* the death of O is not necessary to be considered here. It would have made no difference that the instruction to X was in such terms as "in case I die"; for, while the language imports a condition, there really is no contingency involved. Equally clearly, it seems, if O had said to the custodian, when he handed the deed to the latter, "Deliver this to the grantee on my death, if I do not change my mind in the meantime," there would not have been an effective deed, even though no countermanding directions were ever given by X. To be effective in such situations as these, the deed must have been *delivered* when turned over to the custodian. If there was no delivery then, the ultimate delivery by the custodian would be by him in an agency capacity, which could not be done after O's death.

The facts stated appear to present a case falling rather within the second type above mentioned, where the grantor may recall the instrument upon changing his mind. Such change in mind is wholly optional with O, and, generally speaking, the execution of the will is equally within his volition.

Ruggles v. Lawson, 13 Johns (N. Y.) 285, 7 Am. Dec. 375.

Williams v. Schatz, 42 Ohio St. 47.

For other cases see Decennial Digests, Deeds ¶61.

Q. 21. A deed, complete on its face, was left by O, the grantor, with X, the cashier of a bank, with the explanation that the instrument was so left pursuant to an agreement between O and the grantee, whereby the latter had agreed to purchase and O to sell the land described in the deed. X was instructed to hold the instrument and deliver it to the grantee, if payment of the purchase price were made by the latter to X for O's credit on or before April 1st next, as agreed; but, if the payment was not forthcoming, then the deed was to be returned to O. Payment was made within the allotted time, and the deed was demanded. X refused to turn over the deed, because O had sent notice to withhold the

deed and return it to him. In an action by the grantee against O and X to get the deed, what are the parties' rights?

A. There is some authority for the view that a deed deposited in escrow with a custodian, as was the instrument in this case, is subject to the grantor's recall at any time prior to performance by the grantee, unless there is a binding, enforceable contract of sale of the land involved between grantor and grantee. This is believed to be an erroneous view, for whether the grantor may recall the deed depends upon whether he has made "delivery," not upon the existence or nonexistence of a binding contract.

Was there a delivery on these facts? Did O keep any strings on the deed? Upon performance by the grantee, the instrument was to be at once fully operative, and if the grantee had performed, without any countermand by the grantor, he would have been entitled to the deed, without any further act by the grantor. The delivery, then, must be effectuated, if ever, upon the turning of the deed over to the depository. While the grantor continues the owner of the premises until performance by the grantee there has been created, in effect, in the latter, a power to divest the grantor of his ownership. The fact that O might be entitled to have the deed again, upon the grantee's failure to perform, does not affect the conclusion as to delivery, for whether O shall ever be entitled to the deed depends in no part upon his own volition, but upon due payment by the grantee. It would seem, then, that on principle the countermand by O should be treated as ineffective, and the grantee should have the deed turned over to him upon payment.

Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427.

Farley v. Palmer, 20 Ohio St. 223.

For other cases see Decennial Digests, Escrows 1; Specific Performance 17.

Q. 22. The owner of lands made out a deed thereof in favor of his wife. He handed the document to X, a disinterested third party, saying: "I am about to take a trip to California; with this railroad strike going on, anything may happen to me; if I should meet with a fatal accident on the journey, I want this deed to go to my wife." On the journey the grantor met death in a wreck and thereupon X turned the deed over to the grantee. Heirs of the deceased claim the deed was of no effect, and bring suit to establish their claim. What result?

A. Was the deed effectively delivered? Under the directions to X, the grantor was to have the deed returned to him by the custodian in the event of the grantor returning safely; but the fact that in some contingency the grantor may be entitled to the instrument

does not necessarily negative delivery. The escrow cases show this, for there the grantor may resume control of the document, if the grantee fails to perform the condition precedent. In that type of case, delivery may be reasonably concluded, because the control of the event is in the grantee. If the control of the event were within the power of the grantor, the conclusion would seem clear that there had been no delivery. In the facts here presented, the event upon which the grantor may again have the instrument is not within the control of the grantee, as in the escrow situation, nor is it within the grantor's power. Logically it would seem that in the present case, since the event is outside the grantor's control, there has been a delivery, just as in the escrow case. However, because of the practical difficulties, the operation of the deed affecting the title to land being made to depend upon the happening or nonhappening of an event, provable ordinarily by parol evidence only, courts have been reluctant to reach what might appear to be the more logical conclusion, and, generally speaking, it may be said that in the case presented the heirs should prevail.

The case is not to be confused with the delivery to a third party, to go to the grantee "on the death" of the grantor. There no contingency is present; it is only a matter of time.

Long v. Ryan, 137 P. 29, 166 Cal. 442.

Ballantine, When are Deeds Testamentary? 18 Mich. Law Rev. 470.

For other cases see *Decennial Digests*, Deeds 61.

Q. 23. The owner of lands prepared a deed thereof in favor of his wife and handed it to her, saying: "If I fail to survive this operation, the property is yours; have the deed then recorded." He recovered, and asked to have the deed returned. Upon the wife's refusal he sued to have the deed ordered delivered back to him. What result?

A. If the instrument had been turned over to a third party with such instructions, the result would be clear; the deed should be returned. Should the result be affected by the fact that the document was handed to the grantee, instead of to a mere custodian?

Deeds in the hands of the grantee are presumptively delivered; but the presumption is rebuttable, it being permissible to show, for instance, that the grantee was intrusted with the deed only for purposes of inspection. If it may be shown by parol that a deed in the hands of the grantee was never to be operative, unless something more was done, it would seem that it should be permissible to show in the same way that the instrument was to be effective only on the happening of some event, and some courts no doubt would so hold. In many jurisdictions, on the other hand, largely under the influence of some very early English cases, the view prevails that it is not

permissible to show by parol that a deed in the hands of the grantee was to be operative only upon the happening of an event that might or might not happen. If there is any justification for this view today, it must be in the reluctance to open the operation of deeds to land to the uncertainties of parol evidence.

Wipfler v. Wipfler, 116 N. W. 544, 153 Mich. 18, 16 L. R. A. (N. S.) 941.

22 Mich. Law Rev. 479.

Ballantine, *Delivery in Escrow and the Parol Evidence Rule*, 29 Yale Law J. 826.

For other cases see *Decennial Digests*, Deeds ¶60.

Q. 24. After making a deed of certain lands in favor of X, and delivering it to C, to hold until O, the grantor, died, and in that event to be delivered to X. O married W. Upon O's death, the deed was handed to X and W now claims to be entitled to dower. What are her rights?

A. At common law, speaking generally, wives were entitled to dower in all lands of which their husbands were seized of an inheritable estate during the marriage relation. Assuming that O owned the lands in question in fee prior to delivery of the deed to C, the question arises whether O's relation to the land thereafter was such that his wife should be endowed. Frequently courts have said that deeds delivered as was the one in the case stated operate to vest ownership in the grantee at once, leaving the grantor with what in effect amounts to a life estate. Rarely, however, has this been really decided, and it seems more nearly in accord with the actual situation to say that the grantor during his life remains the owner of the same estate as before the deed was delivered; the deed operating, however, to cut down markedly certain of his powers, at least as to disposition. For example, his power of disposal by will no doubt is gone, and it would seem that no effective conveyance could be made by him to any one, who took either as a volunteer or with notice of the deed in the hands of the third party. It may well be that in favor of a bona fide purchaser the grantor may have a power to cut off the grantee in the earlier deed. That such is in substance the situation of the grantor who, has delivered a deed to a custodian in the typical escrow transaction, is clear, and the same general result would seem reasonable in the type of case here presented.

If this analysis is correct, the conclusion is inescapable that the widow should not have dower; for surely she should not rank along with bona fide purchasers. If it be considered that the grantor had only a life estate left, then the conclusion to the same effect is equally clear.

Smiley v. Smiley, 16 N. E. 585, 114 Ind. 258.

For other cases see *Decennial Digests*, Dower ¶7.

Q. 25. A prepared a deed of land to B, and placed it in the hands of C, with instructions to deliver it to B at the grantor's death. The evidence showed that the custodian was instructed to tell no one that the deed was in his hands, or had been made. At the time of making the deed, and afterwards, before his death, A had several creditors, who did not know the deed existed. After A's death, what are the rights of the creditors to insist on payment out of this land?

A. Aside from the possible rights of the creditors, the transaction would appear to be effective as a conveyance of the land to B. The deed was delivered, although A obviously wanted the ownership in B to be effective only on the grantor's death. Whether the operation of the deed in making B owner was postponed until that time, or whether the deed had the effect of making B owner at once, with a sort of life interest reserved to A, is not important here. In any event, it seems A has taken a step that is irrevocable by him; even though ownership during A's lifetime has not become vested in B, so far as A is concerned, it is bound to vest there at the moment of his death.

Now, is the deed more effective against A than it is against his creditors? As to debts outstanding at the time of the delivery of the deed to C, the moment it became binding and irrevocable as to A, it may be that the transfer should be considered fraudulent, and the property reachable on that basis. So, also, possibly as to later innocent creditors. The only other theory on which the creditors might be preferred would be that they stand as bona fide purchasers from A. As in the escrow cases, it may well be that, while the deed is irrevocable as to A and all those taking under him as volunteers or with notice, as to those standing as bona fide purchasers A had left a power to defeat the grantee, B. Whether mere simple creditors without a lien are allowed the advantageous standing of good faith purchasers is a matter on which views differ.

Rathmell v. Shirey, 53 N. E. 1098, 60 Ohio St. 187.

For other cases see Decennial Digests, Deeds  108.

Q. 26. Suppose in the preceding statement of facts it is made to appear that, instead of creditors of A contesting B's rights, it was a devisee of the same land in a will executed by A after handing the deed to C. How should such devisee stand?

A. Whatever difference of opinion as to the status of creditors there may be, there seems no room to question that devisees do not take in any sense as bona fide purchasers. A devisee is a mere volunteer, a donee, who should stand no better than the devisor. Here, since the deed was irrevocable so far as A was concerned, it would

be equally effective as to A's devisee. A contrary conclusion would mean that a delivered deed may be completely undone by a mere unilateral act of the grantor, an act that is wholly within his volition.

Ranken v. Donovan, 61 N. Y. S. 542, 46 App. Div. 225.

For other cases see *Decennial Digests, Deeds* ¶108.

SECTION 7.—EXCEPTIONS AND RESERVATIONS

Q. 27. A and B own adjoining tracts of land. A sells his tract of land to C, and in the deed is the following provision: "Reserving to B the right to pass and repass over the above-described property over a certain driveway, as the same now is on said above-described property." Later B conveys his property to D, mentioning said right of way in the deed. Up until the time of the conveyance made by A, B had had no right over A's land. Does D take any right of way by virtue of the conveyance to him from B?

A. B's conveyance to D, though with specific mention of the right of way, will not operate to give D an easement over A's land, unless B already had such right over A's land. If B owned an easement over A's land for the benefit of the former's land, the right thereto would pass to D on conveyance by B of his land, whether mentioned or not. Since it is stated that, prior to the conveyance by A to C, there was no easement in favor of B, if B had any such right to pass on to D, it must have come by the provisions in A's deed. The quoted language indicates a "reservation." Technically a reservation applies only to rights issuing, so to speak, out of the land, such as services, rents, etc. The same technical view allows the keeping by the grantor of an easement only on the theory of there being a grant thereof by the grantee back to the grantor.

An "exception," to be considered along with the "reservation" and "grant back," is usually said to be a withholding or withdrawing from the operation of the conveyance of a part of that which otherwise would pass to the grantee. The exception is generally considered merely as a part of the description of the property affected. Logically, though it can hardly be said to be an accepted, authoritative view, an easement may be the subject of an exception; the grantor limiting the scope of his conveyance, so that that part of the sum total of his rights, privileges, powers, etc., constituting what we call ownership, represented by the easement in question, is left untouched.

In the case stated the language used, whether viewed as a "reservation," "grant back," or "exception," in its primary operation could inure to the benefit of A only. Unless the deed of A is given a

double effect, a conveyance of the land subject to the easement to C, and a grant of the easement to B, a result not impossible or illogical, but hardly in accordance with the doctrines and decisions of courts thus far, B would get nothing in the way of a right of way, and D would therefore have no easement.

Haverhill Sav. Bank v. Griffin, 68 N. E. 839, 184 Mass. 419.

38 Harv. Law Rev. 180.

For other cases see *Decennial Digests, Deeds* ¶141.

SECTION 8.—CREATION OF EASEMENTS BY IMPLICATION

Q. 28. O, the owner of a tract of land bounded on three sides by the private lands of others and on the fourth by a public highway, sold and conveyed by warranty deed to A a strip off the side of the tract touching the road. Thereafter, in order for O to reach his remaining land, it was necessary for him to pass either over the land thus conveyed to A or over the properties of the other adjacent owners. What are the rights of O as to means of access?

A. At the outset there may be dismissed the thought that O might be allowed a right of way over the lands of the three neighbors. There is no reason for encroaching upon their private rights, in order to help O out of a difficulty into which he has gotten by reason of a transaction with A alone. This is true, even though a way over one of those three tracts would be the most convenient.

When O conveyed to A the part of his land which left the remainder cut off from all access, it is only fair and sensible to conclude that it must have been the intention of the parties that O should keep a right of way over the part conveyed. Otherwise, O's remaining land would be rendered valueless and useless. The situation presents such strong considerations in favor of such right of way being impliedly kept by O that the conclusion should be to that effect, despite the fact that O's deed to A was one with covenants for title, and O is thus in a sense allowed to derogate from his own grant. If O had had another means of access to the inner tract, though perhaps highly inconvenient as compared with a way over the land conveyed, there would not have been presented a case of real necessity and the easement would not arise by implication in O's favor.

Brigham v. Smith, 4 Gray (Mass.) 297, 64 Am. Dec. 76.

Hildreth v. Googins, 39 A. 550, 91 Me. 227.

Corea v. Higuera, 95 P. 882, 153 Cal. 451, 17 L. R. A. (N. S.) 1018.

For other cases see *Decennial Digests, Easements* ¶18(2, 3, 6).

Q. 29. A water pipe leads from a driven well in a yard to a kitchen, there ending in pump, by which water is habitually drawn for domestic purposes. The well and the water pipe are hidden from view.

What is the effect of conveyance of the dwelling alone by the owner of both yard and dwelling?

A. The real question here is whether the grantee in the deed of the house property gets a right to continue to draw water from the well on the land retained by the grantor. If there is such right, it being in the land of another, it would seem to be an easement. There is nothing in the deed creating an easement; so, if there is one, it must have arisen by implication.

Easements not infrequently do arise by implication. Where the owner of land has made a use of one part for the benefit of another section of the tract, and the latter part is conveyed away, as was done in the facts stated, the grantee will get an easement in the land retained, corresponding to the use indulged in by the common owner, providing certain requisites are present. The "quasi easement," a name given to the use made by the common owner before severance in ownership, must, it is said, have been apparent, continuous, and reasonably necessary to the comfortable enjoyment of the quasi dominant portion. By definition and redefinition these requirements come essentially to this: There must have been such an adaptation of one part of the premises for the use and enjoyment of another part that it may fairly be concluded that it must have been intended that the purchaser of the part benefited was to get not only the tract covered by his deed, but also as incidental thereto the right to use the retained parcel as indicated by the quasi easement. This of course means that the quasi easement must not have been secret, or only for temporary use, or insignificant in its benefit.

In the facts stated, the test would seem to be satisfied, with the possible exception of apparency. At least the pump in the kitchen was visible, and it was fair to conclude that it drew water from somewhere. The source of supply might be, as was the fact, on the retained land, and that may well satisfy the requirement.

Larsen v. Peterson, 30 A. 1094, 53 N. J. Eq. 88.

For other cases see Decennial Digests, Easements ¶15.

Q. 30. A owned two lots, 1 and 2, adjoining each other. On lot 1 he built a two-story brick building, the wall on the side toward lot 2 being half on each lot. The ground floor was used for business, and the upper for living apartments. At the end of the building next to lot 2, but located entirely on lot 1, was a stairway leading to the second story. Later A built on lot 2, using the wall of the first building as a party wall. The new building was similar to the first, and access to the upper floor was arranged for by a door through the party wall leading to said stairway. A conveyed lot 1, and his

grantee now forbids A to use the stairway. A sues to enjoin interference with his right of passage. What result?

A. Here the claim by A is in effect of an easement by implied reservation over lot 1 to use the stairway thereon. It is to be noted that no attempt was made by A in his deed of that lot to keep such easement for himself as owner of the adjoining lot, provision for which might easily have been made by appropriate language in the deed. On the contrary, A conveyed lot 1 to the grantee without reservation or restriction of any character, at least so far as language is concerned. Now the question arises as to whether A should be allowed to set up a claim really inconsistent with his own deed. The case obviously presents a question not involved, if A had conveyed lot 2 and kept lot 1, and the grantee of lot 2 were making a claim to the use of the stairway. In such case the claim of easement is, so to speak, in aid of the grant, not in subtraction from it.

Though courts are not in agreement on this, it seems reasonable to conclude that, in cases such as the one here presented, the grantor, if he wants to keep an easement for himself over land he conveys, should do so by appropriate language in the deed. It is a sound rule of construction generally that a written document should be construed most strongly against the one whose document it is. Only in exceptional cases should a grantor be allowed to claim rights as having been impliedly reserved. A most outstanding instance of such exceptional case is one in which the right claimed by implied reservation is in the nature of a way of necessity; no other means of access being available to the grantor after the deed is given.

In the case under consideration there is nothing driving one to the conclusion that it would be impossible for A to provide another means of access to the second floor of the building retained by him; hence, according to the better view, the suit by A should fail. In a number of jurisdictions, however, the result would be otherwise.

Brown v. Fuller, 130 N. W. 621, 165 Mich. 162, 33 L. R. A. (N. S.) 459, Ann. Cas. 1912C, 853.

Powers v. Heffernan, 84 N. E. 661, 233 Ill. 597, 16 L. R. A. (N. S.) 523, 122 Am. St. Rep. 199.

For other cases see *Decennial Digests, Easements* ⇨ 16, 17(5).

Q. 31. X owned two lots, and built a house on each lot next the line, with a chimney between them, half on each lot, intended for the use of both, with openings for flues from each. By simultaneous deeds he conveyed one lot to A and the other to B by metes and bounds. (a) A sues B for taking down the part of the chimney on his lot. (b) Suppose X conveys to A first; could A or B claim any

rights in the chimney against each other in the absence of express stipulation?

A. It is clear that A and B each owned half the chimney, and that in (a) A is claiming a right to use the half on B's lot. If A has such right, it is an easement, and on the facts, if he has it at all, it must be by implication. Here the deeds were simultaneous; so, strictly speaking, the case is neither one of implied reservation nor implied grant—the grantor not claiming or contesting any right asserted to have arisen by implication. The point made in the preceding answer regarding a grantor not being allowed to derogate from his grant has no application here, and it would seem, therefore, that it should be concluded that A and B each took his lot with the benefits and burdens thereon as then subsisting. The answer to (a) then is that A has good grounds to complain against B.

(b) If X conveyed to A first, then A is claiming as against X, and later as against B, an easement by implied grant. On the principles heretofore outlined, A should prevail. If X conveyed to B first, then A, as successor in ownership of the adjoining lot to X, is claiming that by implication X *reserved* for the remaining lot an easement to use the chimney. Should X thus be allowed to derogate from his grant? The chimney is one entire thing, each half being essential to the enjoyment of the other half; in other words, the claimed rights of A and B in the chimney are reciprocal. This is another one of the exceptional situations, in which grantors are allowed to reserve easements by implication, as in the case of ways of necessity. Really here the grantor does not detract from his grant, for, as stated, each portion of enjoyment is dependent upon the like enjoyment of the common object by the other party.

Heartt v. Kruger, 24 N. E. 841, 121 N. Y. 386, 9 L. R. A. 135, 18 Am. St. Rep. 829.

For other cases see Decennial Digests, Party Walls ¶5.

SECTION 9.—CREATION OF ESTATES IN FEE SIMPLE

Q. 32. Lands were conveyed "to A in fee simple." Upon A's death his widow claimed dower in the lands so conveyed. Is she entitled to it?

A. Dower at common law was, generally speaking, a one-third interest for life in the lands of which the husband was seized of an inheritable estate during the marriage relation. Assuming that A was married to the claimant at some time during his ownership of the estate created by the conveyance mentioned, and that essentially the common-law requisites for dower are applicable, the only real ques-

tion appears to be whether A was seized of an inheritable estate. The intention, it seems, was to give him a fee simple, clearly an inheritable estate. To create an estate in fee simple, at least in a natural person, it was considered that a certain form of expression was almost indispensable; it had to be limited to the grantee, or transferee, "and his heirs." No attempt to express the idea in other words, however clear, was effective. At common law, then, the estate in A could not have been a fee simple.

Legislation not infrequently has changed this doctrine, the provision commonly being that a conveyance shall be deemed to create a fee simple unless the contrary intent appears from the conveyance. Only under such modification could the widow hope to succeed.

Hall v. Hall, 76 A. 705, 106 Me. 389.

For other cases see Decennial Digests, Deeds ⇨124(2).

Q. 33. The owner of land conveyed "to A and B the following described premises: [Description given.] In case of the death of either A or B, the other to have the whole of said property without litigation." Upon the death of A, leaving B surviving, a question arose as to whether A's heirs took any interest. What result?

A. Of course, under the strict requirements of the common law, the heirs of A would have no chance; the language not being sufficient to create inheritable interests. But if the question be tested under the modern doctrine, that an estate in fee may be created without use of the word "heirs," another problem must be considered.

Prior to the description of the property, language had been used sufficient to create a fee simple. The language following the description purports to cut down this apparently created estate. Can this be done? The usual statutory provision allowing the creation of a fee without the word "heirs" provides that such shall be the effect of the conveyance "unless a contrary intent appears." Surely such contrary intent appears here, and it would seem that A did not take an interest inheritable by his heirs.

Cover v. James, 75 N. E. 490, 217 Ill. 309.

McCulloch v. Holmes, 19 S. W. 1096, 111 Mo. 445.

For other cases see Decennial Digests, Deeds ⇨124(1), 136.

Q. 34. By deed lands were conveyed "to A and her heirs, * * * to have and to hold the same unto her heirs and assigns forever, with all appurtenances: Provided, however, that, should the said A die without issue and before her husband, then the property herein conveyed is to revert unto X." What sort of estate did A take?

A. The granting part of this deed purports to give A a fee simple. This would be true, even under the rigid rule of the common law. The first part of the habendum (that part beginning, "to have and to hold") agrees with this. But then follows a proviso, which, if given effect, cuts down A's estate to a mere life estate upon the happening of certain contingencies. Which shall be given effect? The grantor seems clearly to have given one kind of an estate in one part of the deed, and then in another part he marks out, just as clearly, another kind of interest. Effect cannot be given to both; one or the other must be rejected. In this situation it is appropriate to apply the well-known rule of construction that the instrument should be given the meaning that will operate most strongly against the grantor, who must be deemed responsible for the ambiguity. This would give A a fee simple.

In many cases, particularly the older ones, certain more or less arbitrary rules of construction were announced as applicable to deeds with conflicting limitations marking out the estate granted in the premises of the deed and the habendum. It was said, for example, that the habendum could enlarge or explain, but not cut down, the premises. The better and more sensible view probably is to the effect that, after exhausting the possibility of harmonizing the clauses and arriving at the real intent, that clause should be given effect which gives the grantee the larger interest. In getting at the real meaning, no more attention should be given to one expression rather than the other, merely because the one happens to be in a certain part of the deed. The whole instrument is the grantor's deed, and all parts speak at the same moment, the time of delivery.

Carl Lee v. Ellsberry, 101 S. W. 407, 82 Ark. 209, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60.

For other cases see Decennial Digests, Deeds ☞97.

Q. 35. Lands were conveyed "to A for life, remainder after A's death to his heirs." A contract having been entered into between A and B, whereby the former agreed to sell and convey the premises to the latter in fee simple, and B having refused to perform, on the ground that A was not in position to create in B a fee simple, the latter was sued in equity to compel performance. What result?

A. The language of the deed, if given its apparent meaning, gives A only a life estate. This, however, is one of those situations in which language produces a legal effect quite different from that which the words in common speech would indicate. By the application of the rule known as the rule in Shelley's Case, A takes a fee simple. The rule is one of law, not merely of construction. The

doctrine, which was not originated in Shelley's Case, but therein merely applied, grew out of conditions that prevailed centuries ago. But the rule has quite generally persisted, except as abolished or modified by statute. It is partially conjecture as to how the courts came to reach the conclusion underlying the rule.

The rule in Shelley's Case operates as follows: If a life estate is conveyed or devised to A., and then by the same instrument a remainder is given to his heirs, or to the heirs of his body, A will take a remainder in fee simple or fee tail, and his life estate will merge therein. The remainder to A's heirs is treated as a vested remainder to A and his heirs. If a life estate to B is interposed between A's life estate and the remainder to his heirs, this will prevent the merger of A's life estate in the remainder, although it is vested in him.

In many states the rule is abolished, and A would get only a life estate. If, then, the rule in Shelley's Case is to be applied, A was in position to give a fee simple to the purchaser.

Bails v. Davis, 89 N. E. 706, 241 Ill. 536, 29 L. R. A. (N. S.) 937.

Tiffany, Real Property (2d Ed.) § 148.

For other cases see *Decennial Digests*, Deeds ¶128.

SECTION 10.—ESTATES IN FEE TAIL

Q. 36. Lands were conveyed "to A for life, remainder after his death to the heirs of his body." A died, leaving no children or descendants of children; the lands referred to being undisposed of. A dispute arose between A's brothers and sisters, his nearest relatives, and the person who conveyed the premises to A. Who was entitled to the lands?

A. By operation of the rule in Shelley's Case, referred to in the preceding answer, the reference to the heirs of the body of A would be effective only to indicate that A took an inheritable estate. Here the reference is to "heirs of the body"; hence A would not, at common law, take a fee simple, but a fee tail, that special kind of fee estate which was inheritable only in the lineal line, and the existence of which estate depended entirely upon the famous Statute de Donis passed in 1285. If this situation is to be determined on this basis, the collateral heirs of A have no chance, and the conclusion should be in favor of the conveyor, whose possibility of reverter upon the creation of an estate tail has ripened into a present right of possession.

The status of the estate in fee tail in the states of the United States is somewhat involved. Where there is no legislation cover-

ing the subject, courts have differed. In Kansas, for example, it has been concluded that entailed estates may be created, but may be turned into a fee simple by simple methods of disentailment. On the other hand, in Iowa, there being no legislation, it was held that the words created the sort of estate that would have arisen thereby at common law before the Statute de Donis, in 1285. This is a conditional fee, which for certain purposes, at least, is enlarged to a fee simple upon birth of issue.

Many states have statutory provisions, perhaps the most common type being to the effect that words sufficient to create a fee tail shall be deemed to create a fee simple. Another type of statute in substance provides that the donee in tail shall take a life estate, with remainder in fee simple to those who would be entitled, if it were a fee tail, to succeed him upon death.

In the case stated, the brothers and sisters would succeed only in those states in which a fee simple arises on language appropriate to a fee tail. Of course, if the rule in *Shelley's Case* is not in force, A would not take a fee of any sort.

Ewing v. Nesbitt, 129 P. 1131, 88 Kan. 708.

Kepler v. Larson, 108 N. W. 1033, 131 Iowa, 433, 7 L. R. A. (N. S.) 1109.

Rudkin v. Rand, 91 A. 198, 88 Conn. 292.

For other cases see *Decennial Digests*, Deeds ☞ 126, 127(1), 128; Estates ☞ 7; Estates Tail ☞ 1, 3, 7.

SECTION 11.—LIFE ESTATES

Q. 37. The owner of a tract of land upon which was a garage executed in favor of A a document, called therein a "lease," whereby the premises were demised to A "for so long as he should use the described property for a garage." The lessor gave notice to A to vacate the garage and land, and, the latter having refused to do so, suit was brought against him to recover possession. What result?

A. The notice to A to vacate, followed by the suit, indicates that the plaintiff's contention was that an estate at will had been created. Under common-law doctrines, of course, A could not have had at most more than a life estate. Even if necessary formalities were observed as to execution, etc., the absence of the word "heirs" would effectively prevent a fee arising. Even under modern legislation, making the use of that word unnecessary, a fee would not arise on the facts, for it may fairly be said that it was apparent that a less estate was intended. The estate created must have been one at will or for life.

A might have used the premises for a garage throughout his life, which points in the direction of this being a life estate, just as a

conveyance to X "during widowhood" creates a life interest. The fact that A might cease to use the premises for a garage at any time does not militate against this view; it merely makes the life estate determinable possibly before death. If the estate were terminable by the terms of its creation at the option of either party, then truly there would be an estate at will. While it is sound doctrine that an estate at the will of the lessor is impliedly also at the will of the lessee, hence an estate at will, it does not follow, despite Lord Coke's pronouncement, that an estate at the will of the lessee is necessarily also at the lessor's will. In the case stated, the notice would seem to have been ineffectual; hence judgment for A.

Thompson v. Baxter, 119 N. W. 797, 107 Minn. 122, 21 L. R. A. (N. S.) 575.
For other cases see *Decennial Digests, Landlord and Tenant* ¶117; *Life Estates* ¶1, 3.

Q. 38. In a jurisdiction in which it was necessary to use the word "heirs" in creating a fee, a conveyance of land was made by X, the owner thereof in fee simple, "to A." Later a conveyance of the same land was made by A "to B." Upon the death of B, you are asked to advise as to the disposition to be made of B's interest in the land covered by the deeds.

A. The deed from X to A created in the latter a life estate, measured by the life of A. Conveyances, if in a form effective to create a freehold, will give to the designated grantee (the word "heirs" being omitted) a life estate. That his life should be the measure is reasonable, because thereby he is assured an estate that will last so long as he is interested in the use and enjoyment of the premises.

When A conveyed to B, the latter could get no more than A had; but at least that much passed to B. If the life estate vested in B is to be measured by his life, the result may be that A has not conveyed all he had, for B may die before A. If the latter dies first, B's interest is bound to end anyhow. Therefore the estate in B is measured by A's life. This is an estate *pur autre vie*.

Upon the death of B, if A survives, the life estate in B is not yet at an end; it continues until A's death. But to whom can it go? Being realty, it could not go to personal representatives as personality; not being inheritable, it could not go to the heirs; and surely it should not go back to A, who had created the estate. In this difficulty it was the common-law doctrine that the estate vested in the first occupant; he being known as a "general occupant." By statute, however, this is now quite generally changed. A common pro-

vision is that such remnant of the life estate shall pass to the personal representatives as a chattel real.

Roseboom v. Van Vechten, 5 Denio (N. Y.) 414.

For other cases see *Decennial Digests*, Estates ¶4; Life Estates ¶1.

SECTION 12.—ESTATES AT WILL AND PERIODIC TENANCIES

Q. 39. O, the owner of Blackacre, prepared and delivered to X a paper purporting to be a conveyance of the land to X in fee. The document, however, was unsigned. X went into possession, and after one year was dispossessed by D, to whom O had later delivered an effectively executed conveyance of the same premises. In an action by X to recover possession from D, what should be the result?

A. Having taken possession with the consent of the owner under a supposed conveyance, X was not a trespasser, but a tenant at will. The English Statute of Frauds, the model of much of our legislation along the same line, provided in substance that conveyances not in writing and signed should have the force and effect of creating estates at will only. Without such express statutory provision, the effect in the case given would seem to be the same, namely, that an estate at will was created.

At common law estates at will could be terminated at any time, either by the landlord or tenant, and a conveyance by either of his interest in the premises automatically terminated the relationship. By statute it is now quite commonly required that, to terminate an estate at will, notice must be given a prescribed length of time in advance. Assuming that proper notice was given, if any is requisite, D acted within his rights in dispossessing X, providing he did so peacefully, and not by force, as is forbidden by the statutes regarding forcible entries. Even if D's entry and ouster of X was in violation of the statute, no excessive force having been used, the only result, according to what is probably the prevailing view, would be to subject D to criminal prosecution. As to the effects of forcible entries, however, the courts are not all in harmony, and the statutes vary in the consequences prescribed.

Curtis v. Galvin, 1 Allen (Mass.) 215.

Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

Ellis v. Paige, 1 Pick. (Mass.) 43.

For other cases see *Decennial Digests*, Assault and Battery ¶7; Frauds, Statute of ¶123(1, 2); Landlord and Tenant ¶114(1), 118(3), 120(1, 2), 275, 278; Trespass ¶10.

Q. 40. Under an oral agreement with O, the owner, for a lease to run five years, T went into possession of Blackacre. The lease was not executed, but T remained in possession for two years, pay-

ing \$1,200 per year rent in equal monthly installments. At the end of the second year T moved out. Failing to relet the premises, at the end of the third year, O sued for another year's rent. What result?

A. Since T went into possession under a mere agreement for a lease which was never executed he was not really a "tenant for years"; rather, his possession being taken with O's permission, he was a tenant at will. If he continued to be a mere tenant at will, he was warranted in leaving at any time, there being no statutory requirement for notice to end such tenancy, and, of course, O would have no valid claim to rent thereafter.

Another fact is here mentioned, however, which may well change the result. It appears that T paid rent on an annual basis. For a long time courts, in their effort to get away from the frequently harsh consequences of tenancies at will, have held that if there is payment of rent or agreement to pay on a periodic basis, this will amount to a special type of tenancy as from week to week, month to month, or year to year. The dominant feature of this estate is that it is certain for one such period, and so on for successive periods, unless notice—at common law, six months in case the periods were yearly—is given in advance of the end of the current period. If such estate is created, the positions of the parties are relatively secure. Unlike the tenancy at will the holding can be terminated, not upon demand, express or implied, or by moving out, but only on giving the requisite notice; and the tenant's interest is such that an assignment thereof may be made.

In the case stated it seems that T would be a tenant from year to year, and on that basis T could not terminate the estate by merely moving out. Since nothing is said about any notice being given, it must be concluded that T did not effectually terminate the tenancy, and he is liable for the third year's rent.

Lockwood v. Lockwood, 22 Conn. 425.

Lithograph Bldg. Co. v. Watt, 117 N. E. 25, 96 Ohio St. 74.

For other cases see *Decennial Digests*, Landlord and Tenant §§113, 114(1).

Q. 41. By oral agreement premises were leased by L to T for five years, beginning April 1, 1920, at an annual rental of \$1,500, payable in 12 installments on the 1st of each month. T went into possession and paid rent up to June, 1924, when he moved out and sent the keys to L. Despite L's efforts to find a new tenant, the premises remained vacant until May 1, 1925. Suit is brought by L against T to recover rent at the agreed rate to the last-mentioned date. What result?

A. The original agreement or lease being oral, under the English Statute of Frauds and similar legislation in many states in this country, it had the effect, by express terms of the statute, of creating an estate at will only. There is some authority to the effect that, under such legislation, the resulting estate at will must remain so. The better opinion, however, is that such an estate at will, like others arising in other ways, may become an estate from period to period. Here there was actual payment of rent on a yearly basis, as well as an agreement to do so, and either the agreement or the payment would be sufficient to show the requisite intention to make the holding from period to period. It seems, then, that T was tenant of L from year to year.

To terminate the tenancy at the end of any given year, so as to be free of liability for rent thereafter, T should have given notice—at common law, six months—and this apparently he did not do; he simply moved out. This would seem to leave T liable for rent even beyond April 1, 1925, except as he might be relieved by L's reletting on May 1, 1925. There is one point of time, however, at which a tenant on such facts as are here presented may properly leave the premises without previous notice, and that is at the expiration of the time for which the ineffective lease was to run. Although T has never given proper notice, having left the premises by the final expiration date, he should not be liable for rent beyond that time.

Clayton v. Blakey, 8 T. R. 3.

Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79.

Ellis v. Paige, 1 Pick. (Mass.) 43.

Coudert v. Cohn, 23 N. E. 298, 118 N. Y. 309, 7 L. R. A. 69, 16 Am. St. Rep. 761.

Arbez v. Exley Watkins & Co., 44 S. E. 149, 52 W. Va. 476, 61 L. R. A. 957.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 123(1,2); Landlord and Tenant $\S$ 114(1), 116(1,2), 118(3), 120(1), 194(1), 195(1), 200(1).

Q. 42. With permission of L, the owner, T entered into possession; there being no agreement as to time T might remain, and no understanding regarding the rental. After T had been in possession for six months, it was agreed that in exchange for the privilege of occupancy he should keep in repair, not only the premises he occupied but also the buildings on the tract on which L made his home. Eight months later L gave notice to T to vacate, and three weeks thereafter, T not having left, L began suit to oust T. Should L succeed?

A. T was clearly a tenant at will during the first six months, and, if he continued so until the demand for possession by L, the premises should have been given up to L. This is on the assumption that no more notice was required than at common law to end a tenancy at will. No doubt T's contention is that his holding was from period to period. This would be effective, if there had been payment or agreement for payment of rent on a periodic basis. Here the rent, in the form of services to be rendered by T, was not on such basis, and the holding remained at will. T therefore should have acceded to L's demand.

Rich v. Bolton, 46 Vt. 84, 14 Am. Rep. 615.

Lyons v. Philadelphia & R. R. Co., 58 A. 924, 209 Pa. 550.

For other cases see *Decennial Digests, Landlord and Tenant* §114(1, 2), 118(2).

Q. 43. By written lease L demised premises to T for a term beginning April 1, 1920, and ending November 15, 1922; the rent being fixed at \$2,000 per year, payable monthly. T failed to move out on November 15, 1922, but continued in possession and paid rent for three months thereafter. In September, 1923, T notified L of his intention to quit the premises on March 31, 1924. On the latter date T moved out, and the premises were vacant until after November 15 of that year. L claims rent is due from T for the period ending November 15, 1924, and sues therefor. What result?

A. When T failed to move out at the end of his term, it is open to L to take such steps as may be taken against one wrongfully withholding possession, or, on the other hand, to consider him as tenant for a further period. The acceptance by L of the rent thereafter showed his election to look upon T as still a tenant. But a tenant for what sort of term? Surely not for a like term, for that would amount to a new letting for what might be a very extended period. The acceptance of the periodic rent would seem effective to create a period to period tenancy; here it would be from year to year, there being the same reason as in the cases above discussed for avoiding the uncertainties of a holding at will.

T gave six months' notice, evidently considering the yearly periods as running from April 1 to March 31, based on the date of original term's beginning. But from April 1, 1920, to November 15, 1922, T was occupying under a definite term of years; his holding on any other basis could not have started before November 15, 1922. That date, then, should be the vital one in fixing the beginning and ending of the yearly periods in the year to year tenancy. On this basis the notice was ineffective to permit an end-

ing of the relationship on March 31. So, also, since the notice stated a wrong date, it would seem ineffective to end the tenancy on November 15. T should be required to pay rent at least up to that date. If the period to period tenancy began with the original entry, then, of course, that date would be the controlling one for fixing the yearly periods. In a few states, of which Michigan is a conspicuous example, the period to period holdings arising on such facts as are here stated—a tenant holding over after a fixed term—may be ended by either party at the end of any current period without previous notice. This, however, is unusual.

18 Mich. Law Rev. 64.

Croft v. Blay, [1919] 1 Ch. 277.

Scherer v. Moran, 187 N. W. 322, 217 Mich. 607.

For other cases see Decennial Digests, Landlord and Tenant ⇨114(3).

Q. 44. O orally agreed that T might continue in possession of a house as tenant at \$25 per month until the premises were sold, rent payable on the 1st day of each month. On September 13, 1924, O sold the premises to A, and at once served notice on T to vacate in one month from that date. When must T get out?

A. Since O might sell at any price, however low, it would seem reasonable to conclude that as a practical matter the tenancy might be terminated at any time at O's option. By implication, then, T could move out at any time. On this basis, the tenancy created appears to be one at will. The fact that the lease was oral leads to the same conclusion, under the usual statutory provisions.

Was this tenancy at will turned into one from month to month by the provision for monthly rental payments? The basis for period to period holdings, growing out of what would otherwise be tenancies at will, is presumed or implied intention, as shown by the payment or arrangement for payment of periodic rental. Here the agreement between O and T in terms provided for a holding terminable at will, and that should prevail over any implications of rental provisions.

When, then, must T get out? At common law no special notice was necessary to terminate tenancies at will. By statute, however, notice of varying periods of time is now required. But on the facts set forth it may well be concluded that the parties have in effect agreed to a termination upon sale without the necessity of notice.

Hollis v. Pool, 3 Metc. (Mass.) 350.

For other cases see Decennial Digests, Landlord and Tenant ⇨119(1).

SECTION 13.—CONCURRENT ESTATES AND CO-OWNERSHIP

Q. 45. A and his wife conveyed by general warranty deed certain lands to B and C, his wife. B and C had children. The wife died. B remarried. B and his new wife sold the land to D, and conveyed the same by general warranty deed. Afterwards his children brought suit for what they claimed to be their part of their mother's estate. Can the suit be maintained?

A. The first question is whether it is to be understood that in the conveyance to B and C there were used the important words "and their heirs." If such words were not used, and there was no applicable legislation making them unnecessary in the creation of an estate in fee simple, B and C took no more than a life estate. For sake of this answer, however, it will be assumed, either that those words were used, or that in the jurisdiction controlling the construction of the deed an estate in fee simple is deemed to be created, unless a contrary intent appears, as is commonly provided by statute.

At common law, B and C, being husband and wife, would take as tenants by the entirety, a special type of joint tenancy. As in joint tenancies generally, there applies here the feature of survivorship. Upon the death of one of the co-owners, the survivor is sole owner. Hence, upon C's death, B was owner in fee, nothing going to the children as heirs of their mother. When B remarried, the new wife was entitled to her inchoate dower, and the deed by both to D would be effective. The children are entitled to nothing. If B had remained the owner until his death, then, if he died intestate, they would succeed as heirs, subject, of course, to B's second wife's rights as widow, if she survived.

It should be noted, however, that in many states, either by statute or otherwise, estates by entirety are done away with, and B and C would there take either as joint tenants or as tenants in common, depending on the local law. If as joint tenants, the ultimate answer as to the children's rights would be the same; if B and C took as tenants in common, then upon the death of either, without having disposed of his or her share by deed or will, the children of the deceased would succeed to a half interest as heirs. In tenancies in common there is no feature of survivorship, as in joint tenancies and tenancies by entirety.

Fisher v. Provin, 25 Mich. 347.

For other cases see Decennial Digests, Husband and Wife ¶14(2).

Q. 46. Land was conveyed to B and C and their heirs. B became indebted to X, who sued and recovered judgment. Under this

judgment proper levy was made upon the land conveyed to B and C, and the sheriff has advertised a sale of B's interest. What interest, if any, would a purchaser at such sale acquire?

A. At common law a conveyance to two or more, to hold concurrently, presumably made them joint tenants, a form of co-ownership preferred at common law, because the seizin was single, not divided, as in tenancies in common. Whether B and C here took as joint tenants or as tenants in common makes no difference in the answer, for in either case each co-owner has a vendible interest, which may be reached on execution. If the co-ownership is not broken during the joint lives, a distinction, however, is to be noted. In a joint tenancy, on the death of one co-owner the survivor is entitled to the entire ownership; while in a tenancy in common the heirs or devisees succeed to the share of the deceased.

If, in the case stated, B and C were husband and wife at the time of the conveyance to them, the creditor could not reach B's interest. It is a quality of tenancies by entireties at common law that neither alone can effect a transfer of his or her interest. By statute it is not infrequently provided that the share of one tenant by entireties may be subjected to the payment of an individual debt. Of course, if the question here proposed arises in a state in which tenancies by entireties are not recognized, the observations regarding such holdings have no application.

Thornburg v. Wiggins, 34 N. E. 999, 135 Ind. 178, 22 L. R. A. 42, 41 Am. St. Rep. 422.

For other cases see *Decennial Digests*, Husband and Wife ¶14(6).

Q. 47. By his deed O conveyed land "to B and C, husband and wife, and their heirs, in joint tenancy." B executed a deed purporting to convey a half interest in the tract received from O to a brother. After B's death, his surviving wife, C, contests the brother's claim. What result?

A. Did B have a conveyable interest? Under common-law rules he did not have such interest, if the effect of O's deed was to make B and C tenants by the entireties. The deed specifically states that B and C are to take "in joint tenancy," and if those words are to be given their literal meaning, creating in B and C that type of co-ownership known as joint tenancy, either one during life may dispose of an undivided half interest. It may be argued that a tenancy by entireties is simply a special type of joint tenancy, and that the deed from O should be construed as creating a holding by entireties, in which case, as stated, at common law, at least, B's deed would be of no effect as against C. While the matter is cer-

tainly not free of doubt, it would seem more reasonable to conclude that O used the language in the deed with the intent to create in B and C the sort of co-ownership the words naturally indicate, namely, a joint tenancy. In that case, B's deed to his brother was effective.

If the suggested construction be considered as sound, no estate by entireties being created, there may still be a question whether, under modern legislation, the language used was sufficient to create even a joint tenancy. A common statutory provision is to the effect that a conveyance to two or more shall be deemed to create a tenancy in common, unless it appear from the language used that it was the intention to create a joint tenancy, and not a tenancy in common. It may be suggested that the language here, while showing an intent to create a joint tenancy, did not negative a tenancy in common. The reasons for preferring joint tenancies at common law have long since passed away, and to-day there is a strong leaning in favor of tenancies in common. However, whether B and C here took as joint tenants or as tenants in common is immaterial, for in either case the deed by B to the brother would be effective.

Hoag v. Hoag, 99 N. E. 521, 213 Mass. 50, Ann. Cas. 1913E, 886.

Hoyt v. Winstanley, 191 N. W. 213, 221 Mich. 515.

Thornburg v. Wiggins, 34 N. E. 999, 135 Ind. 178, 22 L. R. A. 42, 41 Am. St. Rep. 422.

For other cases see *Decennial Digests, Husband and Wife* ¶14(2, 6).

Q. 48. A, the owner in fee simple of Blackacre, executed a deed in favor of B, providing in substance that the grantee therein should receive an undivided half interest in Blackacre, to hold in joint tenancy with the grantor. On B's death a contest arose between his heirs and A, each side claiming the share which had belonged to B.

A. If the deed from A to B created a joint tenancy, by right of survivorship A would be sole owner of the entire tract on B's death. On the other hand, if A and B were tenants in common, B's heirs would prevail as to B's half interest. What, then, was the effect of A's deed?

An outstanding feature of joint tenancies at common law was the singleness of seizin, each co-owner being seized, not only of his share, but of the whole. Unless there was such seizin, there was no joint tenancy. To create such seizin, each co-owner had to receive his interest at the same time, by the same transfer. Obviously in the case stated that was not true; hence B did not become A's joint tenant. He did, however, acquire an undivided half in-

terest as a tenant in common, and upon death his share passed to his heirs, there being no will.

Pegg v. Pegg, 130 N. W. 617, 165 Mich. 228, 33 L. R. A. (N. S.) 166, Ann. Cas. 1912C, 925.

For other cases see *Decennial Digests, Husband and Wife* ☞47(4).

SECTION 14.—COVENANTS FOR TITLE

Q. 49. A and B, husband and wife, conveyed certain lands, by deed with covenant of warranty, to X. The wife, who joined in execution of the deed, however, had no estate or interest in the premises, except her inchoate dower. The same lands were conveyed by X to P, who now sues A and B for breach of the covenant, there having been outstanding at the time of the deed by A and B an undischarged mortgage. What result?

A. The rights of P against A are not necessarily the same as against B, the wife, even assuming a married woman's ability to bind herself by contract. So far as A is concerned, the sole question here would seem to be whether there has been a breach of the covenant of warranty, which in essence is a guaranty or promise of indemnity against disturbance in enjoyment of the covenantor or an outstanding paramount interest. The mortgage here was such an outstanding interest, but its mere existence is not a disturbance or eviction. If, under the mortgage, there has taken place an eviction, actual or constructive, the covenant has been broken, and P may sue A, though the latter made no promises directly to P. The action is maintainable as upon a covenant "running with the land." The mere existence of the outstanding mortgage, without an eviction, may well amount to a breach of a covenant against incumbrances.

As to B's liability, another problem arises. Since she had no estate in the premises conveyed, could her covenant be said to have run with the land to P? The generally prevailing view, though of doubtful soundness logically, requires, for a covenant to run with the land, that between covenantor and covenantee there shall be some succession in interest or estate. Under this view, B would not be liable to P. Courts have found this requirement satisfied, if there passes only a possessory interest, or even if the covenantee goes into possession of the land to which the covenant refers. In the case stated the wife did not have even so much as a possessory interest, and it cannot be said that X took possession pursuant to the wife's deed.

H. T. & C. Co. v. Whitehouse, 154 P. 950, 47 Utah, 323, L. R. A. 1916D, 611, 14 Mich. Law Rev. 601.

For other cases see *Decennial Digests, Covenants* ☞57.

Q. 50. In the granting part of a deed O stated that he granted and conveyed Blackacre, "subject to a mortgage of \$5,000, given November 10, 1923, to the Security Trust Company." Later in the deed he covenanted "that the above-described premises are free and clear of all incumbrances whatsoever," and that he would "warrant and defend the title against all lawful claims." The grantee in that deed, in order to avoid a foreclosure of the mortgage, was driven to pay off the incumbrance. He then sued O for breach of the covenants. What result?

A. Unqualified covenants of warranty and against incumbrances were clearly broken on such facts. The only question is whether these covenants are to be construed as unqualified. Did the covenantor guarantee that there were no outstanding incumbrances? And did he undertake to warrant the title against all outstanding lawful claims? The language must be scrutinized. The covenant is with reference to the "above-described premises," and the content of the obligation is to be determined accordingly. What constitutes the "above-described premises?" Is it Blackacre? or is it Blackacre subject to the outstanding mortgage? While there may conceivably be room for some difference of opinion, as is almost inevitable when a problem of meaning of language is involved, the more reasonable conclusion would seem to be that what O was conveying was Blackacre subject to the mortgage, not Blackacre, and therefore the covenants should be construed as qualified by the specified incumbrance. In this view, O has not broken his covenants.

Drury v. Holden, 13 N. E. 547, 121 Ill. 130.

For other cases see *Decennial Digests*, Covenants  34.

Q. 51. O executed a deed in favor of P, the deed in the granting part reading: "I hereby grant and convey all my right, title, and interest in and to Blackacre unto P and his heirs." In the deed O covenanted that he was "well seized of the above-described premises" and would "warrant and defend the title to the same against all lawful claims." It developed that O really owned only the north half of Blackacre, the other half being owned by X. After being ousted by X from the possession of the south half, P sued O for breach of the covenants. What result?

A. Again the question arises as to the scope of the covenants. Did the covenanting language mean that O was well seized of and would warrant the title to Blackacre? or did it mean that he was guaranteeing whatever right, title, and interest he really then had?

On one side it may be said that "above-described premises" meant A's right, title, and interest in Blackacre, whatever that was. This would result in making the deed in effect a mere quitclaim, the covenants amounting to nothing. On the contrary, it may be argued that "above-described premises" meant Blackacre itself, thus giving some meaning and force to the covenants. On a matter of construction, such as this is, it would seem that, as between two possible meanings, one of which would render the language nugatory, while the other would give vitality to the words used, the latter ought to be preferred. If a sensible alternative is available, a conclusion ought not to be reached that would make the words used meaningless and ineffective.

Reynolds v. Shaver, 27 S. W. 78, 59 Ark. 299, 43 Am. St. Rep. 36.

Kimbrow v. Harper (Okla. Sup.) 238 P. 840.

For other cases see *Decennial Digests, Covenants* ¶34, 46.

Q. 52. In a deed of Blackacre, from O to X, there was a covenant to the effect that the premises conveyed were free and clear of all incumbrances, with the exception of a mortgage of \$5,000, bearing date April 1, 1920, held by the Dollar Savings Bank. There was also a covenant in the deed in substance that the grantor would warrant and defend the title to the said premises against all lawful claims whatsoever. By quitclaim deed X conveyed Blackacre to P. Foreclosure proceedings having been instituted, after the deed to P, to foreclose the mortgage referred to above, P paid off the indebtedness secured by the mortgage, and then sued O for breach of the covenants in the deed to X. What are P's rights?

A. Even though it be considered, in the jurisdiction where Blackacre lies, that covenants against incumbrances may run with the land, P cannot possibly hope to succeed on this covenant, for the covenant itself excepts the mortgage to the bank from its scope. O's guaranty regarding incumbrances would be broken only by charges, liens, etc., other than this particular mortgage.

The yielding by P to the threat of ouster through the foreclosure in paying off the indebtedness may well amount to a constructive eviction, thus a breach of the covenant of warranty, if that covenant is to be construed as general and unqualified. There is no question as to this covenant inuring to the benefit of subsequent owners, and P was a subsequent owner of the estate vested in X, though the conveyance was by quitclaim. The only effect of the quitclaim is to relieve the grantor therein from any liability as a guarantor; the grantee simply gets whatever the grantor has to give.

Was the covenant of warranty qualified by the reference to the mortgage in the other covenant? This is again a question of construction. Since each covenant serves its own special purpose, it seems more reasonable to construe them independently. It is particularly reasonable to construe these two covenants separately, for a grantor may well be willing to covenant for general warranty despite an outstanding mortgage, intending to pay it off before an eviction should occur, while a covenant against incumbrances, which is broken at once, if at all, he would make only with qualification. In this view, though some courts would hold otherwise, O should be liable on the covenant of warranty.

Welbon v. Welbon, 67 N. W. 338, 109 Mich. 356.

Sandwich Mfg. Co. v. Zellmer, 51 N. W. 379, 48 Minn. 408.

Bricker v. Bricker, 11 Ohio St. 240.

For other cases see *Decennial Digests, Covenants* ⇨32, 35.

Q. 53. By deed O conveyed Blackacre to X, O therein covenanting that he was then "lawfully seized of a good, absolute, and indefeisible estate of inheritance, in fee simple, of and in all and singular the premises thereby conveyed with the tenements, hereditaments and appurtenances thereto belonging." X conveyed to P. While P was in possession, V appeared and took away certain plumbing installed by him under a conditional sale arrangement with O. The articles removed were so affixed that, as between O and X, they might properly be considered part of Blackacre, and X and P both took, thinking the fixtures were part of the premises. What, if any, remedy has P against O?

A. P's only claim against O must be on the covenant quoted. This appears to be a covenant of seizin. It is to be observed that this covenant, like the ones against incumbrances and of good right to convey, is a guaranty of a present state of fact, which either exists or does not. So far as the promissory language goes, there is nothing prospective involved. The covenant is either broken when made, or it never will be broken. In this respect these covenants differ materially from those looking to the future—the ones for quiet enjoyment, general warranty, and further assurance. Assuming for the moment that the reservation of title to the fixtures in V caused O's covenant to be broken, the question arises as to whether broken covenants will run, so that successors in ownership may sue thereon. Though in England and in some of our states it is held that such covenants may run, though technically broken, until substantial damage accrues, the more general rule is to the effect that only the covenantee may sue. In so far as

this prevailing view is based on the old notion that choses in action are nonassignable, it is of questionable soundness.

If it be considered that the covenant of seizin may run, a conclusion here in favor of P seems sound. The outstanding ownership in V amounted to a breach of this covenant, it being commonly looked upon as a guaranty of existing ownership.

Rockafellow v. Gray, 191 N. W. 107, 194 Iowa, 1280.

Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68.

Mitchell v. Warner, 5 Conn. 497.

Herzog v. Marx, 94 N. E. 1063, 202 N. Y. 1, 35 L. R. A. (N. S.) 976.

For other cases see *Decennial Digests, Covenants* ¶62, 94, 125(2).

SECTION 15.—TRANSFER OF AFTER-ACQUIRED TITLE BY ESTOPPEL

Q. 54. The ownership of Blackacre was vested in A for life, remainder in fee to B. A deed of Blackacre in favor of D was duly executed by A. This deed read in part as follows: "Whereas, I am seized in fee simple of the premises herein described, I do hereby grant and convey Blackacre to D and his heirs," etc. One month after the delivery of that deed, B conveyed his interest in the premises to A. Still later A sold and deeded the tract to P, who knew nothing of the earlier deed to D. In whom, P or D, is the better right to Blackacre?

A. At the time of the deed from A to D the grantor had only a life estate, and that is all D could get at that time. The fact that A recited that he was seized in fee could not operate at that time, at least, to give D any more than A's actual interest. However, A later acquired the balance of the fee. The moment after the conveyance by B to A, could the latter be heard to say as against D that a fee had not passed to him? In the face of his solemn representation in his deed, it would seem that A should not be allowed to claim anything in conflict therewith. Therefore, as between A and D and their privies, the latter was in effect, if not in actuality, the owner in fee. There appears to be a difference of opinion as to whether in such situation the later acquired interest in the grantor remains there stricken lifeless, so to speak, by the estoppel, or whether it passes through to the grantee in the estoppel deed. Ordinarily it makes no difference which view is applied, but occasionally, as perhaps here, it is important. If that after-acquired interest has passed to D, there is nothing to go to P, even though he was a bona fide purchaser; but if the interest acquired by A from B remains in A, subject to the estoppel, then it seems a reasonable conclusion that P, a bona fide purchaser, should take free of the estoppel.

The estoppel here is obviously based upon a representation of fact, and in such case the entire deed must be scrutinized, to see whether the truth is disclosed. A most common basis for the estoppel is a covenant for title; in such instances the scope of the representation, then promissory in character, is determined solely by a construction of the covenant. However in either case the real basis for the estoppel is representation. The problem is discussed without reference to the effects of the recording acts.

Jordan v. Chambers, 75 A. 956, 226 Pa. 573, 134 Am. St. Rep. 1081.

Ayer v. Philadelphia & B. Face Brick Co., 34 N. E. 177, 159 Mass. 84.

Hannon v. Christopher, 34 N. J. Eq. 459.

For other cases see *Decennial Digests, Estoppel* ¶38, 39, 42, 43, 50; *Vendor and Purchaser* ¶239(4).

SECTION 16.—OPERATION OF THE RECORDING ACTS

Q. 55. By duly executed deed O conveyed Blackacre to P, who failed to record. After O died intestate, his heir, an only child, executed a deed of the same land to D, a good-faith purchaser. What are the merits of the claims of P and D to Blackacre?

A. While the recording acts vary in language, generally they come essentially to this: Certain title instruments are void as to certain classes of people, unless the documents are dealt with as prescribed in the statute. A clear-cut point of difference is in the necessity that the later deed be recorded first. Nothing is said in the case stated as to whether D recorded, and it will be assumed he did not. In some states his failure to record would prevent his having any chance to take advantage of P's failure to record; in other states it is not required that the later purchaser first record, and for the further consideration of this problem it will be assumed that the land is in a state which does not require the later purchaser to record.

When O conveyed to P, the latter became owner, and O had nothing left. In order to provide a means for ascertaining the status of the title to land, the recording acts calling for recording in a public office were enacted. The title of P is subject to the statute provision that an unrecorded deed is void as to certain people. This in effect means that, while ownership has passed to the grantee, the grantor retains a power to divest the grantee of that ownership so long as the deed is left unrecorded. Recording does not *give* the grantee ownership, but it *cuts off* the power of the grantor to displace the grantee in his position as owner. Here O did not exercise that power; he died. Upon O's death, however, his heir succeeded to the same position theretofore held by O in respect to

Blackacre and the unrecorded deed to P, and the power to defeat P was effectively exercised by the heir in favor of D.

Youngblood v. Vastine, 46 Mo. 239, 2 Am. Rep. 509.

Aigler, Operation of the Recording Acts, 22 Mich. Law Rev. 405, 415.

For other cases see Decennial Digests, Vendor and Purchaser ¶233.

Q. 56. O made a contract with P for the sale of Blackacre to the latter. P borrowed money from M, and gave as security a mortgage on Blackacre. This mortgage was properly recorded. Later P assigned his contract to A, who completed the purchase and secured a deed from O. All this A did without knowledge that M held a mortgage. In a foreclosure suit by M, may A defend successfully?

A. By the contract P acquired, not ownership in the full sense, but only an equity, and his mortgage to M was therefore only a mortgage on that equitable interest. A was a bona fide purchaser of the legal estate. Such being the case, A, though later in time, should take free of M's equity. This would be the result, apart from any recording act.

It is stated that M recorded. If that recording was effective to charge A with notice that there was such outstanding earlier equity, A could not rank as a bona fide purchaser. Under English recording statutes, an instrument by record acquires no additional operation or effect, so there A would not be charged with notice. In the American courts, however, recording, if in the chain of title, does have the additional effect of giving notice. Therefore, since A took, not only from O, but also from P, he was charged with notice of recorded instruments executed by either.

Simonson v. Wenzel, 147 N. W. 804, 27 N. D. 638, L. R. A. 1918C, 780.

For other cases see Decennial Digests, Vendor and Purchaser ¶231(5).

Q. 57. O owned two adjoining lots, 1 and 2. He conveyed lot 1 to A, and in the deed agreed that no building should be built on lot 2 within 30 feet of the street on which both lots abutted. A duly recorded. O later conveyed lot 2 to X, who paid value therefor, knowing nothing of the agreed restriction upon that lot. When X commenced the construction of a building within 30 feet of the street, A sued to enjoin. What result?

A. By O's deed A acquired, not only the ownership of lot 1, but also an equitable servitude upon lot 2, kept by O. That servitude was binding upon O and any successor in ownership, except a bona fide purchaser of the legal estate. X was such bona fide purchaser, unless it can be said that he was charged with notice of the restriction contained in the recorded deed to A.

When X purchased from O, he may be expected to examine the records to see whether any earlier deeds have been made. In this case, X, on examining the records, could, of course, see that O had conveyed lot 1 to A. The recorded deed was primarily a conveyance of that lot. Should X be expected, at his peril, to follow up his examination to the point of finding out that in that deed there was a restriction placed upon the use of the adjoining lot? If the answer is in the affirmative, the burden upon the title searcher is considerable, and perhaps unreasonable. Some courts would so conclude. On the other hand, it may fairly be urged that there is sufficient advantage to be derived in the protection of restricted districts to warrant throwing such burden upon prospective purchasers. This probably is the prevailing view.

Glorieux v. Lighthipe, 96 A. 94, 88 N. J. Law, 199, Ann. Cas. 1917E, 484.
McQuade v. Wilcox, 183 N. W. 771, 215 Mich. 302, 16 A. L. R. 997.

For other cases see *Decennial Digests, Vendor and Purchaser* ¶231(3, 4).

Q. 58. P mortgaged land to B, and the mortgage was recorded. B assigned the mortgage to R, and the assignment was not recorded. B then released the land by deed to P (who knew of the assignment to R), and this release was recorded. Thereupon P conveyed to X, a purchaser in good faith, for value, who neglected to record his deed from P until after the assignment to R, and also an assignment from R to plaintiff's intestate, were recorded; the intestate having taken such assignment in good faith, for value. Assuming that this case arises in a state where a subsequent deed will be preferred as against a prior unrecorded deed only where a later deed has been recorded first, what should be the result as far as priorities are concerned as between plaintiff and X?

A. Assuming P was the owner of the land, and in position to mortgage it, the mortgage in B's hands was an effective lien, and this by successive assignments passed to R and the plaintiff's intestate. If the recording acts be forgotten for the moment, it is clear that plaintiff's intestate, holding under the chain of title senior in time, would be protected against X, who holds under a later and therefore inferior chain.

But R did not record his assignment, thus neglecting a step necessary under the recording act to preserve his favored position. In favor of an innocent purchaser, B was in position to displace R by another transfer of the mortgage. B made such transfer, in effect, by the release to P, but he was not an innocent taker; hence R was not displaced. It was P thereafter who was in position to defeat R and his successors, and, if X had recorded the deed

to him before the assignment to R was recorded, X would, under the statute, have been favored. This statute, however, displaces earlier transfers only in favor of subsequent innocent takers who *first* record. The claimant under the assignment to R having beaten X to the recording office, the latter must lose.

Fallass v. Pierce, 30 Wis. 443.

22 Mich. Law Rev. 418.

For other cases see Decennial Digests, Vendor and Purchaser ¶231(11).

Q. 59. O, the owner in fee of Blackacre, executed a deed thereof to A, who failed to record. A in turn conveyed to B, who did record. B then mortgaged the premises to M, and this mortgage was recorded. Some time after these deeds another deed was executed by O in favor of X, and on advice of counsel X secured a quitclaim deed from A, who was the divorced wife of O. It does not appear, however, that X had any intimation that O had ever executed a deed to A. The premises were then mortgaged by X to P, who now seeks to foreclose. M appears and claims to have superior rights to the land. What result?

A. By the deed to A the entire ownership vested in him, and this in turn passed to B and M. Aside from the recording act, then, M was senior in time and right. He claims, however, through the unrecorded deed from O to A. As the latter was subject to loss of his common-law priority by operation of the recording act, so also were B and M; their recording not being effective to amend the broken link, A's failure to record. Now O conveys to X, who, so far as actual knowledge is concerned, is an innocent purchaser. But X also takes a deed from A, whose deed to B is on record. Since X has taken a deed from A, as well as from O, can he ignore the recorded deed from A to B? X's chain of title is double—from O and from A. Should it be concluded that X was an innocent purchaser, in view of these facts? It is submitted that X should be charged with constructive notice of the earlier chain, and he therefore should not be deemed an innocent purchaser, which a person must be to displace earlier unrecorded deeds. P should stand no better than X.

If the case arises under a statute requiring that the subsequent innocent purchaser must first record, there may be an additional reason for rejecting P's claim, for nothing is said about recording by X or P.

Losey v. Simpson, 11 N. J. Eq. 246.

Simonson v. Wenzel, 147 N. W. 804, 27 N. D. 638, L. R. A. 1918C, 780.

For other cases see Decennial Digests, Vendor and Purchaser ¶231(4, 5).

REAL PROPERTY—FIXTURES

By JOSEPH WARREN MADDEN, Dean and Professor of Law, West Virginia University

Q. 1. A had a farm, on part of which was a grove that he decided to turn into a public picnic ground. He built a building about 15x30, of rough boards, with a brick fireplace, a cook stove, and a sink and pump connecting with a well. He also built outdoor tables and benches; he installed several swings, sinking bolts in the trees, to which to attach the ropes; he also built two rustic bridges over a stream that ran through the grove. The grove was in fact never used for picnic purposes, and a year later A sold his whole farm to B; the deed conveying the land simply by metes and bounds. A then attempted to remove all the above-mentioned articles. Was he entitled to do so?

A. No; the only things which A could rightfully remove were the cook stove, the outdoor tables and benches, and the swings. The other things mentioned became realty, upon their annexation, and passed by A's deed to B. Three tests are usually applied in determining whether a thing which is in the doubtful class is realty or personalty:

(1) Is the thing actually annexed to the land, or to something which is clearly a part of the land, or, if it is not actually annexed, is it a part, or accessory to some part, of the realty?

(2) Is it adapted to the use to which the land is devoted?

(3) Was it annexed with the purpose of making it a permanent addition to the land?

In our case, the building was annexed to the soil, at least by its own weight, and probably by posts set in the ground, was of considerable size and weight, and contained a brick fireplace, which was doubtless set directly upon the ground, and which would render the building practically immovable without destruction. It was well adapted to the use which the landowner intended to make of the land when he built the building. It was annexed as a permanent addition to the land, to be used and worn out right where it was located. The pump, which was connected with the well, which was clearly realty, also tends to attach the building to its location and to the soil. The sink would go with the building, since sinks are usually a permanent part of the buildings in which they are located.

The outdoor tables and benches were attached to the ground only by their own weight, which would not be great, and were easily movable. They are not particularly adapted to any particular place upon this land, and could be readily used upon another piece of land devoted to a similar purpose. While they were probably intended to be used permanently upon this land, yet they belong to a class of things which are practically always furniture, rather than a part of the land. The same observations apply to the swings and the cook stove. The annexation and adaptation are both very weak. As to the bridges, they were annexed by their weight, and perhaps sunk in the soil or fastened to trees at the ends. In length and structure they were adapted to a definite location upon this land, and could hardly be used elsewhere.

Snuffer v. Spangler, 92 S. E. 106, 79 W. Va. 628, L. R. A. 1918E, 149.

Lipsky v. Borgmann, 9 N. W. 158, 52 Wis. 256, 38 Am. Rep. 735.

Winslow v. Bromich, 38 P. 275, 54 Kan. 300, 45 Am. St. Rep. 285.

Neufelder v. Third St. & S. Ry., 63 P. 197, 23 Wash. 470, 53 L. R. A. 600, 83 Am. St. Rep. 831.

Hanson v. Ryan, 201 N. W. 749, 185 Wis. 566, 36 A. L. R. 1516, noted in 3 Wis. Law Rev. 371 (portable garage, landlord and tenant).

For other cases see *Decennial Digests, Fixtures* ⇨ 4, 5, 7, 9, 14, 33, 35(2, 3).

Q. 2. A owned a lot and factory. He bought from B machinery for the factory at a price of \$5,000—\$1,000 cash, and a mortgage on the machinery for \$4,000. This mortgage was duly recorded as a chattel mortgage. After installing the machinery, A gave C a real estate mortgage on the premises for \$25,000; C having no actual notice of B's mortgage. Later A bought additional machinery from B for \$3,500, paying \$2,000 cash and giving a chattel mortgage back for \$1,500. B recorded this mortgage as a chattel mortgage. This machinery was also installed in the factory. A later became bankrupt. Under order of court, the factory and machinery were sold as they stood for \$25,500. This sum was allocated by the court as follows: \$3,500 as the present value of the first lot of machinery; \$3,000 as the present value of the second lot of machinery; \$19,000 as the present value of the factory exclusive of the machinery. How should the \$25,500 be divided?

A. C should receive \$24,000, and B \$1,500, out of the fund. It is assumed that the circumstances under which the machinery was installed were such as to make the machinery a part of the land; that is, that the machinery was annexed to the building, adapted to use in connection with the building, and intended by the owner, who annexed it, to become a permanent addition to the building.

Then C's mortgage upon the premises would include all parts of the realty, including the machinery already annexed. The fact that B had recorded his chattel mortgage of the first lot of machinery is immaterial, since the machinery was, doubtless with B's consent, annexed and made a part of the land. A purchaser or mortgagee of land is under no duty to examine the records, to discover whether any parts of the land have been mortgaged as chattels, before being affixed to the land. The first chattel mortgage would therefore be completely subjected to the rights of C under his mortgage. As to the second chattel mortgage to B, while the machinery, when annexed, also became a part of the land, and while a prior mortgage does, ordinarily, cover future annexations to the land, yet B would be preferred as to the amount of his mortgage, if that amount did not exceed the value actually added to the premises by the annexation of the machinery. If there had been no mortgage upon the land, the chattel mortgage to B would have preserved the character of the machinery as chattels, as between A and B, or would at least have secured to B the right to remove them, under his chattel mortgage, if the debt was not paid by A. Since C, when he took his mortgage, did not rely upon the machinery, which had not yet been installed, as security, he is not in the position of a purchaser for value without notice, and it is not inequitable to allow B the right of removal as against him also. If B had undertaken to remove the machinery, and such removal would have damaged the realty, as it existed before the annexation, B would have to make good that damage.

Ice, Light & Water Co. v. Lone Star Engine & Boiler Works, 41 S. W. 835, 15 Tex. Civ. App. 694.

Campbell v. Roddy, 14 A. 279, 44 N. J. Eq. 244, 6 Am. St. Rep. 889.

Lazear v. Ohio Valley Steel Foundry Co., 63 S. E. 772, 65 W. Va. 105.

For other cases see *Decennial Digests*, *Fixtures* ⇨ 19, 21; *Receivers* ⇨ 77(1).

Q. 3. A owned a house and lot. He leased the place to B, who erected at the rear of the lot a brick garage, large enough for two cars. In it he installed a work bench, an electric motor, running a lathe, and electric lights. He put in a radiator, and laid pipes connecting with the heating plant in the house, and laid down a cement walk to the house. A later executed to C a real estate mortgage on the place. Later A failed to keep up the interest on his mortgage, and C began foreclosure proceedings, as he was entitled to do under his mortgage. B's lease was almost at an end, and he began to remove the various articles above mentioned. C seeks to enjoin him. What judgment?

A. B may be enjoined from removing the brick garage and the cement sidewalk, but may remove the other articles mentioned. The additions made by a tenant, for the purpose of making his occupancy of the premises more convenient, are known as tenants' fixtures, or trade fixtures. They are removable by the tenant, within the term of his lease, unless they are so firmly annexed to the realty that their removal would greatly damage the realty, or would result in the substantial destruction of the things themselves. The right of removal by tenants has been liberally permitted, in order to encourage the tenant to make full and convenient use of the property during his term. For this reason, as well as for the reason that there is usually no intent on the part of the tenant to make permanent annexations to the land, many things are removable by a tenant which, if annexed by the owner of the premises, would become for all purposes a part of the realty. The radiator, pipes, and electric lights, if installed by an owner, would be realty, yet are considered trade fixtures and removable by the tenant. The work bench, motor, and lathe would probably be considered personalty, even though installed by the owner. A's mortgage to C would not give C a right to prevent B from removing his chattels and trade fixtures. B's occupancy of the premises gave notice to C of his rights as tenant, including the possibility that C might have the right to remove fixtures. Since C's mortgage is subject to B's term, it is subject to B's right to remove tenants' fixtures, which is an incident of the term. The cement walk is part of the land, since it must have been intended as a permanent annexation, and since it could not be removed without destruction. The same observations apply, somewhat less strongly, to the brick garage. Some cases have gone rather far in permitting the tenant to remove his annexations, if he can do so without injury to the land, even though he must destroy most of the value of the fixtures in removing them. This view is economically unsound, and most courts do not adopt it.

Belvin v. Raleigh Paper Co., 31 S. E. 655, 123 N. O. 138.

Sanders v. Davis, L. R. 15 Q. B. Div. 218.

See *Potter v. Gilbert*, 35 A. 597, 177 Pa. 159, 35 L. R. A. 580.

Williams v. Vanderbilt, 34 N. E. 476, 145 Ill. 238, 21 L. R. A. 489, 36 Am. St. Rep. 486.

For other cases see *Decennial Digests*, Fixtures ⚡18(1); *Mechanics' Liens* ⚡192; *Mines and Minerals* ⚡69.

REAL PROPERTY—RIGHTS IN THE LAND OF ANOTHER

By JOSEPH WARREN MADDEN, Dean and Professor of Law, West
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Section

1. Rights Incidental to Possession.
2. Support.
3. Waters.
4. Rights of Reversioners.
5. Profits.
6. Easements.
7. Licenses.
8. Covenants Running with the Land.
9. Equitable Enforcement of Restrictive Covenants.
10. Rents.

SECTION 1.—RIGHTS INCIDENTAL TO POSSESSION

Q. 1. After A had built his house, a survey showed that one of the eaves extended about four inches over the land of his neighbor B. The spouting was so constructed that no water from the house fell upon B's land. B sued A in trespass. What judgment?

A. Judgment for B. Every unauthorized entry upon the land of another is a trespass, for which the law will give redress. The fact that the entry was by mistake, or that no damage resulted from it, is no justification of the entry. The law protects one's land from intrusion more carefully than it protects his chattels from mere touching. The fact that the unauthorized entry, if continued for the period of the statute of limitations, might give a right to continue the intrusion permanently, is often given as a reason for the rule.

Hannabalsen v. Sessions, 90 N. W. 93, 116 Iowa, 457, 93 Am. St. Rep. 250.
Butler v. Frontier Telephone Co., 79 N. E. 716, 186 N. Y. 486, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858.

For other cases see *Decennial Digests*, Ejectment ¶18; Trespass ¶12.

Q. 2. The defendant operated a cancer hospital in a residence district. There were residences within 100 feet of the hospital. The plaintiff, owning one of the houses, seeks to enjoin the defendant from operating the hospital. The testimony of real estate men is that the hospital causes a depreciation in the sale and rental value of the neighboring houses. The medical testimony is that there is no danger of contagion or infection from the hospital to the occupants of neighboring premises. Should the injunction be granted?

A. Yes; the plaintiff has shown damage, though that damage is caused by a popular fallacy, and not by a scientifically justified fear. The plaintiff is not responsible for the popular error, and he should not be obliged to suffer the loss caused thereby. The operation of the hospital constitutes a nuisance, because, by the prevailing opinion, it renders the adjoining property substantially less desirable for residence purposes. If the alleged nuisance merely affected particular people of abnormal sensitiveness, the result would be otherwise.

Stotler v. Rochelle, 109 P. 788, 83 Kan. 86, 29 L. R. A. (N. S.) 49.

Haggart v. Stehlin, 35 N. E. 997, 137 Ind. 43, 22 L. R. A. 577.

City of Northfield v. Board of Chosen Freeholders of Atlantic County, 95 A. 745, 85 N. J. Eq. 47.

For other cases see Decennial Digests, Nuisance $\S$ 3(8), 71.

SECTION 2.—SUPPORT

Q. 3. The defendant mined coal under his land so close to the boundary of the plaintiff's land as to create a danger that the plaintiff's land would sink. No subsidence actually occurred, however, until eight years thereafter. Then the plaintiff's land sank, and damage resulted. The period of the statute of limitations was six years. May the plaintiff recover?

A. Yes; one has a right to the lateral support of his land in its natural condition, by his neighbor's land. The cause of action, however, does not accrue until the actual subsidence occurs; hence the statute of limitations has not run. The mere excavation is no wrong to the plaintiff, since artificial support might be substituted. Vexatious actions might be brought, if the mere excavation were held to be actionable. Also, where the excavation is under the surface, the statute of limitations would in many cases have run before the plaintiff would have discovered the situation.

The rule stated above places a considerable burden upon the mining industry, by indefinitely extending the time during which a liability may be established; but it seems to be necessary to prevent injustice to the owners of neighboring lands. It is a nice question whether, if one subsidence occurs and a recovery is had, any future action can be brought for a future subsidence, since, in contemplation of law, all damages are satisfied by the judgment.

Smith v. City of Seattle, 51 P. 1057, 18 Wash. 484, 63 Am. St. Rep. 910.
See Noonan v. Pardee, 50 A. 255, 200 Pa. 474, 483, 484, 55 L. R. A. 410,
86 Am. St. Rep. 722.

But see Darley Main Colliery Co. v. Mitchell, L. R. 11 S. C. 127 (new cause of action after each subsidence).

For other cases see Decennial Digests, Limitation of Actions $\S$ 55(5).

Q. 4. The plaintiff owned a four-story building, one side of the foundation of which was located close to the boundary between his land and defendant's land. The defendant excavated upon his land for the purpose of constructing a building, and removed the earth to a depth of several feet, clear up to the boundary line. He used reasonable methods of excavation, but did not notify the plaintiff, nor shore up the plaintiff's building. As a result the plaintiff's building settled and cracked, and was seriously damaged before he learned of the excavation. Is the defendant liable for the damage?

A. Yes. One is not under a duty to furnish lateral support for artificial structures upon his neighbor's land. Buildings should be built so that they will stand upon their own foundations, without exerting lateral pressure beyond the land on which they are located. Any other rule would prevent the full use of valuable land by one's neighbor, after a building had been constructed. Therefore excavation carried on with reasonable care will not render one liable. However, the failure to notify a neighbor whose building is endangered is held to constitute negligence. This result would not follow, of course, if he had knowledge of the facts, gained from other sources. There was no duty on the part of the defendant to shore up the plaintiff's building. That was the plaintiff's own lookout. The sole ground of liability in the case is the lack of notice. If the excavating is done negligently, such as by the use of explosives, and the damage is caused thereby, of course, there is liability. In some jurisdictions, the duties of the parties in a case such as this are fixed by statute or by municipal ordinance.

Gerst v. St. Louis, 84 S. W. 34, 185 Mo. 191, 209, 105 Am. St. Rep. 580.

Schultz v. Byers, 22 A. 514, 53 N. J. Law, 442, 13 L. R. A. 569, 26 Am. St. Rep. 435.

Davis v. Summerfield, 42 S. E. 818, 131 N. C. 352, 63 L. R. A. 492, 92 Am. St. Rep. 781.

For other cases see Decennial Digests, Adjoining Landowners ¶4(4).

SECTION 3.—WATERS

Q. 5. A, an upper riparian proprietor, erected a mill and dam, and diverted a substantial part of the water of the stream through an artificial channel which returned to the stream at a point below the riparian land of B. B was not damaged, since he was not making any use of the water upon his land. He sues A, however, and claims that he should recover at least nominal damages. What judgment?

A. Judgment for B. Any material or perceptible diminution in the flow of a stream, except for reasonable domestic or agricultural purposes, is a wrong against the lower riparian owner. The fact

that he may not, at the time, be making any use of the water, does not prevent him from protecting his natural right to the undiminished flow of the stream through his land. One reason often given by the courts is that if the lower owner should acquiesce in the diversion for the prescriptive period, he would have lost his right. However, if the courts should hold that he had no cause of action until damage resulted, that reason would not seem to apply. Hence the argument is, to a degree, circular. However, it would be inconvenient to interfere with the user of the upper proprietor which had been maintained for the prescriptive period, just because no lower owner, during that time, had been damaged.

Ware v. Allen, 5 N. E. 629, 140 Mass. 513.

New York Rubber Co. v. Rothery, 30 N. E. 841, 132 N. Y. 293, 28 Am. St. Rep. 575.

Roberts v. Martin, 77 S. E. 535, 72 W. Va. 92, Cf.

Eells v. Chesapeake & O. Ry. Co., 38 S. E. 479, 49 W. Va. 65, 87 Am. St. Rep. 787.

For other cases see *Decennial Digests*, *Easements* §7(1); *Limitation of Actions* §55(7); *Waters* §60, 78, 84, 86.

Q. 6. X, the owner of a city lot lying on a slope, erected a wall at the upper side of his lot which caused surface water to collect upon the land of his neighbor, **Y**, which water damaged **Y**'s land and a quantity of goods in his basement. May **Y** recover against **X**?

A. No. Surface water is regarded as a common enemy, and one may improve his lot to keep it off, though he thereby interferes with the natural flow, to the damage of his neighbor. This rule is based upon public policy, which recognizes that it is more important that land be available for improvement than that the natural contour and drainage should be preserved. The lower owner has no right to have the surface water come down, though it would irrigate or fertilize his land, or fill his reservoir. Neither has he any right that his upper neighbor should restrain it from coming down. He does have a right, however, that it should not be collected upon the upper land and thrown in a body upon his land, to his damage. By the preferable view, he has a right to prevent it from coming down. Several jurisdictions have however, adopted the contrary view. Since it is nearly always possible to arrange artificial drainage, where the natural drainage of surface water is interrupted, the decision herein made seems preferable.

Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519.

Walker v. New Mexico & S. P. R. Co., 17 S. Ct. 421, 165 U. S. 593, 41 L. Ed. 837.

See *Farkas v. Towns*, 29 S. E. 700, 103 Ga. 150, 68 Am. St. Rep. 88.

Boyd v. Conklin, 20 N. W. 595, 54 Mich. 583, 52 Am. Rep. 831.

For other cases see *Decennial Digests*, *Waters and Water Courses* §116, 118, 119(2).

Q. 7. The plaintiff, a farmer, had a good water well upon his farm, the water from which he had used for domestic purposes and for watering his stock, for the past 30 years. The defendant, a coal-mining company, opened a mine upon its premises, one-fourth of a mile away, and the sinking of the shaft caused the water, which had formerly percolated to and supplied the plaintiff's well, to run into the shaft, from which it was pumped to the surface and wasted. The defendant had no knowledge or means of knowledge that the sinking of its shaft would have the effect of destroying the plaintiff's well. Is the defendant liable for the plaintiff's damage?

A. The defendant is not liable. One has no right in waters percolating through the soil of another, which will prevent the other from making a normal use of his premises, even though that use should have the effect of cutting off the flow of the water. The uncertainty of the location of underground waters and of the direction in which they flow would make such a rule of law too burdensome to the development of land. Neither can one acquire a right to the uninterrupted flow of such waters by user for the prescriptive period. The user is not adverse, since it is no wrong, and there is no notice of it to the one against whom the right is claimed.

If the act of cutting off the waters is done out of malice, rather than for the purpose of making use of the premises, it is held to be wrongful by the courts of many jurisdictions. If the defendant had drilled a well for the purpose of transporting the water off his premises, and the effect had been to destroy or damage the plaintiff's well, some authorities would hold the defendant liable, applying the doctrine that rights in percolating waters are relative rather than absolute, and that the defendant's use of the water off the premises is unreasonable. If the second well is drilled for use on the premises, however, there is no liability.

Katz v. Walkinshaw, 70 P. 663, 74 P. 766, 141 Cal. 116, 64 L. R. A. 236, 99 Am. St. Rep. 35.

Forbell v. City of New York, 58 N. E. 644, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666.

See Houston & T. C. R. Co. v. East, 81 S. W. 279, 98 Tex. 146, 66 L. R. A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827.

Erickson v. Crookston Waterworks, Power & Light Co., 117 N. W. 435, 105 Minn. 182, 17 L. R. A. (N. S.) 650.

For other cases see Decennial Digests, Waters and Water Courses 101, 102, 105, 107(2).

SECTION 4.—RIGHTS OF REVERSIONERS

Q. 8. The defendant erected a plant for the generation of electricity, which, in the course of its operation, emitted heavy smoke and

steam, and produced loud noises which constituted a nuisance to the adjoining store building owned by the plaintiff. The plaintiff then leased his building to a third party for six years at a rental which was \$6,000 less than the rental which he could have secured before the erection of the defendant's plant. Plaintiff now sues the defendant for the \$6,000. Can he recover?

A. No; the defendant's acts constitute a wrong to the occupant of the plaintiff's premises, for which that occupant may sue, though he has secured them at a reduced rental because of the defendant's acts. The damage in this case is considered as temporary, since it would be stopped at any time by the discontinuance of the defendant's activities, or by a change in its methods, which would eliminate the smoke, steam, and noise. If the defendant had caused the plaintiff's building to crack, or had in any way physically damaged it, the plaintiff could have sued for the injury to his reversion. Where there are several interests in the same piece of property, the holder of each interest may recover for the damage done to his interest. If the plaintiff in this case should recover the \$6,000, and then the lessee should secure an injunction restraining the defendant from continuing the nuisance, the injustice of the result would be plain. In some cases, such as the *Elevated Railway Cases*, the nuisance has been considered as a permanent one, for which the landlord alone could sue, where he had leased his premises after the railroad was constructed.

Miller v. Edison Electric Illuminating Co. of New York, 76 N. E. 734, 184 N. Y. 17, 3 L. R. A. (N. S.) 1060, 6 Ann. Cas. 146.

Bly v. Edison Electric Illuminating Co., 64 N. E. 745, 172 N. Y. 1, 58 L. R. A. 500.

Kernochan v. Manhattan Ry. Co., 59 N. E. 906, 161 N. Y. 345.

For other cases see *Decennial Digests*, *Eminent Domain* §155; *Landlord and Tenant* §142(6, 7, 8).

SECTION 5.—PROFITS

Q. 9. A granted to B "the right to take and carry away all coal" to be found within certain described premises belonging to A, "provided that B, his heirs and assigns, pay to A, his heirs and assigns, the sum of five cents per ton for all coal so taken from the premises." Thereafter A proceeded to mine coal from the premises and B sought to enjoin him from doing so. What should be the result?

A. An injunction should not issue. The right granted to B was a profit, a mere right to go upon A's land, and mine coal, and reduce it to his possession. This did not make B the owner of the coal. A still owned it, and, unless the profit which he had granted to B was

an exclusive profit, A could still exercise the usual rights of ownership over his property, except that he could not exclude B from enjoying his right. The question of whether B's profit was meant to be an exclusive one is a question of intent, to be determined from the terms of the grant. The fact that there was no time limit within which B must exercise his profit, and that he was to pay for the right only when he exercised it, would make it improbable that A intended to deprive himself entirely of the beneficial use of his property, when he might never receive a penny by way of royalty from B. If the terms of the grant had been the same, but B had paid a lump sum for the profit, then the profit would be held to be an exclusive one.

Grubb v. Bayard, 2 Wall. Jr. 81, Fed. Cas. No. 5,849.

Harlow v. Lake Superior Iron Co., 36 Mich. 105.

See Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760.

For other cases see Decennial Digests, Mines and Minerals §55(3, 4, 5), 62(1).

SECTION 6.—EASEMENTS

Q. 10. Jones, who contemplated the purchase of land in a certain vicinity for the construction of a factory, purchased from Smith, a nearby landowner, the right to construct and maintain a sewer and drain 30 inches in diameter across the land of B to be located upon a specified route. Jones' plans for the factory fell through, and he conveyed to the city of Zenith all his rights under the conveyance from Smith. The city undertook to construct the sewer through Smith's land, and Smith sought an injunction. Should it be granted?

A. No; the easement which Jones obtained by his purchase from Smith was an easement in gross. It could not have been an easement appurtenant, since Jones owned no land for the benefit of which it could have been used. The fact that he contemplated purchasing land and using the sewer in connection with it could not attach the right to any particular piece of land. In most jurisdictions in this country, an easement in gross, of the type specified here, is assignable. If it had been a right of way for travel by persons and vehicles, and not annexed to any particular piece of dominant land, there would be a danger of surcharging the servient estate by the assignment of the easement to numerous persons, or by its being inherited by numerous heirs. Since the dimensions of the sewer were fixed, and the use to which it could be put was specified, the use of the easement by the city would be no greater burden upon the servient

estate than its use by Jones. It would therefore be perpetual and assignable.

City of Richmond v. Richmond Sand & Gravel Co., 96 S. E. 204, 123 Va. 1.
Standard Oil Co. v. Buchi, 66 A. 427, 72 N. J. Eq. 492.

Columbia Water Power Co. v. Columbia Electric St. Ry., Light & Power Co., 20 S. E. 1002, 43 S. C. 154.

Shreve v. Mathis, 52 A. 234, 63 N. J. Eq. 170.

Assignability of Easements in Gross, Simes, 22 Mich. Law Rev. 521.

For other cases see *Decennial Digests*, *Easements* ⚭3(1, 2), 26(1);
Waters and Water Courses ⚭158(4).

Q. 11. White, for a consideration, granted to Black the exclusive right to bring visitors upon the estate of White, for the purpose of inspecting various rare plants and shrubs and historical relics, which White kept upon the estate. After Black had exercised the right for a time, collecting a profitable fee from the visitors, White sold his estate and everything on it to Green, who had notice of the arrangement with Black. Green locked the gates, and refused to admit Black or his visitors. What are the rights of Black against Green?

A. He has none. The supposed grant from White to Black did not convey an easement, nor any other right in the land. It was a mere personal arrangement between White and Black, in the nature of a contract, rather than a conveyance. Easements cannot be created at will, for the result would be to so burden and restrict the free use and control of land by the general owner of it that his ownership would be worthless, and a sale of the land would be impossible. For reasons of public policy, therefore, rights in the land of another are restricted to certain traditional types, such as rights of way, of drainage, of light and air, and some others. Other easements, similar to the traditional types, will probably be added, but the unlimited creation of rights in land, enforceable against subsequent owners, should not be permitted. Some further rights, enforceable in equity, may be created by restrictive covenants; but the right claimed in this case would not fall within that class.

Wheelock v. Jacobs, 40 A. 41, 70 Vt. 162, 43 L. R. A. 105, 67 Am. St. Rep. 659.

Hill v. Tupper, 2 Hurl. & C. 121.

See *Schmoele v. Betz*, 61 A. 525, 212 Pa. 32, 108 Am. St. Rep. 845.

Steiner v. Peterman, 63 A. 1102, 71 N. J. Eq. 101.

For other cases see *Decennial Digests*, *Easements* ⚭2, 14(1); *Licenses* ⚭44(3); *Municipal Corporations* ⚭671(7); *Waters and Water Courses* ⚭154(1).

Q. 12. Davis purchased from Jenkins a right of way over a strip of land 15 feet in width, along the east margin of Jenkins farm,

to be used by Davis in traveling to and from his summer cottage. Davis tore down the fence at each end of the way, and improved the way by placing gravel upon it. Jenkins placed gates at the ends of the way, and pastured his cattle in the inclosure, where they frequently obstructed the automobiles of Davis and his guests. Jenkins also used the way to haul heavy loads upon farm wagons with narrow iron tires, which destroyed the improved surface of the road. Which, if any, of these acts of Jenkins were legally wrongful?

A. The placing of the gates was no wrong. A private way is not an open way, unless such a way is stipulated, or the use which is to be made of it is so extensive that keeping it closed by gates interferes seriously with its use. The expense to Jenkins of fencing along the entire way would be out of proportion to the slight inconvenience to Davis in being required to open and close the gates, and it may be inferred that an open way was not intended. Neither was the pasturing of the cattle a legal wrong. Davis did not purchase the strip of land, but only a right to pass over it. It still belonged to Jenkins for all other purposes, and the pasturing of his cattle in the field was proper, though it caused Davis some inconvenience. The use of the road for hauling, which damaged it, was a legal wrong as against Davis. This was not merely making use of Jenkins' own land, but was making use of an improvement supplied by Davis, and damaging it. Jenkins had all the rest of his field to drive over, and his driving upon the improved way was a serious interference with the use of it by Davis. He was under no duty to keep the way in repair for Davis, but he was under a duty not to damage it.

Herman v. Roberts, 23 N. E. 442, 119 N. Y. 37, 7 L. R. A. 226, 16 Am. St. Rep. 800.

Durfee v. Garvey, 21 P. 302, 78 Cal. 546.

Wiley v. Ball, 79 S. E. 659, 72 W. Va. 685.

Dulin v. Ohio River R. Co., 80 S. E. 145, 73 W. Va. 166, L. R. A. 1916B, 653, Ann. Cas. 1916B, 1183.

For other cases see *Decennial Digests*, Adverse Possession ¶60(6); Easements ¶44(1), 61(2); Waters and Water Courses ¶170.

Q.13. Johns owned a piece of land with a two-story wooden building on it. He conveyed the second story of the building to Marks, who used it as a residence, using an outside stairway. After 20 years, during which time Johns had not painted nor repaired the building, the timbers and foundation had become so ruinous that the part belonging to Marks was unsafe for occupancy. Johns states that he intends to allow the building to fall, and to replace

it with a one-story commercial garage. What are the rights of Marks?

A. He has none. The location of his property gives him an easement of support in the part of the building owned by Johns. Johns could not remove this support, but he is under no duty actively to maintain it, and, if it is removed by the elements, he need not replace it. If the building were destroyed by fire, he would be under no duty to replace his part of it, in order to furnish a support for Marks' second story. An easement in an artificial structure gives a right in that structure in its present condition, but no right that such condition should be permanently maintained, nor replaced if it should be destroyed. Practically, Marks' easements of support and in the stairway vanish when the structure in its present condition is removed, though it is held that, if the structure is rebuilt practically as it was before, the easement which existed before may again be used. Whether this is done or not will depend entirely upon the will of Johns; so this rule is not of much value to Marks.

Bowhay v. Richards, 116 N. W. 677, 81 Neb. 764, 19 L. R. A. (N. S.) 883.

McKenna v. Eaton, 65 N. E. 382, 182 Mass. 346, 94 Am. St. Rep. 661.

Jackson v. Bruns, 106 N. W. 1, 129 Iowa, 616, 3 L. R. A. (N. S.) 510.

Weis v. Meyer, 17 S. W. 339, 55 Ark. 18.

For other cases see Decennial Digests, Easements ¶16, 49; Health ¶14; Party Walls ¶5.

Q. 14. Defendant, a railroad company, placed a dam in a small stream running through its premises, and used the water from the pond thereby created, for its engines, so that practically no water at all continued over the dam and flowed down the stream. This situation was continued for 25 years, during which time plaintiff, a lower riparian owner, improved his property and constructed his house and outbuildings upon the old bed of the stream, placing a 36-inch tile drain, which was sufficient to carry the water as it then flowed. Defendant began to use electric engines, and took no water from the pond, so that the original flow of the stream was revived. The plaintiff's drain was insufficient to carry it, and his land and buildings were damaged. May he sue the defendant for damages?

A. No; the defendant, by its long user, acquired a right by prescription to divert the water of the stream, so that the plaintiff could no longer complain of the diversion, as he might have done before the prescriptive period had expired. But this was a right in the defendant, with no correlative duty on its part to continue to pump the water from the pond, and prevent its flowing down

the old channel, for the plaintiff's benefit. The usual easement involves no duty on the part of the dominant owner to exercise it, nor to continue to exercise it, even though he has begun to do so. In some cases, where a stream has been diverted into a different channel, through which it will continue to flow without any active assistance, and owners upon the old bed of the stream have acquiesced for a considerable time, and have constructed their buildings and graded their land upon the assumption that the new status will continue, the courts have held that the stream cannot be restored to its old channel, to the damage of these owners. But in the case under discussion all parties knew that the new status depended upon the continued action of the defendant, and the plaintiff could not expect the defendant to continue that action perpetually, or for any fixed period of time

Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299.

See *Stimson v. Inhabitants of Brookline*, 83 N. E. 893, 197 Mass. 568, 16 L. R. A. (N. S.) 280, 125 Am. St. Rep. 382, 14 Ann. Cas. 907.

Mathewson v. Hoffman, 43 N. W. 879, 77 Mich. 420, 6 L. R. A. 349.

Goodrich v. McMillan, 187 N. W. 368, 217 Mich. 630, 26 A. L. R. 801.

For other cases see Decennial Digests, *Waters and Water Courses* 146, 162, 167(1), 168, 179(5, 6).

Q. 15. A owned a house and lot, which in the year 1900 had a stable upon it, in which X, A's predecessor in title, kept a horse and carriage. X had acquired by prescription a right to drive over the lot of B, which adjoined his, to reach the public street. In 1901 A purchased the premises from X. In 1902 the stable burned, and A, having no horse or carriage, cleared the ground and planted fruit trees upon its site. In 1905 B constructed a garage upon the site of the old driveway, which X had used. In 1907 A proposes to purchase an automobile, build a garage upon the former site of the stable, and use the driveway which X had used. May he require B to move his garage, and to open the driveway for his use?

A. No. A had, by his conduct in clearing the site of the stable and planting trees there, shown an intent to abandon the easement which he undoubtedly had at that time. B, in reliance upon that abandonment, has built a permanent structure, which would have to be removed or destroyed before A could again use his easement. The rule is that an abandonment by the dominant owner, acted upon by the servient owner, who changes his position in a substantial way in reliance upon the abandonment, destroys the easement. The rule is hardly consistent with the general rule that permanent interests in land can only be conveyed by deed or will, and

is practically limited to the easement cases. If one acquires title to the land itself by adverse possession, he does not lose that title merely by failure to use or occupy, unless another occupies adversely for the statutory period. In the easement cases, a mere nonuser, coupled with the intent to abandon does not cause the loss of the easement, according to a considerable number of cases.

Moore v. Rawson, 3 Barn. & C. 332.

Warren v. Syme, 7 W. Va. 474.

See Scott v. Moore, 37 S. E. 342, 98 Va. 668, 81 Am. St. Rep. 749.

King v. Murphy, 4 N. E. 566, 140 Mass. 254.

For other cases see Decennial Digests, Easements $\S$ 30(1, 2); Frauds, Statute of $\S$ 63(3).

SECTION 7.—LICENSES

Q. 16. Defendant, a farmer, gave oral permission to his neighbor, the plaintiff, to lay a four-inch gas pipe line across defendant's land close to the fence, for a distance of one-half mile. No consideration was paid by plaintiff. After a few weeks plaintiff and defendant had a quarrel about another matter, and defendant threatened to tear up the line and throw the pipes into the road. It will cost the plaintiff \$500, in addition to the expense of acquiring another right of way, to remove the line and place it elsewhere. May he restrain the defendant from tearing up the line?

A. No; the permission given the plaintiff was only a license, and was revocable at his pleasure, even though the revocation would damage the licensee. The usual methods of acquiring a permanent right in the land of another are prescription and grant. Neither of those methods was used here. Some cases have held that, where a license is given and acted upon by the expenditure of considerable sums, it cannot be revoked; but that doctrine, even where it is followed, is limited to cases where a permanent right, or a right for a definite period of time, was intended to be given. In this case it could not have been contemplated that the line should remain perpetually, and no shorter period of time was stipulated. The law must consider, therefore, that the line was to remain so long as the defendant was willing. He therefore has the right to revoke the license.

Dickinson v. Foster, 95 S. E. 196, 81 W. Va. 739.

Crosdale v. Lanigan, 29 N. E. 824, 129 N. Y. 604, 26 Am. St. Rep. 551.

Yeager v. Tuning, 86 N. E. 657, 79 Ohio St. 121, 19 L. R. A. (N. S.) 700, 128 Am. St. Rep. 679.

See Stoner v. Zucker, 83 P. 808, 148 Cal. 516, 113 Am. St. Rep. 301, 7 Ann. Cas. 704.

For other cases see Decennial Digests, Easements $\S$ 1; Licenses $\S$ 43, 44(3), 58(1, 4); Waters and Water Courses $\S$ 157.

SECTION 8.—COVENANTS RUNNING WITH THE LAND

Q. 17. A leased a saloon building and its fixtures to B for the purpose of conducting a saloon. B covenanted that he would conduct the saloon in an orderly and legal manner. B assigned the unexpired portion of his lease to C, who operated the saloon in a disorderly manner, violating the laws concerning the hours of closing, the sale of liquor to infants and habitual drunkards, etc. A assigned his reversion to D, who sues C for breach of the covenant in the lease. May he recover?

A. Yes. Ordinarily one is not bound by a contract made by another, but in the case of "covenants running with the land" one may be bound, if he becomes the owner of land, to perform certain obligations entered into by his predecessor in title with reference to the land. Where the relation of landlord and tenant exists, a covenant by either which "touches and concerns" the land, and is not merely a personal covenant, will run with the land, by a rule of the common law, and with the reversion, by the provisions of the English statute of 32 Henry VIII. The question of whether a particular covenant "touches and concerns" the land, or is merely collateral, has given the courts much difficulty. If the compliance with the covenant affects the tenant in his use of the premises, and its breach would affect the landlord, as landlord, and not merely as an owner of adjoining property, or as a possible business competitor, or in some other collateral way, the covenant is treated as a running covenant. In this case, a compliance with the covenant does restrict the tenant in his use of the premises, and a breach of the covenant would damage the value of the landlord's reversion, by giving the property a bad reputation, and possibly by exposing the landlord to legal action. D, therefore, is affected as landlord, and may sue C, the assignee of the tenant, for breach of the covenant.

Crowe v. Riley, 57 N. E. 956, 63 Ohio St. 1.

Granite Building Corp. v. Greene, 57 A. 649, 25 R. I. 586.

See Thruston v. Minke, 32 Md. 487.

See Bigelow, 12 Mich. Law Rev. 639.

For other cases see Decennial Digests, Easements §3(1); Landlord and Tenant §44(1, 2), 53(2), 134(4).

Q. 18. X leased Blackacre to Y for the purpose of drilling for natural gas, and Y covenanted to pay X a certain annual rental, and also to furnish to X, at his dwelling house on another tract of land, Whiteacre, a sufficient amount of gas for X's needs. Y assigned his lease to Z, who paid the annual rental, but who refused

to supply gas to X on Whiteacre. X sues Z for breach of the covenant. May he recover?

A. Yes; the lessee's covenant to pay rent is held to run with the lease, and with the reversion. If a part of the consideration for the lease consists of services to be performed by the tenant on land of the lessor other than the leased land, or of the lessee's covenant to grind his grain at the lessor's mill, so that the lessor may profit by the tolls, it has been held that such duties will be considered as rent, and therefore as running with the land. The duty to furnish natural gas, produced on the leased premises, to the lessor at his home, would seem to come within the same rule. If the covenant were to buy all of the tenant's clothes at the landlord's store, the covenant would not run, though, of course, it might form a part of the consideration for the lease. But it would neither affect the tenant in his use of the premises, nor the landlord, as landlord, but only as the owner of a clothing store on other premises. If, in our case, Whiteacre and the reversion in Blackacre should be conveyed by X to different persons, a difficult question would arise as to whether either of those persons could enforce the covenant against the lessee or his assignee. The owner of the reversion in Blackacre probably could not, since the covenant was not made with him, nor has he any interest in its enforcement. The owner of Whiteacre is in no privity of estate with the occupier of the leased premises; so it would seem that he could not enforce the covenant.

Harbert v. Hope Nat. Gas Co., 84 S. E. 770, 76 W. Va. 207, L. R. A. 1915E, 570.

Indiana Nat. Gas & Oil Co. v. Hinton, 64 N. E. 224, 159 Ind. 398.

See Webster v. Nichols, 104 Ill. 160.

For other cases see Decennial Digests, Covenants ¶61; Landlord and Tenant ¶262(1/4); Mines and Minerals ¶74, 79(5).

Q. 19. L leased Blackacre to E for 10 years, the lease containing a covenant by the lessor, for himself, his heirs, executors, administrators, and assigns, that he or they would, upon 30 days' notice before the end of any year, convey the leased premises in fee simple to the lessee, his heirs and assigns, for a specified sum to be paid in cash. L assigned the reversion to D, and E assigned the term to F. F gave notice to D that he desired to purchase Blackacre under the provisions of the lease, and tendered the price, but D refused to execute a deed. F files a bill in equity for specific performance of the agreement. Should he succeed?

A. Yes; the covenant is of a kind which is held by the American courts to run both with the land and the reversion. It "touches and

concerns" the lessee's interest in the premises, in the same way that a right to renew a lease does. It constitutes an important part of the consideration for accepting the lease. It affects the value of the tenant's interest, as tenant, and restricts the landlord's right, as landlord. It is not necessary that the covenant should relate to an act to be done upon the land itself, if its performance will affect the interests of the parties to the lease, as such parties. Covenants to renew leases have been treated as running covenants, and covenants in leases to convey the fee involve the same principals. The English courts have treated the covenants to renew leases as anomalous, though they have allowed them to run, but have refused to allow a covenant to convey the fee to run. They hold that such a covenant is outside the scope of the relation of landlord and tenant, and does not affect that relation, at all. By the American view, however, the covenant may be enforced by F, though it was not in terms assigned to him, and may be enforced against D, though he did not expressly assume its obligations.

Blakeman v. Miller, 68 P. 587, 136 Cal. 138, 89 Am. St. Rep. 120.

Hollander v. Central Metal & Supply Co., 71 A. 442, 109 Md. 131, 23 L. R. A. (N. S.) 1135.

Harper v. Runner, 123 N. W. 313, 85 Neb. 343.

Contra: *Woodall v. Clifton*, [1905] 2 Ch. 257.

For other cases see *Decennial Digests*, Covenants ⌘59; Landlord and Tenant ⌘53(2), 79(2).

Q. 20. A owned Whiteacre, and B owned Greenacre, two adjoining tracts of land. A and B entered into an agreement in writing whereby A agreed to maintain, for a period of 20 years, a dam upon Greenacre for the use of B's mill. B agreed to pay \$75 per year to A for the maintenance of the dam. The agreement contained this provision: "The terms and provisions of this agreement shall be considered as covenants running with the land." B conveyed Greenacre to Y. A kept up the dam, and Y made the payments, for a number of years, and then A refused to maintain the dam longer. Y sued A for damages for the breach. What judgment?

A. Judgment for A. The covenant, though expressly intended by the parties to be a running covenant, will not run with the land. As between owners in fee, the doctrine of running covenants is very narrow. It is limited by most courts to cases where there was a privity of estate, based upon an easement, or profit, or other servitude in one of the tracts of land for the benefit of the other tract, and the covenant was made in furtherance of that easement. It is said that there must be some "privity of estate" between the covenanting parties, at the time the covenant is made. This principle is an ar-

bitrary one, and difficult to justify. It is probably based upon the analogy of the tenure which always exists in the landlord and tenant cases, where covenants are most often used.

In our case there was no privity of estate between the covenantor, A, and the covenantee, B, which would attach the benefit of the covenant to B's land. No question is involved as to whether the burden of the covenant would run, since the suit is against the original covenantor. It might be argued that, since such a covenant is assignable, the conveyance of Greenacre by B to Y would amount to an assignment of the benefit of the covenant. But no such intent is shown, and to hold that the covenant was assigned, without any words showing an intent to assign, would amount to a holding that the covenant ran with the land.

Lyon v. Parker, 45 Me. 474.

Hurd v. Curtis, 19 Pick. (Mass.) 459.

Evansville & S. I. Traction Co. v. Evansville Belt R. Co., 87 N. E. 21, 44 Ind. App. 155.

See *Horn v. Miller*, 20 A. 706, 136 Pa. 640, 9 L. R. A. 810.

Hurxthal v. St. Lawrence Boom & Lumber Co., 44 S. E. 520, 53 W. Va. 87, 97 Am. St. Rep. 954.

See *Clark*, 32 Yale Law J. 123.

For other cases see *Decennial Digests*, *Contracts* ⚭186(1); *Covenants*, *Action of* ⚭3; *Covenants* ⚭29, 53, 57, 84; *Street Railroads* ⚭55.

Q. 21. A granted a tract of land to R for a railroad right of way, and R covenanted, in consideration of the grant, for itself and its assigns, that it would always, for the benefit of A and his assigns, as the owners of the adjoining land, maintain its roadbed upon the right of way granted, at the natural level of the ground. A later conveyed all his land adjoining the right of way to C. R conveyed its railroad to D. D raised its roadbed, and B sues D for a breach of the covenant. What judgment?

A. Judgment for B. The conveyance from A to R, and the covenant in that conveyance, created a sufficient privity of estate to make the covenant a running covenant. No legal policy is violated by permitting the benefit of a covenant to be attached to land and run with it into the hands of successive owners. The covenant could be assigned from one person to another, and, since it relates to and benefits a particular piece of land, and was apparently intended by the parties to run with that land, it should be held to run. The question of whether the burden would run to D, the assignee of R, is more difficult. There are strong reasons of public policy why the law should not permit new and unusual burdens to be fastened upon land, to which it would be perpetually subjected, no matter who should own it. Yet most American courts hold that the burden of

a covenant, such as is involved in this case, will run, if the burden plainly touches and concerns the land which is sought to be subjected to it. However, where the covenant involves the performance of some positive act by the covenantor, the burden of the covenant does not run, because of the difficulties which would arise from attempting to enforce against unknown future owners positive duties, which their circumstances might render it impossible for them to perform. Exceptions to this rule are the cases of maintaining fences and rights of way, but the law has permitted these positive duties to be attached to land, calling them "spurious easements," and regarding them as exceptional.

St. Louis, I. M. & S. Ry. v. O'Baugh, 5 S. W. 711, 49 Ark. 418.

Ford v. Oregon Electric Ry. Co., 117 P. 809, 60 Or. 278, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280.

National Union Bank at Dover v. Segur, 39 N. J. Law, 173.

Gilmer v. Mobile & M. Ry. Co., 79 Ala. 569, 58 Am. Rep. 623.

For other cases see *Decennial Digests, Contracts* ⚡187(1); *Covenants* ⚡29, 61, 69(1), 82.

Q. 22. A and B owned adjoining lots in the business section of a city. They entered into an agreement whereby A was to build a wall, the center line of which would be upon the boundary between their lots, and which was to be a party wall. The agreement contained this language: "Provided, always, that the right of using the party wall, conferred by this agreement, shall be contingent upon the said B, his heirs, executors, administrators, or assigns, paying or causing to be paid to the said A, his heirs, executors, administrators, or assigns, the one-half part of the original cost of said wall. A erected the wall, and later conveyed his lot to X. B conveyed his lot to Y, who built upon it, using the party wall. Both X and Y had notice, when they purchased their lots, of the covenant concerning the party wall. X sued Y for one-half the cost of the wall. What judgment?

A. Judgment for X. Party wall covenants are commonly held to run with the land, both as to the duty to pay and the right to receive payment, if they indicate that it was the intent of the parties that they should run. The construction of a party wall under an agreement may be considered as putting in each owner the title to that part of the wall which stands upon his land, but with mutual easements in both parties for the proper use of the wall. This relation creates a sufficient privity, so that a running covenant might be attached to it. However, some courts have had difficulty in connecting the right to receive the money with one of the pieces of land, saying that it does not "touch and concern" nor affect the land at all,

and therefore cannot be made to run, even though so intended. Another theory upon which the party wall cases have been based is that the builder of the wall continues to own all of it, and the adjoining owner has an option of buying one-half, and thus securing permission to use it. Under this theory the right to receive the money and the duty to pay fall upon the owners of the two pieces of land, at the time the use of the wall is begun, and the difficulty of making a mere covenant to pay money run with the land is avoided. It seems convenient and desirable that these covenants should, upon one theory or another, be treated as running covenants, if the parties so intended.

Adams v. Noble, 79 N. W. 810, 120 Mich. 545.

Loyal Mystic Legion v. Jones, 102 N. W. 621, 73 Neb. 342.

Southworth v. Perring, 81 P. 481, 82 P. 785, 71 Kan. 755, 2 L. R. A. (N. S.) 87, 114 Am. St. Rep. 527.

See *Crawford v. Krollpfeiffer*, 88 N. E. 29, 195 N. Y. 185, 133 Am. St. Rep. 783.

See *Aigler*, 10 Mich. Law Rev. 186.

For other cases see *Decennial Digests*, Party Walls ¶9(5).

SECTION 9.—EQUITABLE ENFORCEMENT OF RESTRICTIVE COVENANTS

Q. 23. A, the owner of a tract of land, platted it into lots and blocks, with the necessary streets and alleys, which he dedicated to the public. He sold the lots to individual purchasers, inserting in each deed the following provision: "The grantee herein covenants and agrees that, in order to preserve the eligibility and desirability of this subdivision as a residence neighborhood, he will not erect upon the premises conveyed by this deed any residence costing less than \$8,000, nor more than one residence upon one lot, nor any out-building whatever, except a neat and workmanlike garage, and that he will not erect any building within 20 feet of the line of the street or streets upon which his lot abuts." A sold the first lot in the subdivision to B, and the last lot to X. X proposed to build a house costing only \$6,000, and within 15 feet of the street line. May B secure an injunction against X?

A. Yes; the restrictive covenants in the deeds from A are enforceable in equity. They would not constitute running covenants at law, in most jurisdictions, because there is no sufficient privity of estate between the parties. In England, no burden created by a covenant will run with the land, at law. But in equity the courts have been liberal in enforcing these restrictive covenants, practically as equitable servitudes, binding upon and enforceable by those intended to be burdened and benefited by them, and all who take

with notice under them. While X's covenant was not made with B, it was made for B's benefit, as well as that of the other owners, and B has an equitable right to its enforcement. It ran to B, through his prior conveyance from A, which contained a similar covenant.

Its benefits would run to all those in the subdivision who traced their titles from A, and who were themselves bound by similar restrictions. The covenant runs backward, to benefit a prior grantee, as well as forward. The original covenant may be made between neighbors, and not in connection with any grant at all; yet it will run to purchasers. Unless the restrictions are inserted with uniformity in the deeds of the several lots, the purpose of the restriction could not be accomplished, and equity will not enforce them against any of the parties.

De Gray v. Monmouth Beach Club House Co., 24 A. 388, 50 N. J. Eq. 329.

Parker v. Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632.

Codman v. Bradley, 87 N. E. 591, 201 Mass. 361.

Stevenson v. Spivey, 110 S. E. 367, 132 Va. 115, 21 A. L. R. 1276.

See 17 Harv. Law Rev. 174 (Ames).

16 Mich. Law Rev. 90 (Clark).

18 Col. Law Rev. 291 (Stone).

19 Col. Law Rev. 177.

For other cases see Decennial Digests, Covenants ⇨69(1,2); Deeds ⇨173, 174; Injunction ⇨62(3).

Q. 24. A was the owner of a two-flat building. He conveyed the upper flat to B in fee. The deed contained the following clause: "The said A hereby covenants to and with the said B daily to carry away all garbage and rubbish that the said B may deposit upon the said B's porch, and, in the event that the said A shall fail so to do, B may deposit the same on A's porch, or in the back yard." The deed provided that the terms A and B should include their respective heirs and assigns. A conveyed to X, and B to Y. X refused to carry away the garbage, and prevented Y from depositing it on X's porch. What are Y's rights?

A. Y has no rights. The burden of the covenant in this case would not run with the land, either at law or in equity. At law, in England, the burden of no covenant will run. In many states privacy, such as an easement in the land as to which the covenant is made, is necessary. But generally the covenant would fail, because it either imposes a positive duty, which cannot, except in fencing and right of way cases, be made the subject of a running covenant, or, in the alternative, it imposes a new and unusual incident or burden, permitting one's neighbor to deposit garbage on one's porch, which should not be permitted to perpetually incumber a piece of land. The last sentence of this answer applies just as fully to the

enforcement of covenants in equity as to their enforcement at law. The undesirability of connecting a positive duty with a particular piece of land, so that every owner in the future, regardless of ability or circumstances, will be required to perform that duty or pay damages for its breach, is obvious. The doctrine, as to new and unusual burdens or incidents, is a sound doctrine. Every owner should not be permitted, at his own pleasure, to impose upon his land servitudes which have never been recognized by the law as useful or desirable. This doctrine applies to attempts to create new kinds of legal easements. It is logically just as applicable to equitable servitudes, attempted to be created by covenants. The confusion of titles and impairment of value, which would result if this doctrine were not applied, is obvious. While courts of equity have enforced a considerable variety of restrictions, yet most of them have been designed to protect the character of the neighborhood, or serve some similar purpose, and it seems plain that the covenant in our case falls wholly outside the precedents, and outside the policy of equitable servitudes.

Norcross v. James, 2 N. E. 946, 140 Mass. 188.

Kettle River R. Co. v. Eastern Ry. Co. of Minnesota, 43 N. W. 469, 41 Minn. 461, 6 L. R. A. 111.

See *Bald Eagle Val. R. Co. v. Nittany Val. R. Co.*, 33 A. 239, 171 Pa. 284, 29 L. R. A. 423, 50 Am. St. Rep. 807.

For other cases see *Decennial Digests, Covenants* ¶57, 61, 84; *Injunction* ¶62(1).

SECTION 10.—RENTS

Q. 25. L leased to T a lot, with a building upon it, for a term of 20 years. The city of C, in which the premises were located, commenced a condemnation proceeding to take part of the property, including a part of the building 10 feet in width for its entire length, for the widening of a street. T filed a claim in the condemnation proceeding for the full value of the occupancy of the part of the premises taken for the remainder of his term, and for damages to his interest in the rest of the property. The city denied any liability whatever to T. Which is right?

A. T's claim is correct. The city's defense is apparently based upon the assumption that its only liability is to L, because T's rent for the balance of the term will be apportioned, and he will be absolved from paying any more rent than the remainder of the property will be worth, computed in proportion to the rent reserved upon the entire property. However, by the weight of authority, T will still remain liable to L for the entire rent reserved, for the full term. A lease for years is not a mere contract, but a conveyance, making the

lessee the owner of the premises for his term. He may proceed against wrongdoers, in trespass or ejectment. If the lessor himself should evict the tenant from the premises, the rent would be suspended; but where such eviction occurs by the act of a third person, not in privity with the lessor, the tenant must protect his own interest. However, where the entire premises are taken by condemnation, most courts hold that the entire rent is extinguished, and it would logically follow from that view that, in case of a partial taking, the rent should be apportioned. Some cases do take that view, but the general rule is that the tenant remains liable. The city is liable, therefore, to T.

Stubbings v. Village of Evanston, 26 N. E. 577, 136 Ill. 37, 11 L. R. A. 839, 29 Am. St. Rep. 300.

Gluck v. City of Baltimore, 32 A. 515, 81 Md. 315, 48 Am. St. Rep. 515.

See *Corrigan v. City of Chicago*, 33 N. E. 746, 144 Ill. 537, 21 L. R. A. 212. *Board of Levee Com'rs v. Johnson*, 6 So. 199, 66 Miss. 248.

For other cases see *Decennial Digests*, *Eminent Domain* ¶133, 147, 155, 279(1); *Landlord and Tenant* ¶191.

Q. 26. L leased Blackacre, a small truck farm, to T, for a term of years, at a monthly rental. There was a small outbuilding upon the premises, suitable for the storage of wagons or automobiles. L had, before leasing the premises to T, placed some machinery in this building and locked it. After T took possession, L neglected for two months to open the building for T's use, although T requested that he do so. T refused to pay the rent for the two months. What are the rights of L?

A. L has no right to any rent, nor to any compensation, for the use and occupation of the premises during the two months. L could not recover rent upon the lease, for he had not put the tenant into the full possession of the premises leased. He could not recover for the use and occupation of such part of the premises as were occupied, for it was his own willful default which prevented the contract of lease from being carried out in full. If the tenant had been kept out of some part of the premises by a person with title paramount to that of the landlord, or even by some person claiming under the landlord, but by title paramount to the tenant, the landlord could have recovered for use and occupation, if the tenant actually occupied the rest of the premises. If the tenant had known, when he entered, that a part of the premises were not open, and had acquiesced in that situation, he could not later complain of it, without first demanding that he be admitted to the entire premises. But in the case under discussion nothing but the landlord's willful and continuing default has caused the situation complained of. Where the only compensa-

tion due is for use and occupation, no distress may be had, for distress lies only for rent, and no rent, as such, is due in that case.

Moore v. Mansfield, 65 N. E. 398, 182 Mass. 302, 94 Am. St. Rep. 657.

McClurg v. Price, 59 Pa. 420, 98 Am. Dec. 356.

See Friend v. Oil Well Supply Co., 36 A. 219, 179 Pa. 290.

For other cases see Decennial Digests, Landlord and Tenant ⇨185, 186(1).

Q. 27. L leased a dwelling house to T for a year, by a lease containing no covenants, except a covenant to pay the rent in advance. During the year the house was destroyed by an explosion of gas, which had accumulated in the basement of the house. L sued T for the value of the house, and introduced evidence that T had negligently failed to turn off a gas jet in the basement, and that this failure caused the explosion. T introduced evidence denying this fact, and also evidence tending to show that the gas came in from a leaking gas main, in the street, and entered the basement along a drain pipe, without T's fault. The trial court instructed the jury that, regardless of any negligence on the part of T, he was liable for the destruction of the house. Was this error?

A. Yes; the tenant is not an insurer of the premises. By early English statutes the tenant's liability for waste was established, but there is still doubt as to whether a tenant for life or years is liable for permissive waste; that is, for a failure to repair premises, by reason of which failure they became ruinous. Where the premises are destroyed by reason of the tenant's negligence, it would seem that he should be liable, upon ordinary principles of negligence, though this has been denied in the case of a tenant at will. Where, as in this case, the premises are destroyed without negligence, it would seem that the loss should fall upon both landlord and tenant according to their respective interests. The landlord should lose his house and the tenant his occupancy. The tenant will still be liable for the rent, unless there is a statute absolving him from further payments.

Earle v. Arbogast, 36 A. 923, 180 Pa. 409.

U. S. v. Bostwick, 94 U. S. 53, 24 L. Ed. 65.

See Parrott v. Barney, Fed. Cas. No. 10773, 2 Abb. U. S. 197, 207.

Myers v. Hussenbuth, 65 N. Y. S. 1026, 32 Misc. Rep. 717.

For other cases see Decennial Digests, Landlord and Tenant ⇨55(1).

REAL PROPERTY—FUTURE INTERESTS

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Section

1. Rights of Entry for Condition Broken.
2. Remainders and Executory Interests.
3. Limitations to Classes.
4. Rule in Shelley's Case.
5. Future Interests in Personal Property.
6. Construction of Limitations—Heirs—Survivors.
7. Vesting of Legacies.
8. Gifts on Failure of Issue.
9. Divesting Contingencies.
10. Powers.
11. Rule against Perpetuities.
12. Restraints on Alienation.

SECTION 1.—RIGHTS OF ENTRY FOR CONDITION BROKEN

Q. 1. A conveyed a strip of land to the X Railway Company to be used for a right of way, the deed containing the following words: "Upon the express condition that the said railway company will build and maintain a suitable station upon the land, for public use, and will stop at least two passenger trains per day in each direction at such station, for the purpose of taking on and discharging passengers." The X Company built a station upon the land and stopped its trains, as provided in the deed. A sold all the land which he owned in the vicinity to Y. A died, leaving H as his heir at law. The railway company discontinued the use of the station and stopped none of its passenger trains there. What are the rights of H?

A. H may enforce the condition and resume possession of the strip of land. The railway company may, of course, reacquire the land by eminent domain proceedings, but that is beside the question. The provision in A's deed to the X Company was in the form of an express condition. Such a condition in a conveyance is enforceable, and the grantor may re-enter for its breach. The law dislikes a forfeiture, and has a tendency, in a case of ambiguity, to find that a covenant or trust was intended, rather than a condition. However, if an express right of entry for breach is provided for in the deed, that is almost conclusive to show that a condition was intended. In the case under discussion, it might be urged that the words should be construed as a covenant for the benefit of A, as owner of adjoining lands, and that, since he had sold all of his adjoining land before

his death, his heir would have no right to enforce the covenant. But here the provision was stated to be an "express condition," and "for public use"; hence it should not be construed as a covenant. A right of entry for condition broken may descend to an heir, though at common law it could not be conveyed or devised.

Taylor v. Cedar Rapids & St. Paul R. R. Co., 25 Iowa, 371.

Brown v. Chicago & N. W. Ry. Co. (Iowa) 82 N. W. 1003.

See Druecker v. McLaughlin, 85 N. E. 647, 235 Ill. 367.

For other cases see Decennial Digests, Covenants ⚡29; Deeds ⚡160; Railroads ⚡82(3).

Q. 2. L leased Blackacre to E, the lease containing a covenant that the lessee would not assign the lease without the written consent of the lessor, and that, for a violation of this covenant, the lessor might re-enter. Upon the request of the lessee, the lessor gave his written consent to the assignment of the lease to N, who assumed, in writing, all of the obligations of the original lease. N assigned the lease to O, who took possession. L sued for the possession of the premises, claiming a forfeiture. What judgment?

A. Judgment for O. The express provision for re-entry made the stipulation against assignment enforceable as a condition, though it was also stated as a covenant. But the condition had been waived by L's consent to the first assignment to N. This rule was established in England by Dumpor's Case, which, while it has been severely criticized, has been followed in England and in the United States. The court seemed to consider the condition as indivisible and entire, so that any waiver at all completely destroyed it. The unsatisfactory reasoning in Dumpor's Case has been supplemented in cases in this country by the argument that, the condition being a restraint upon alienation, it should be narrowly construed as being in violation of public policy. It is doubtful whether there is any real public policy against restraints upon the alienation of leasehold estates. Certainly the law has permitted such restraints to be freely imposed. In one case in this country, where the consent to assign contained a provision against any further assignment, the court distinguished Dumpor's Case, and held that the condition had not been waived.

Easley Coal Co. v. Brush Creek Coal Co., 112 S. E. 512, 91 W. Va. 291.

Aste v. Putnam's Hotel Co., 141 N. E. 666, 247 Mass. 147, 31 A. L. R. 149.

See Kew v. Trainor, 37 N. E. 223, 150 Ill. 150.

9 Minn. Law Rev. 60.

For other cases see Decennial Digests, Landlord and Tenant ⚡47, 75(3), 76(1, 3), 103(1).

Q. 3. L leased Blackacre to E for ten years, for the purpose of testing the land for oil and gas, and the production of these minerals,

if found. E covenanted that he would commence drilling within nine months of the date of the lease, and prosecute such drilling with diligence, or would pay \$2 per month until such time as he should commence drilling, and that a failure to do either should work an absolute forfeiture of the lease. E neither drilled nor paid the stipulated sum, and at the end of a year L declared the lease forfeited and excluded E from the land. E tendered the sum due under the option to pay, and sued in equity for relief against the forfeiture. What judgment?

A. Judgment for E. Equity has developed a jurisdiction to relieve against a forfeiture of an estate, where the default consists in the nonpayment of money, on the theory that the default can usually be recompensed by the payment of the sum due, with interest. This doctrine has been applied to the failure to pay rent, taxes, and assessments. Where the default consists in the failure to make repairs, or in assigning or subletting without consent, equity will usually not relieve, since to do so would violate the express stipulation in the lease or conveyance, and the substituted arrangement might not be equivalent. Since, in the case under discussion, the lessee had the option of drilling or paying, payment is all that the lessor could have demanded, and a delayed payment, with interest, would wholly recompense him.

Monarch Gas Co. v. Roy, 95 S. E. 789, 81 W. Va. 723.

Sunday Lake Mining Co. v. Wakefield, 39 N. W. 136, 72 Wis. 204.

Hukill v. Guffey, 16 S. E. 544, 37 W. Va. 425.

For other cases see *Decennial Digests*, Equity ¶24; *Mines and Minerals* ¶70(4), 78(2).

SECTION 2.—REMAINDERS AND EXECUTORY INTERESTS

Q. 4. T devised Whiteacre to P and his heirs, the will containing the following provision: "But if the said P shall die without issue, then the property shall pass to X or his descendants then living." P survived T and died, leaving no issue, but leaving a collateral relative, H, as his heir at law. X survived P. Is he entitled to Whiteacre?

A. Yes; the gift over to X is an executory devise, and is valid, though it is limited upon a fee. No remainder could be created, to take effect after a fee, according to the rules of common-law estates, nor could a fee be cut short upon a contingency, and the land be given over to another person. But the practice of making conveyances to uses developed a new set of equitable future interests, which were not restricted by the rules of feudal conveyancing. When the Statute of Uses converted these equitable estates into the corre-

sponding legal estates, and the Statute of Wills made possible the creation of legal estates directly by will, these new legal interests, known as springing and shifting uses and executory devises, were still held legal. They were also held to be indestructible by anything that might be done by the holders of preceding estates. The only important limitation upon them was that they should not arise at too remote a period, and thus violate the rule against perpetuities. The courts of Illinois have held that a fee cannot be limited upon a fee by deed, but that view would seem to be erroneous, when applied to deeds taking effect under the Statute of Uses. Even in Illinois however, it is plain that an executory devise, such as appears in the case under discussion, would be valid.

Glover v. Condell, 45 N. E. 173, 163 Ill. 566, 35 L. R. A. 360.

Smith v. Kimbell, 38 N. E. 1029, 153 Ill. 368.

See *Palmer v. Cook*, 42 N. E. 796, 159 Ill. 300, 50 Am. St. Rep. 165.

For other cases see *Decennial Digests*, Deeds $\S$ 120; Wills $\S$ 580, 625.

Q. 5. T devised Greenacre to his daughter Mary for her life, with a provision that, upon the death of his said daughter, the land should go to her children, if she should leave any her surviving, and, if she left none, then to the children of her brothers and sisters. Mary died without children. Two of her brothers survived her, but had no children at the time of her death. Children were born to them later, and those children claimed the property. Mary's brothers also claimed the property, as the heirs of T. Who are entitled?

A. The remainder to Mary's children, or, in the alternative, to the children of Mary's brothers and sisters, was "a contingent remainder with a double aspect." According to the rules of the common law, a contingent remainder must take effect, if at all, immediately upon the termination of the preceding particular estate, since it could not exist without a particular estate of freehold to support it. This rule was established for estates created *inter vivos*, because of the necessity of having a freeholder in possession with an estate of sufficient duration, so that he would fulfill the feudal obligations. When devises of land were made legal by the Statute of Wills of Henry VIII, the courts might have taken the view that, since the rules of feudal tenure were losing much of their importance, the doctrine of the destructibility of contingent remainders should not be applied to estates created by this new method. However, with regard to remainders created by will, or by conveyances taking effect under the Statutes of Uses, the old rule was made applicable. In many of our states the doctrine has been modified by statute, so that the intent of the testator may be carried out, and the children

of Mary's brothers, when they were born, may become entitled to the property. In the meantime, of course, the heirs of T would be entitled.

Bond v. Moore, 86 N. E. 386, 236 Ill. 576, 19 L. R. A. (N. S.) 540.

Madison v. Larmon, 48 N. E. 556, 170 Ill. 65, 62 Am. St. Rep. 356.

See Hayward v. Spalding, 71 A. 219, 75 N. H. 92.

For other cases see Decennial Digests, Remainders $\S$ 10; Wills $\S$ 497(1), 524(7), 614(1), 634(1), 676.

Q. 6. D, by a deed of bargain and sale, conveyed Blackacre "to my son John for his life, and if my daughter Grace survive my said son John, she shall have the land for her life, and at her death it shall go to my other children in equal shares." John committed acts of waste upon the land, and Grace sought to enforce a forfeiture of his estate for such acts, and to obtain possession of the land for herself. Had she such a right?

A. Yes; Grace's remainder was vested. In spite of the conditional manner in which it is stated, rules of construction in favor of vesting have caused the courts to treat such remainders as vested. It might be argued that any life estate following another life estate is in fact contingent upon the second life tenant's outliving the first. However, it stands ready throughout its continuance to take effect in possession, whenever and however the preceding estate terminates, and this satisfies the usual definition of a vested remainder. The word "if," as used in the will, has been construed as merely indicating when the second life estate is to commence.

Wiggin v. Perkins, 5 A. 904, 64 N. H. 36.

Doe ex dem. Poor v. Considine, 6 Wall. (73 U. S.) 458, 18 L. Ed. 869.

Bowler v. Bowler, 52 N. E. 437, 176 Ill. 541.

For other cases see Decennial Digests, Deeds $\S$ 133(2); Wills $\S$ 634(3, 8).

SECTION 3.—LIMITATIONS TO CLASSES

Q. 7. W executed a deed of bargain and sale, which purported to convey Whiteacre to "my daughter Sarah and all of her children, born and to be born, they all to take as tenants in common." Sarah had two children at the time the deed was delivered to her. Three others were born to her later. What were the rights of Sarah and her children?

A. The children born to Sarah after the delivery of the deed are entitled to an equal share. At first the land passed to Sarah and her children then living, but they took *as a class*, which, by the express intent of the grantor, was intended to open and let in after-born members of the class. There is no rule of law to prevent the intent of the grantor from being carried out, in the case of such a convey-

ance, by deed of bargain and sale. No shifting of the fee could be provided in a conveyance made by feoffment, but such a shift could be accomplished by a conveyance operating under the Statute of Uses, or by will. If none of the persons mentioned as grantees in the deed had been in existence at the time the deed was executed, some difficulty would arise as to how the deed could be effective, since there would be no one with whom the bargain and sale could have been made. But if one of the bargainees was in existence, the title could pass to that one, subject to a partial shift to the others as they came into being. At least one court has taken a contrary view, holding that the deed must be presently effective as to all, but that view would seem to be erroneous.

Mellichamp v. Mellichamp, 5 S. E. 333, 28 S. C. 125.

Cook v. Cook, 2 Vern. 545.

See *Miller v. McAlister*, 64 N. E. 254, 197 Ill. 72.

For other cases see *Decennial Digests*, Deeds ¶13, 120.

SECTION 4.—RULE IN SHELLEY'S CASE

Q. 8. T devised Blackacre to "my son John for life, with remainder to John's wife Mary for life, with remainder, after the death of Mary, to the person or persons who, at the death of John, shall be his heir or heirs at law." After T's death John and Mary joined in conveying Blackacre to the defendant, by a deed purporting to convey a fee-simple title. John predeceased Mary, leaving the plaintiff as his sole heir at law. After Mary's death, the plaintiff sues in ejectment to recover the possession of Blackacre. What judgment?

A. Judgment for plaintiff. The rule in Shelley's Case does not apply, since the remainder was not given to the heir of the life tenant, but "to such person as should be his heir." In such cases the courts hold that such person constitutes a new stock of title, and that he takes a remainder. The rule in Shelley's Case probably originated as an attempt to preserve, as far as possible, the interest of the heir of the life tenant, at a time when contingent remainders generally were not recognized as valid. The courts have held the rule to be a rule of law, rather than a rule for determining intent, and have applied it in violation of the plain intent of the grantor or testator.

The fact that an intermediate life estate in the wife of John was created would not keep the rule from applying, if there were a remainder to the heirs of John. But the rule has no particular usefulness at the present time, and the American courts have held that it does not apply to a case where the words can be interpreted as a

description of a particular person, rather than of an indefinite line of succession from the first taker.

Peer v. Hennion, 76 A. 1084, 77 N. J. Law, 693, 29 L. R. A. (N. S.) 945.

Earnhart v. Earnhart, 26 N. E. 895, 127 Ind. 397, 22 Am. St. Rep. 652.

See *Cook v. Councilman*, 72 A. 404, 109 Md. 622.

Robinson v. Le Grand, 65 Ala. 111.

For other cases see *Decennial Digests*, Deeds ⚡120; Wills ⚡495, 603(3), 608(3).

SECTION 5.—FUTURE INTERESTS IN PERSONAL PROPERTY

Q. 9. M executed a sealed writing by which he conveyed "twenty thousand dollars of United States government bonds now in my possession to my wife Sarah M, immediately upon my death, she to have them for her life, and after her death the said bonds, or their proceeds, if they shall have been paid before that time, shall be divided among my nephews and nieces then living, and the issue of any deceased, such issue taking their parents share." The writing was delivered to Sarah. What rights were created by it?

A. The writing created a valid springing interest in Sarah, to take effect after M's death, and the limitations to the nephews and nieces were valid. Some difficulty was experienced by the courts in the early cases involving future interests in chattels, because of the non-permanent character of chattels as compared with land. In the cases of leasehold interests, the fact that, in legal contemplation, any term of years was considered inferior to any life estate, caused the courts to look upon a remainder after a life estate in a term of years as a mere possibility. But the practical view prevailed, and such future interests were held valid. In the case of chattels personal, the first taker was considered as having the "use," and the remainderman the chattel. In the case of chattels which cannot be used without being consumed, if an actual use of the chattels themselves is contemplated, the remainder might fail as being indefinite and impossible of legal protection; but that is really the case with a life estate with a power of disposal, which would clearly be good if stated as such. At the present time, future interests may be as freely created in chattels as in land, and by any method of conveyance which is sufficient to pass the title to chattels.

Brummet v. Barber, 2 Hill (S. C.) 543.

Cresap v. Cresap, 12 S. E. 527, 34 W. Va. 310.

Behrens v. Baumann, 66 S. E. 5, 66 W. Va. 56, 27 L. R. A. (N. S.) 1092.

For other cases see *Decennial Digests*, Gifts ⚡34, 43; Remainders ⚡12; Wills ⚡616(3).

SECTION 6.—CONSTRUCTION OF LIMITATIONS—HEIRS—SURVIVORS

Q. 10. M devised Whiteacre to her husband, G, for his life, then to C, the only son of M and G, for his life, "then to the heirs at law of G." M died, then G died, leaving C as his sole heir. C came of age, and entered into a contract to sell Whiteacre to X. After an examination of M's will, X refuses to accept C's conveyance, on the ground that C cannot pass a good title. C sues X, asking for specific performance of the contract.

A. C should win. He can pass a perfect title in fee simple to X, as his life estate is merged in the remainder. X's objection is apparently based upon the supposition that the words "heirs at law of G" might be construed to mean those who would be G's heirs at law, if he should die at the time of the death of C. The words "heirs at law" can, technically and accurately, mean only one thing, viz. the persons who at the time of the death of the person whose heirs are mentioned, answer that description. In some exceptional cases, a different construction has been given, as, for example when a testator gives a life estate to the person who, at the time of the making of the will and at the testator's death, is the testator's sole heir at law and gives a remainder "to my heirs at law." In such a case the facts indicate an intent to depart from the primary meaning of the words. But where the ultimate gift is to the heirs at law of a person other than the testator, and who is intended to survive the testator, the testator could not have had any person in mind who would certainly answer the description; hence there is no indication of an intent to depart from the primary meaning of the words. G might have remarried and had other children, or C might have predeceased G. In either case C would not have been the sole heir; hence there was no complete incongruity between the gifts of the life estate to C and the remainder to the heirs of G.

Carpenter v. Hubbard, 105 N. E. 688, 263 Ill. 571.

Burton v. Gagnon, 54 N. E. 279, 180 Ill. 345.

See Welch v. Brimmer, 47 N. E. 699, 169 Mass. 204.

Bond v. Moore, 86 N. E. 386, 236 Ill. 576, 19 L. R. A. (N. S.) 540.

For other cases see Decennial Digests, Wills $\S$ 595, 601(1), 602(3), 608(3).

Q. 11. T devised all of his property, real and personal, to his children, John, Henry, and Mary, "in equal shares for their lives with remainder as to the share of each upon his death, to his children in fee, and if either of the three should die without children, his share to go to the survivors for life, with remainder to their children in the same manner as the original shares, but, if all of the three children

should die without children, then, upon the death of the last survivor, all of said property shall pass to the persons who would have been the heirs at law" of the testator if he had died at that moment. After the death of T, John died first, leaving a child. Henry died next, without children. Mary then died, leaving a child. To what shares of the estate are the children of John and Mary entitled?

A. The question raised by this case is whether the word "survivors" in this case should have its natural meaning, or should be construed as "others," in order to carry out the intent shown by its context in the will. Primarily, of course, the word "survivor" means one who outlives another. However, where the testator has carefully attempted to provide for every possible contingency and has included a gift over upon the death of all the life tenants without children, if the word "survivor" is given its natural meaning, a gap is left in the testator's provision, if it should happen that the last of the life tenants to die should leave no children. His share would pass by intestacy, which seems incongruous when compared to the other careful provisions of the will. The courts have, therefore, interpreted the word "survivor" to mean "other" in such cases allowing the children of the life tenant who dies first to take as remaindermen a part of the share of the one who dies later, without children. This rounds out the testator's attempt to provide against intestacy in every contingency.

Balch v. Pickering, 28 N. E. 293, 154 Mass. 363, 14 L. R. A. 125.

Fox's Estate, 70 A. 954, 222 Pa. 108.

See *In re Cary's Estate*, 69 A. 736, 81 Vt. 112.

For other cases see *Decennial Digests*, Wills ¶548.

SECTION 7.—VESTING OF LEGACIES

Q. 12. W, upon her death, devised her residuary estate, consisting of personalty, to trustees "upon trust to pay the income thereof, or such part as the trustees may deem expedient, toward the education and maintenance of my four children until they reach 21, and when each reaches 21, the trustees shall pay him an equal share and the trustees shall have the further power to pay not more than one-half of the presumptive share of any of the children to him or her, upon his or her marriage, notwithstanding minority." John, the eldest of the children, married at the age of 20, but the trustees had advised against the marriage and refused to pay to him any part of the estate. He died under 21, leaving his wife entitled to all his personalty under the statute of distribution of the jurisdiction. Is John's wife entitled to one-fourth of the estate, or are the other three children, all of whom reached the age of 21, entitled to all of it?

A. The three surviving children of W are entitled to all of the estate. John had no vested legacy. The only gift to John was in the direction to pay him an equal share at 21, and such a gift is held to be contingent upon his reaching that age. If, however, the income in the meantime is given to the legatee, that is regarded as an indication that he is to be entitled to the legacy immediately, taking the benefit of it, and only its payment to him is postponed. But here the income is to be used for the whole class of children, and no one of them would have a share of it which would correspond to the share of the principal which he would receive upon reaching 21. The probabilities are that the trustees would make an unequal division of the income, according to the ages and educational requirements for the time being of the children. Therefore the payment of the income in this case furnishes no argument for vesting and John's wife would take nothing. The other three children, now constituting the whole class, would take the whole estate.

Andrews v. Lincoln, 50 A. 898, 95 Me. 541, 56 L. R. A. 103.

Anderson v. Menefee (Tex. Civ. App.) 174 S. W. 904.

See *Strode v. McCormick*, 41 N. E. 109, 158 Ill. 142.

In re *Kountz's Estate*, 62 A. 1103, 213 Pa. 390, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427.

For other cases see *Decennial Digests*, *Deeds* ¶120, 133(1); *Perpetuities* ¶4(3); *Wills* ¶634(15), 852.

SECTION 8.—GIFTS ON FAILURE OF ISSUE

Q. 13. J devised Greenacre to his son S and his heirs, with a provision that, if S should die without issue, the said Greenacre should descend to his (J's) other children and their heirs. J died. S conveyed Greenacre to D and died without issue. J's other children, R and L, sued D in ejectment for the land, and D defended upon the ground that the attempted limitation to the other children was void as a violation of the rule against perpetuities. What judgment?

A. Judgment for R and L. The devise to S would have, under the English law, created an estate tail because "death without issue" was construed by the English courts to mean an indefinite failure of issue; that is a failure of the issue of S in any generation. In order, then, that the issue should have the benefit of the estate, it was construed to be an estate tail. The remainder to the other children would then be a vested remainder, subject to be destroyed by a common recovery, and not in violation of the rule against perpetuities. The American courts, however, have tended to construe "death without issue" to mean a failure of the issue of the first taker at the time of his death, and under this rule the gift over to the other chil-

dren of J would constitute a good executory limitation, taking effect within the limits of the rule against perpetuities. A gift over of personal property, or of an estate in fee simple of real property, upon an indefinite failure of issue, would, of course, violate the rule against perpetuities.

Smith v. Kimbell, 38 N. E. 1029, 153 Ill. 368.

Flinn v. Davis, 18 Ala. 132.

Daniel v. Thomson, 14 B. Mon. (Ky.) 662.

Parish's Heirs v. Ferris, 6 Ohio St. 563.

For other cases see Decennial Digests, Perpetuities 4(5, 13); Wills 545(6), 594, 625.

SECTION 9.—DIVESTING CONTINGENCIES

Q. 14. T bequeathed the income from a fund, which was placed in the hands of trustees, to his two grandchildren, A and B, until they became of age, at which time they were to be paid the principal, and, if one of them died before majority, the other was to receive the whole, and, if both died before majority, their father, F, was to receive the principal, if he should be then living. A, F, and B died in the order named, both A and B being still under age. Who is entitled to the fund?

A. The next of kin of B. Upon A's death his interest in the principal passed to B, and it was never divested out of him; hence his next of kin are entitled. The divesting contingency was not only the death of the survivor of A and B, under age, but such death while F was alive. There has been a considerable diversity of opinion as to whether the validity and effectiveness of the gift over is a part of the divesting contingency, or whether the first estate may be treated as divested, even though the substitutional gift never takes effect. The question, of course, is one of intent, since the testator might lawfully make either provision, if his language made clear his intent. Where the language is not plain, however, as in the principal case, the question is whether the testator intended to take the property from B only in order to give it to F, or intended to take it from B because of his death under age, and, having taken it from him, intended that F should have it, if he be then living. If the testator's intent was the latter, the next of kin of the testator would take the estate, unless it was covered by a residuary clause in the will. In cases where the gift over failed because it was illegal, the courts have held that the former estate was divested, because the exact physical event upon which the divesting depended has happened, while in our case the survival of F to take the estate may

reasonably be considered as a part of the physical event upon which divesting depended.

Dusenberry v. Johnson, 45 A. 103, 59 N. J. Eq. 336.

See *Brown v. Brown*, 93 N. E. 357, 247 Ill. 528.

Drummond v. Drummond, 26 N. J. Eq. 234.

For other cases see *Decennial Digests*, *Perpetuities* ⌘4(12); *Wills* ⌘630(10), 855.

SECTION 10.—POWERS

Q. 15. T devised Blackacre to his wife, W, for her life, with the provision that "at her death the said land is to be at her disposal, to whom she may think proper, of her heirs." W enjoyed the property during her life, but made no disposition of it at her death. Both the heirs of W and the heirs of T claim the property. Which heirs are entitled?

A. The heirs of W. W had a life estate, with a special power of disposal at her death among her heirs. If it was merely a power, of course, upon her failure to exercise it, the land would pass to the heirs of T, as undisposed of under T's will. But where the subject of the power (that is, the land) and the objects of the power (that is, the persons who are to take) are definite, the courts have construed the power as a power in trust. A duty rests upon the donee of the power to exercise it, and in default of exercise the beneficiaries are held to take the property in equal shares. This practically gives to the donee only a power to select among the members of the class, or to determine the shares of the members, and gives the property to the class, subject to that power to modify their shares. It is sometimes said that there is a "gift by implication" to the class in default of appointment. Where the class named is "relations," or some such indefinite term is used, the courts allow the donee to appoint to relations other than statutory heirs or next of kin, but hold that in default of appointment the property goes to the heirs or next of kin, according as it is real or personal property. If the first gift is in fee or absolute, the modern English cases hold that it takes rather plain language to impose a trust upon the property or the power; the courts taking the view that the testator was merely recommending a course of action, without intending to bind the devisee to follow the recommendation.

Milhollen v. Rice, 13 W. Va. 510.

Smith v. Floyd, 35 N. E. 606, 140 N. Y. 337.

McGaughey v. Henry, 15 B. Mon. (Ky.) 383.

Rogers v. Rogers, 2 Head (Tenn.) 660.

For other cases see *Decennial Digests*, *Powers*, ⌘29, 39; *Wills* ⌘506(6), 616(7), 694.

Q. 16. T by will gave to his son S the residue of his (T's) estate, real and personal, for the use of the said S during his life, with the right to appoint the same by his will to any person or persons whomsoever, and, "in default of such appointment, the said property shall pass to the children of S in equal shares." After T's death, S accumulated some property in his own right but, in his last years, suffered financial reverses, and died heavily indebted. His children claimed the property covered by T's will, as passing to them in default of appointment. The creditors of S claim that it should be applied toward the payment of his debts. Which claim should prevail?

A. The children of S are entitled to the property. The will of T gave to S a general power of appointment, which, if it had been exercised by him, would have converted the appointed property into assets for the benefit of S's creditors. This doctrine arose in equity, and was based upon the idea that the donee, having the power to appoint the property to his executors, and thus make it available for his creditors, is under an equitable duty to do so, and his appointment in favor of others is a violation of that duty which equity will not permit. The doctrine violates the general theory of powers, which is that the gift comes from the creator of the power; the appointment being simply an event or contingency upon which the estate of the appointee arises. It has not been applied to cases like the principal case, in which no appointment is made, since then the donee has shown no intent to interfere with the property, and the persons who take in default of appointment, or by intestacy, clearly take directly from the original testator, and not from the donee of the power. Equity has not taken the additional step necessary to bring such property within its rule.

Gilman v. Bell, 99 Ill. 144, 149.

Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908.

Ryan v. Mahan, 39 A. 893, 20 R. I. 417.

See *White v. Massachusetts Institute of Technology*, 50 N. E. 512, 171 Mass. 84.

For other cases see *Decennial Digests*, Powers ⚡25; Wills ⚡693(7), 694, 807.

Q. 17. W devised all her estate real and personal, to her daughter, D, with the power to dispose of the same, at D's death, by will, to any relative or other person or persons she might choose. D survived W and died leaving a will in which she gave some specific legacies to various persons, and "all the residue of my estate, real and personal, to my husband H." D's individual estate was so small that, if the specific legacies were paid, only a very small amount of personal property and a city lot of small value would have passed to the hus-

band by the residuary clause. H claims that D had exercised the power given her by her mother's will, in his favor. The relatives of W claim the property as intestate property of W. Which claim is correct?

A. The power was not exercised by D, and therefore the property descends as intestate property of W. While it may be supposed that D probably intended to exercise the power in favor of her husband, yet she did not use language which, even taken in connection with the surrounding circumstances, necessarily showed that intent. If she had referred to property "over which she had a power of disposal," that would have been sufficient as an exercise. If she had made specific reference in her will to some of the property subject to the power, that would have left no doubt of her intent. But her will can be given complete effect, and no part of it will be completely nugatory, if the property subject to the power is left outside its scope. In many jurisdictions there are statutes which give to such language as D used the effect of an exercise of a general power. In such a jurisdiction, H's contention would, of course, be correct.

Harvard College v. Balch, 49 N. E. 543, 171 Ill. 275.

Mason v. Wheeler, 31 A. 426, 19 R. I. 21, 61 Am. St. Rep. 734.

Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 429, 431, 22 Am. Rep. 52.

See Stone v. Forbes, 75 N. E. 141, 189 Mass. 163.

For other cases see Decennial Digests, Powers §33(1, 2); Wills §589.

SECTION 11.—RULE AGAINST PERPETUITIES

Q. 18. T by his will directed that the residue of his estate should be placed in trust "for as long a period as the law will permit." He then directed the payment of annuities to certain named persons for their lives, and on their deaths to their heirs, "and on the final distribution of the trust fund, said fund to be divided equally among the persons then entitled to the said annuities." The trust was attacked by those who would have been entitled to the property if T had died intestate, upon the ground that the trust was void, as in violation of the rule against perpetuities. Is the trust valid?

A. Yes; the will itself gives a measure which can be used to determine when the trust will end, viz. 21 years after the death of the last of the annuitants named in the testator's will. This measure can be readily applied and involves no uncertainty. The period of the rule, 21 years after lives in being at the time the conveyance takes effect, was worked out gradually by the English courts over a long period of time. The danger of permitting the dead hand to control the living world for an indefinite period was sensed almost

as soon as indestructible future interests were held to be permissible by devise and by conveyances taking effect under the Statute of Uses. First, a postponement for a life in being was permitted. Then the period of 21 years after a life in being was allowed, since, if an estate was given to an infant at the end of a life in being, it would not, as a practical matter, be alienable until he reached his majority. According to Professor Gray, this extension was caused by an erroneous confusion of the rule against remoteness of vesting with the policy of the law against restraints on alienation. However, the extension became incorporated into the rule against perpetuities, and the 21-year period was allowed to be added as a period in gross, where no infancy was in fact involved. Periods of gestation were also permitted, if gestation was actually involved, but not otherwise. Lives may be taken as a measure, though the persons whose lives are taken are given no interest under the conveyance; but, where so indefinite a number of lives are used that it will be practically impossible to ascertain when they have ended, the conveyance will be void for uncertainty.

Fitchie v. Brown, 29 S. Ct. 106, 211 U. S. 321, 53 L. Ed. 202.

In re Moore, L. R. [1901] 1 Ch. 436.

Pownall v. Graham, 33 Beav. 242.

As to Restrictions on the Duration of Trusts at Common Law, see *Fraser*, 9 Minn. Law Rev. 324.

For other cases see *Decennial Digests, Perpetuities* ¶6(1).

Q. 19. T devised "the residue of his estate, real and personal, to X upon trust to pay all of my debts, and after said debts are paid, so much of said residue as may remain shall be given to C absolutely. The next of kin of T claim that the gift to C is void, as in violation of the rule against perpetuities. Is their position correct?

A. No; the interest of C vested immediately upon the death of T. It is well settled, of course, that the interest given, in order to be good, *must* vest, if at all, within the period of the rule, and will violate the rule if it may possibly not vest until too remote a period, even though there is a great likelihood that the contingency upon which vesting depends will, in fact, happen within the period of the rule. Instances of the application of this principle are the case giving property to persons living "when my gravel pits are worked out," and cases where the debts are to be paid and the property sold and the proceeds divided among the testator's issue "then living." This principle has been adhered to by the courts strictly and almost universally. But in the case under discussion the person to whom the property is given is ascertained, and the

devise would be treated as an immediate devise of the beneficial interest, subject to or charged with the payment of the debts. Such an interest is well known to the law. The policy of the rule against perpetuities is not violated, and the devise is saved by this construction.

Morgan v. Morgan, 40 A. 736, 20 R. I. 600.

Hawkins v. Bohling, 48 N. E. 94, 168 Ill. 214.

Bates v. Spooner, 54 A. 305, 75 Conn. 501.

See *Belfield v. Booth*, 27 A. 585, 63 Conn. 299.

Siedler v. Syms, 38 A. 424, 56 N. J. Eq. 275.

Johnson v. Preston, 80 N. E. 1001, 226 Ill. 447, 10 L. R. A. (N. S.) 564.

For other cases see *Decennial Digests, Perpetuities* ¶4(3, 15), 6(14); *Wills* ¶634(4).

Q. 20. A granted Blackacre to B by a deed containing this language: "The grantor herein and hereby reserves to himself and his heirs the right to repurchase the land herein conveyed, at any time within ninety-nine years from the date of this conveyance." The deed contained a further provision for the determination by appraisal of the purchase price, in case the grantor should exercise the right to repurchase. Three years after the conveyance A sought to exercise the right to repurchase Blackacre; but B refused to reconvey, claiming that the reservation in the deed from A to B was void as in violation of the rule against perpetuities. Is A entitled to specific performance of the agreement?

A. No; the reservation is not specifically enforceable. It is an attempt to create in A an interest, contingent upon his determination to exercise it, which will spring up at any time within 99 years. The agreement, being for a conveyance of an interest in land, is of a kind which, if valid, is specifically enforceable in equity, and therefore creates an interest in the land. Such an interest must, unless it is a present vested interest, be held to violate the rule against perpetuities. It clearly is not vested, and exists only as a present right to a future interest upon a contingency, which is equally true of springing and shifting legal interests. It is just as possible to have a vested equitable interest as a vested legal interest, and the fact that the legal title may not be called for until a time beyond the period of the rule would not make the equitable interest void. But in our case even the equitable interest depends on a contingency which may not happen until too remote a time. The courts have held that an option to call for a renewal of a lease at a remote period is valid, really treating that case as an exception to the rule. Some American courts have extended the exception to an option to purchase the fee, contained in a lease. There

is a conflict of authority as to whether the option under discussion in our case is enforceable *at law* in an action for damages.

Starcher Bros. v. Duty, 56 S. E. 524, 61 W. Va. 373, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990.

Woodall v. Bruen, 85 S. E. 170, 76 W. Va. 193.

Barton v. Thaw, 92 A. 312, 246 Pa. 348, Ann. Cas. 1916D, 570.

See Diffenderfer v. Board of Public Schools, 25 S. W. 542, 120 Mo. 448.

Eastman Marble Co. v. Vermont Marble Co., 128 N. E. 177, 236 Mass. 138, 27 Yale Law J. 885.

For other cases see Decennial Digests, Perpetuities §4(1, 2), 6(1); Landlord and Tenant §87.

Q. 21. T devised lands to trustees, in trust for his daughter N for life, then in trust to sell the lands and divide the fund into the same number of shares as there shall be children of N then living, or deceased leaving issue then living, and pay the income from one share to each child, and the principal of one share to the issue of each deceased child, such issue taking only the share of which the child would have taken the income if living, such income to be paid for the lives of such children, and upon the death of each child to pay the principal of the share of such child to the heirs of such child. N had three children living at the death of T, viz. A, B, and C, and a fourth child born after T's death. To what extent are the provisions of the will valid?

A. All the provisions in the will are valid, except that for the heirs of the children of N who were born after the death of T. That provision is clearly void, since it may not vest immediately upon the expiration of lives in being at the death of the testator. All of the life estates were clearly good, since they must vest at the end of the life of N, who was in being at the testator's death. The fact that the life estate of N's child born after the death of T will not expire until after the period of the rule is immaterial, since the rule is concerned only with the beginning and not with the expiration of estates. The void provision for the heirs of a child of N born after the death of T does not render void the provisions for the heirs of the other children, since those provisions are quite independent of the provision for such heirs. Upon the death of N, the shares of the life tenants will be determined. Looking at the will at the time of the death of the testator, and at the children of N then in being, we may say, as to each one, for example, A, that the amount of his share as life tenant will be finally determined within the life of N, and the amount of the shares of his heirs will be finally determined at the death of A, and no contingency, such as the birth of other persons, can happen after the

death of N, which will affect the share of A, and therefore the share of A's heirs will be finally determined at A's death. We use the life of N as the measure in determining the validity of the gifts to her children, and the lives of each of her children in being at the death of the testator in determining the validity of the gifts to the heirs of that child. The heirs of each child constitute a separate class, whose share is not affected by the events which may happen in any other class. In the case of the gift to the heirs of D, the child of N born after T's death, the life of D cannot be used as a measure, since D was not in being at T's death, and therefore the shares of D's heirs will not be determined until too remote a period. In case of gifts to classes, the exact number of the class, and the exact share of each member, must be determined within the period of the rule.

Dorr v. Lovering, 18 N. E. 412, 147 Mass. 530.

Storrs v. Benlow, 3 De Gex, M. & G. 390.

Cattlin v. Brown, 11 Hare, 372.

For other cases see *Decennial Digests, Perpetuities* ¶6(9).

Q. 22. T bequeathed personal property to trustees, in trust for C for life, and after C's death in trust for such person or persons as C should by will appoint, and, if C should make no such appointment, then in trust for X absolutely. C by will appointed the property to M for life, with remainder to M's children. M was unborn at T's death. Was C's appointment of the remainder to M's children valid?

A. No. Where a power of appointment is given, the usual rule requires that the appointment made under the power be read back into the instrument creating the power, in order to determine whether the rule against perpetuities has been violated. In our case the gift, according to this rule, would be to an unborn person for life, with remainder to his children. Another rule, however, permits the circumstances existing at the time of the execution of the power to be read into the original instrument; hence the gift to M for life would be good, because M was in existence at the death of C, when the power was exercised. The gift would be read as to C for life, then to M for life, if M should be in being at C's death. As to the gift to M's children, that is too remote from T's death. It might be argued that, since C's power is a general one, she is substantially the owner, and therefore the policy against permitting one to control the disposition of property at a period remote from the time of his conveyance or death is not violated, since the appointor, C, rather than the testator, T, really makes the last

disposition of the property. This doctrine is applied in cases where the power of appointment is perfectly general, and may be exercised either by deed or will. There the donee of the power can do anything with the property, by way of conveyance, which an owner could do, and may therefore be properly considered the owner, for the purpose of applying the rule against perpetuities. But in our case the power could be exercised only by will; hence the donee of the power does not have a substantially complete dominion over the property, and therefore the appointment must be traced back to the creation of the power. The later English cases have taken the opposite view, and would hold the appointment to M's children good in our case, on the ground that C had, at least at the moment of her death, substantial dominion over the property.

Genet v. Hunt, 21 N. E. 91, 113 N. Y. 158.

Lawrence's Estate, 20 A. 521, 136 Pa. 354, 11 L. R. A. 85, 20 Am. St. Rep. 925.

In re Powell's Trusts, 39 L. J. Ch. (N. S.) 188.

See *Rous v. Jackson* (1885) 29 Ch. Div. 521.

For other cases see *Decennial Digests, Perpetuities* ¶6(16); *Powers* ¶19.

Q. 23. T devised property to trustees, in trust for D for life, and after her death as she should by will appoint. D by will appointed to her children for life, with remainder to X and Y. All of the children of D, and also X and Y, had been born before the death of T. Are D's appointments valid?

A. Yes. In applying the rule against perpetuities to an appointment made under a power, the court should read the appointment back into the instrument creating the power, to determine its validity. But, by another rule, the circumstances of the persons to whom the property is appointed, such as whether they were in being at the death of the testator, should also be read into the original instrument. Under this second rule, T could have created all the estates which D created, and they would have been valid. The proper method is to let the appointing instrument and the circumstances under which it is made determine its meaning, and then read that meaning back into the instrument creating the power. That will make T's will give the property to D for life, then to her children born in T's lifetime for life, then to X and Y, persons in being at T's death. That is the only meaning that D's will could possibly have at the time of D's death, when it took effect; hence the doctrine that, in applying the rule against perpetuities, the possibility that an estate created by it will vest at too remote a time will render it void has no application. The small number of

American cases involving this question seem to be erroneously decided.

Wilkinson v. Duncan, 30 Beav. 111.

Gray, Rule against Perpetuities (3d Ed.) § 523c et seq.

Brown v. Columbia Finance Co., 97 S. W. 421, 123 Ky. 775.

But see *Smith's Appeal*, 88 Pa. 492.

For other cases see *Decennial Digests, Perpetuities* ¶4(20); *Wills* ¶693 (5).

Q. 24. T devised all his property to trustees, in trust for his wife for life, then in trust for his children for life, then in trust for his more remote descendants for their respective lives, for as long a time as the law would permit, and, when the law would no longer permit the use of the property for the maintenance of his descendants, in trust for that charitable hospital for the sick, in the city of X, which should, during the year preceding the determination of the trust for his descendants, have accommodated the largest number of charity patients. To what extent are the provisions of T's will valid?

A. The trust for T's wife and children for life is, of course, valid. The trust for his descendants for life would be good only as to T's grandchildren, since they are the only ones whose interests must surely vest at the expiration of lives in being at the testator's death. The gift to a charitable hospital is void, since it would not vest until the death of T's grandchildren, if he should have grandchildren, and that would be too remote a time. The fact that the gift is to a charity would not save it, since the rule applies to a remote gift to a charity, just as it does to a remote gift to an individual. There may be a shift from one charity to another at a remote period, probably because of an indefinite theory that all charity is identical. But in our case the gift to the charity depends upon a remote contingency, and is void. The courts have been rather liberal in holding that gifts to charities vest immediately, and that conditions which might appear to be conditions precedent to vesting are merely administrative details pertaining to the charity, as, for example, in a case of a gift of money to a town for a hospital, provided the town will furnish the site. But in our case there is a clear condition precedent to the vesting of the gift; hence the gift is void.

Girard Trust Co. v. Russell, 179 F. 446, 102 C. C. A. 592.

Hillyard v. Miller, 10 Pa. 326.

Brooks v. Belfast, 38 A. 222, 90 Me. 318.

For other cases see *Decennial Digests, Perpetuities* ¶8(1, 8); *Wills*, ¶775.

SECTION 12.—RESTRAINTS ON ALIENATION

Q. 25. T devised Blackacre to his wife, W, for her life, with remainder to his son, S, and his heirs, provided that, if S should sell, mortgage, or otherwise incumber the land, or his interest in it, before he should come into possession of it, his interest should be forfeited and should pass to T's nephew, N. After T's death, but before W's death, S mortgaged all his interest in Blackacre to B. After W's death, N claims that he is entitled under T's will, and B claims that the provision in T's will for the forfeiture of S's estate is void, and that he (B) is entitled to foreclose his mortgage. Which claim is correct?

A. B's claim is correct. The provision for forfeiture is void. Such a provision, annexed to a fee simple in land or an absolute interest in personal property, if such interests are vested in possession, is clearly void, even though it be limited in time, and applied only to conveyances by a particular method, such as a mortgage or devise. Where such a provision is attached to a contingent future interest, it is valid in so far as it applies to attempts to alienate such an interest before it becomes vested. These contingent interests were not alienable at common law, and the statutes making them alienable have been rather narrowly construed by the courts, which indicates that there is no important public policy in favor of their alienation. As for vested remainders, they were alienable, even at common law, and therefore the usual policy of the law against restraints upon alienation is applied by the American courts. The English courts, however, have taken the opposite view. There is a principle that an alienation of a vested remainder may be set aside, in equity, if it was not made upon a full consideration, which indicates that the policy of the law is not strongly in favor of their alienation. The English decisions are probably based upon a recognition of that policy.

Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61.

Anderson v. Cary, 36 Ohio St. 506, 38 Am. Rep. 602.

Latimer v. Waddell, 26 S. E. 122, 119 N. C. 370, 3 L. R. A. (N. S.) 668.

In re Goulder [1905] L. R. 2 Ch. 100. See Rules against Restraints on Alienation, Fraser, 8 Minn. Law Rev. 185.

For other cases see Decennial Digests, Deeds ⚡149; Wills ⚡601(4).

Q. 26. T devised Whiteacre to C and her heirs, the will containing a proviso that, if C did not dispose of the land by deed or will, and should die without issue, the land should go upon C's death to X. C died intestate and without issue, not having conveyed White-

acre in her lifetime, and leaving H as her heir at law. Who is entitled to Whiteacre, H or X?

A. H is entitled to Whiteacre. The provision in T's will, giving the property to X upon T's failure to alienate, is void by the weight of American authority. The cases are usually based upon the doctrine of repugnancy. It is thought that to give one a fee simple, and then subtract from that fee simple the usual attribute of its descent to one's heirs upon his death intestate, presents a case of repugnancy. But this argument is based upon purely formal logic, since many estates in fee or absolute estates are made subject to be cut short upon a contingency, and the estate shifted to another. An attempted alienation cannot be made such a contingency, since there is an important policy in favor of free alienation, which would be discouraged or prevented by permitting a forfeiture for alienation. But the provision in our case really encourages alienation, and so does not violate that policy. No satisfactory reason has ever been assigned for the American decisions. It has been suggested that a shift of the title cannot be made to take effect "at the very moment of devolution," but the numerous cases of gifts over on death without issue, where that contingency is not coupled with any failure to alienate, shows that there is no such principle.

Williams v. Elliott, 92 N. E. 960, 246 Ill. 548, 138 Am. St. Rep. 254.

Ide v. Ide, 5 Mass. 504.

Jackson v. Robins, 16 Johns. (N. Y.) 537.

See Hubbard v. Rawson, 4 Gray (Mass.) 242.

For other cases see Decennial Digests, Wills §601 (1, 2), 694.

Q. 27. T devised \$100,000 to trustees, in trust to pay the income from the fund to T's son, S, annually during his life, the interest of S in the fund and in such payments to be exempt from any claim or right on the part of the creditors of S, and not to be alienable by S in any manner. The fund, after the death of S, was given to the children of S, by the will of T. After T's death, S, being in financial straits, executed for a cash consideration a deed conveying to P one-half of his interest in the fund created by T's will. P notified the trustees of the conveyance to him. What are their duties?

A. The trustees may disregard the notice, and continue paying the interest to S. The provisions in T's will exempting S's interest from the claims of his creditors, and making it inalienable, are valid. They constitute a *spendthrift trust*; that is, an equitable life estate, not alienable nor subject to debts. The policy of the law, which forbids restraints upon the alienation of fees simple or

absolute interests, either legal or equitable, and even of legal life estates, in land or chattels, has yielded, in the case of life interests in property placed in trust, to the natural desire of testators to make a provision for support of descendants. The English courts have never permitted the spendthrift trust, but the American courts have disregarded the admonition of Professor Gray, and are almost unanimous in holding these trusts valid. It is frequently argued that the spendthrift trust is unfair to creditors; but there are many situations in the law where an appearance of prosperity cannot be depended upon by creditors, as being based upon any interest in property which would be subject to levy. Creditors, in these cases, as in all others, must investigate the debtor's title before they can safely rely upon it as a basis of credit. Perhaps the strongest argument against the spendthrift trust is that it handicaps the beneficiary and his community, by insuring a comfortable maintenance for him, in spite of his own folly or prodigality. He has no great incentive to industry or progress. It seems probable that spendthrift trusts will be used more and more by testators, as their possibilities are discovered, and that, when a considerable number of persons in any community are supported by spendthrift trusts, undesirable social effects may possibly be felt.

Broadway Bank v. Adams, 133 Mass. 170, 40 Am. Rep. 504.

Guernsey v. Lazear, 41 S. E. 405, 51 W. Va. 328.

Jourolmon v. Massengill, 5 S. W. 719, 86 Tenn. 81.

Contra: *Tillinghast v. Bradford*, 5 R. I. 205.

Hutchinson v. Maxwell, 40 S. E. 655, 100 Va. 169, 57 L. R. A. 384, 93 Am. St. Rep. 944.

For other cases see *Decennial Digests*, *Assignments for Benefit of Creditors* ⚡174; *Insolvency* ⚡55; *Trusts* ⚡12, 51, 151(2).

Q. 28. T devised the residue of his estate to trustees, in trust for his son, S, the entire income to be paid to said son or expended for his benefit until he should reach the age of 35, when the principal should be turned over to him for his absolute use, but the said residue and the income from it to be inalienable by S, and not subject to his debts, until he should reach the age of 35. S was 15 years old at the time of T's death. At the age of 33 S was heavily indebted, and passed into voluntary bankruptcy. Is the estate left him by his father assets for the payment of his debts?

A. Yes; the interest of S in the property is an absolute interest, and not the subject of an ordinary spendthrift trust. By the general rule, such a trust as we have in this case can be terminated by the cestui que trust at any time after he comes of age and can give a valid receipt for the trust fund. No other person is inter-

ested in the fund, and the will of the testator will usually not prevail against the right of the living owner to have possession of his property. This doctrine is illustrated by cases where the testator has directed that property be used to purchase an annuity, or be converted into some other form, for a sole and competent beneficiary. In such cases the courts hold that the directions of the testator will be disregarded, if the sole beneficial owner prefers not to have them carried out. The fact that in our case the postponement is only for a period of 20 years would not save it, for such an estate cannot be made inalienable, nor kept out of the possession of its owner, even for a short time. However, some of our courts have shown a tendency to permit the creation of indestructible trusts for a period to be measured by the period of the rule against perpetuities. There is, of course, no question of remoteness of vesting involved, and the rule against perpetuities is only used by way of analogy. The doctrine of these courts would seem to be an unfortunate one, because it permits a restraint upon alienation, and also because it introduces into the law the anomaly of a sole owner who cannot control in the usual manner that which he owns. Even in the case of the so-called Massachusetts business trust, where the interests of both trustee and beneficiary are alienable, the objection last mentioned still applies, so long as the trust is held indestructible.

Sanford v. Lackland, Fed. Cas. No. 12,312, 2 Dill. 6.

Mebane v. Mebane, 39 N. O. 131, 44 Am. Dec. 102.

See Boston Safe Deposit & Trust Co. v. Collier, 111 N. E. 163, 222 Mass. 390, Ann. Cas. 1918C, 962.

Wallace v. Foxwell, 95 N. E. 985, 250 Ill. 616, 50 L. R. A. (N. S.) 632.

Parker v. Cobe, 94 N. E. 476, 208 Mass. 260, 33 L. R. A. (N. S.) 978, 21 Ann. Cas. 1100.

9 Minn. Law Rev. 325.

For other cases see Decennial Digests, Bankruptcy ⚡143(10); Trusts ⚡151(1), 152; Wills ⚡674, 729.

SALES

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Section

1. Transfer of Title.
2. Buyer's Remedies and Rights.
3. Seller's Remedies and Rights.
4. Warranty, Express or Implied.
5. Estoppel and Bona Fide Purchase for Value.
6. Statute of Frauds.

SECTION 1.—TRANSFER OF TITLE

Q. 1. A shipped 500 bushels of apples, consigned to B, and took the bill of lading in B's name. He had no order from B, but wrote B at the time that he had shipped the apples, and hoped B would take them at \$1 per bushel. This was on October 8. On the 9th of October A discovered that C was paying cash for apples, and at once offered to sell him the aforesaid 500 bushels. C accepted the offer, paid A \$450 cash, and took the bill of lading from A. On the 11th A received a letter of acceptance from B. This he turned over to C. C tendered the bill of lading to B on the 12th, demanding cash, which B refused. On the 14th, C renewed his tender of the bill of lading, agreeing to 10 days' credit. B acquiesced, took the bill, and got the apples on the 15th. At what time did title vest in B?

A. Title could not have passed at the time of shipment, because there was then no contract between A and B. Assuming that A's offer still continued, B's acceptance created a contract, and title would presumably have passed at that time, had A been capable of passing it. But before B's acceptance A had passed the title to C. There is nothing to indicate that C was holding the bill of lading as a mere agent or pledgee of A, but the facts imply that he was a buyer, to whom title was intended to pass. As such, he got title, since intent of the parties governs, even though the seller be out of possession. (See question No. 2.) Hence, C having the title, it could no longer pass from A to B. B's negotiations with C did not result in a contract until the 14th. Title would not pass from C to B without a contract, but did presumably pass as soon as the contract was entered into. (See question No. 3.)

For other cases see Decennial Digests, Sales $\S$ 1, 22(3).

Q. 2. A contracted to sell and B to buy certain cattle, belonging to A and clearly identifiable by brand. They had been wandering

at large on general range ground for some time previous, and neither A nor B knew where they were. B paid a price based on this fact, and it was agreed that from and after the date of the contract title and risk of loss should be in B. Eventually B discovered the cattle in the possession of X, who refused to give them up. Could B maintain trover?

A. At the time the contract was entered into the parties intended title to pass at once, and A had at that time a title which he was capable of passing. The fact that A was not in possession of the cattle at the time would not preclude passing of the title. As X presumably had no right to the cattle, B could maintain trover by virtue of his title.

Cartland v. Morrison, 32 Me. 190.

Nelson v. Nelson, 6 Gray (72 Mass.) 385.

For other cases see Decennial Digests, Sales $\S$ 13, 226(15).

Q. 3. Smith sold to Brown all the bricks in a certain yard for an agreed price, it being understood that Brown might remove the bricks any time within three months, but must pay the price before removal. Where was title subsequent to the agreement, but before payment?

A. Presumably title was in Brown. Neither delivery nor payment are essential to the passing of title. It may pass, the goods being identified, when the parties so intend. The rule is that they will be presumed to have intended it to pass at once, when the goods are in a deliverable condition, and nothing remains to be done in respect to performance, except the payment and taking of possession. This presumption is followed, even though the payment is a condition precedent to the buyer's right of possession. The seller has a lien for the price.

Tarling v. Baxter, 6 B & C, 360.

McArthur v. Mathis, 45 S. E. 530, 133 N. C. 142.

Baker v. McDonald, 104 N. W. 923, 74 Neb. 595, L. R. A. (N. S.) 474.

For other cases see Decennial Digests, Sales $\S$ 1(1), 199.

Q. 4. Smith offered to sell to Brown a certain automobile for the sum of \$300. Brown refused to buy, unless certain work was done on it to put it into better running condition. Smith replied that Brown might take it to a garage and have the work done, and, when the cost was known, might pay Smith \$300, less the cost of the repairs. To this Brown agreed, and directed a garage man to call for the machine. While being repaired, the machine was destroyed through the negligence of the garage man. Brown not

being financially responsible, Smith would like to hold the garage man liable. Has he any right of action?

A. The facts as stated do not indicate any contract relation between Smith and the garage operator. In such case, Smith would be compelled to base his action on some property interest in the machine. But presumably title had passed to Brown. There is a presumption that, when the seller "is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done." Sales Act, § 19, rule 2; *Automatic Time Table Adv. Co. v. Automatic Time Table Co.*, 94 N. E. 462, 208 Mass. 252. It is possible that the repair work to be done might have brought the case under this rule, had the seller retained possession. *Blackwood v. Cutting Packing Co.*, 18 P. 248, 76 Cal. 212, 9 Am. St. Rep. 199. The facts, however amount to a delivery of possession to the buyer before the work was done, which would serve to negative the suggested presumption. *Mt. Hope Iron Co. v. Buffington*, 103 Mass. 62; *Allen v. City of Greenwood*, 147 N. W. 1094, 147 Wis. 626. Smith, having parted with title, could not maintain an action.

For other cases see *Decennial Digests*, Sales ⇨ 200(1), 209, 226(9).

Q. 5. A and B entered into an agreement written as follows: "This witnesses that A has this day sold and B has bought all the paintings now belonging to A's father, which A shall receive under and by virtue of will or inheritance from his father, and that B has paid therefor the whole agreed price of \$2,000." The instrument was dated and signed. Ten days later the father died, leaving certain pictures to A. The will was probated and the estate administered, but the administrator refused to deliver the pictures to B when shown the writing. A, without having done anything more whatever in the matter, had departed the jurisdiction. Could B maintain replevin or trover against the administrator?

A. To do so, under the circumstances, he would have to show title in himself. There was a contract between him and A. It is possible that the parties intended to pass title at once. But A had no title to pass; hence, even if there were such intent, it could not have been effectuated. A could not pass a title which he did not have. Subsequently he got a title, but an after-acquired title does not pass by virtue merely of a previous contract to pass it. There must be some demonstration of intent to pass it after the seller acquires it. A had made no such demonstration; hence B could not maintain a proprietary action. The agreement, however, would

be treated as a contract to sell, on which an action for breach could be maintained.

For other cases see Decennial Digests, Sales $\S$ 11, 13, 197, 208, 211, 214.

Q. 6. Brown and Smith entered into an agreement whereby the former bought and the latter sold three \$1,000 bonds, known as "X Co. 6 per cent. first mortgage bonds." Brown paid the agreed price at the time. Both parties knew that Smith did not own any such bonds at the time. Subsequently, before any further dealings with Brown, Smith assigned all his property to a receiver for the benefit of creditors. In his safe were found three bonds, such as described, which Smith had purchased between the time of the contract and the receivership. Brown claims these bonds as his property. Is his position sound?

A. Title could not have passed at the time the agreement was entered into, whatever the intention of the parties, because Smith had no title to pass. For it to pass subsequently, both the common law and the Sales Act require an "appropriation" of specific goods to the contract by one party, with the consent, expressed or implied, of the other. In this case the coincidence of Smith's possession of bonds suitable to the terms of the contract could hardly be accepted as proof of Smith's intention to pass title in them to Brown. If Smith had no such intention, there was no appropriation, and no title could have passed to Brown. (See question No. 5.)

If Smith had acted, not as seller to Brown, but as agent of Brown to get bonds for him, title would have passed directly from the third party to Brown, when Smith made the purchase. Proof would be necessary, of course, that the particular bonds had been acquired by Smith pursuant to his agency for Brown.

Gorman v. Littlefield, Trustee, 33 S. Ct. 690, 229 U. S. 19, 57 L. Ed. 1047.

Markham v. Jaudon, 41 N. Y. 235.

Cf. Chase v. City of Boston, 62 N. E. 1059, 180 Mass. 458.

For other cases see Decennial Digests, Bankruptcy $\S$ 140(3); Brokers $\S$ 26; Taxation $\S$ 85.

Q. 7. Assuming the foregoing statement of facts, with the additional circumstance that the bonds, when found in Smith's safe, were in an envelope on which Smith had written the statement that they were the property of Brown, would title be in Brown?

A. Such circumstances would seem sufficient evidence of Smith's intention to pass the title; but it would not vest in Brown without his consent, express or implied. The issue, therefore, would be whether Brown had assented to the passing of title in those par-

ticular bonds. The buyer's contract that he will take title when it shall be offered is not ipso facto a consent to its passing when it is offered. In cases where the buyer has authorized the seller to do certain things to the property selected by the seller, it has been held, without clear explanation, that the buyer's consent is present. So, too, where the seller's selection has been made from a specified larger mass. By analogy it seems possible that the buyer's knowledge of the particular issue of bonds from which the seller was to select three might be treated as showing his consent in advance, or through the seller as his agent, to whatever three the seller should appropriate.

Greenleaf v. Hamilton, 46 A. 798, 94 Me. 118.

Hopkins v. Bronaugh (C. C. A.) 281 F. 799.

American Hide & Leather Co. v. Chalkey & Co., 44 S. E. 705, 101 Va. 458.

Mitchell v. Le Clair, 43 N. E. 117, 165 Mass. 308.

See 33 Yale Law J. 330.

For other cases see *Decennial Digests*, Sales ⇨ 181(3, 10), 182(2), 211, 212, 345.

Q. 8. Smith was the owner of a brickyard. Brown contracted to buy from him all the bricks which should be produced from the yard prior to August 1, up to 500,000, at a stated price per thousand. By June the 500,000 had been produced. Brown had taken and paid for about 400,000. The remaining 100,000 were piled in the yard. Additional bricks were in the course of manufacture. Smith became bankrupt, and a trustee took possession of his yard, including the 100,000 bricks mentioned. Is Brown entitled to those bricks?

A. Under a contract to sell goods to be manufactured by the seller, it is ordinarily held that title does not pass merely by virtue of completion of the goods. Something further, indicative of intent to pass the title, is essential. *Fordice v. Gibson*, 28 N. E. 303, 129 Ind. 7; *Haynes v. Quay*, 95 N. W. 1082, 134 Mich. 229. Where, however, the agreement is for the entire output of a factory, there is authority that title does pass on completion. *Williams v. Chapman*, 24 S. E. 810, 118 N. C. 943. Brown's title (ignoring questions of retention of possession as affecting creditors' rights) would depend on whether his contract could be brought within the latter class, or, if not, on what was done after the completion of the bricks. (See preceding question.)

For other cases see *Decennial Digests*, Sales ⇨ 201(2), 214.

Q. 9. Smith agreed to sell and Brown to buy all the bricks in a definite stack. The price was fixed at \$15 per thousand for those of first quality and \$10 for those of second quality, it being un-

derstood that the seller should have his own experts examine the stack and determine the relative quantities of each, and that the buyer would accept this determination. Before this examination was made, the question of title became important as between the parties. Would it have mattered, if they had expressed an intention that it should vest in the buyer at once?

A. This case differs from that of question No. 3, in that here the seller was obligated to do something necessary to fix the total price, and had the right to do so. In such case many courts presume an intent on his part not to pass title until that shall have been done. *Kein v. Tupper*, 52 N. Y. 550; *Smith v. Wisconsin Inv. Co.*, 89 N. W. 829, 114 Wis. 151; *Wesoloski v. Wysoski*, 71 N. E. 982, 186 Mass. 495; *Lingham v. Eggleston*, 27 Mich. 324. The Sales Act has no provision covering the precise circumstance, and the omission may imply a legislative rejection of the doctrine. Cf. *Elder v. Insurance Co. of North America*, 206 Ill. App. 172. An expressed intent that title should pass would have served to rebut this presumption of intent not to pass title, and would therefore have been materially important. 10 Cal. Law Rev. 178.

For other cases see Decennial Digests, Sales §200(1, 2), 201(5), 214.

Q. 10. Smith agreed to sell and Brown to buy up to 10,000 first-grade bricks from Smith's yard, which contained a much larger quantity, at \$15 per thousand, it being understood that Smith's experts should select the bricks and Brown would accept their choice. Before the selection was made, the question of title arose between the parties. Would it have mattered, if the agreement had expressed an intention that title should pass to the buyer at once?

A. In the preceding question the bricks, whose ownership was intended sooner or later to pass, were identified at the time of the contract, and title could have passed at once. In this case, however, there were many more than 10,000 first-grade bricks in Smith's yard. The particular bricks whose ownership was to be passed were not then known. There is an obvious distinction, not always realized by courts, between something to be done by the seller to determine the total price, from which a presumption as to title arises, and something to be done to identify the subject-matter of the contract, which precludes passing of title. "The property or title cannot pass until the particular property which is the subject of the contract becomes ascertained. This is true, independently of the intention of the vendor or vendee." *Ellis & Meyers Lumber Co. v. Hubbard*, 96 S. E. 754, 123 Va. 481; *Dunn v. State*, 8 S. E.

806, 82 Ga. 27; 3 L. R. A. 199. For this reason, even an expressed intent could not have passed the title.

For other cases see Decennial Digests, Intoxicating Liquors $\Leftrightarrow$ 147(1); Sales $\Leftrightarrow$ 200(4), 208, 214.

Q. 11. The elevator company bought wheat from farmers and advertised that it would "pay cash." Smith brought several loads of wheat to the elevator and contracted with the manager for their sale. The wheat was unloaded into the bins, and Smith, having stipulated cash payment, was directed to go to the office for his money. There the officers of the company told him they were out of ready money and could not pay at once. Smith demanded a return of the wheat, which was refused. Smith brought suit for conversion. Should he have succeeded?

A. Under the particular circumstances of the case it would probably be presumed that payment was intended as a condition precedent to the passing of title. As title does not pass unless so intended by the parties, Smith would still have had title, and could therefore maintain the appropriate proprietary or tort action. *People's State Bank v. Brown*, 103 P. 102, 80 Kan. 520, 23 L. R. A. (N. S.) 824; *Hamra Bros. v. Herrell* (Mo. App.) 200 S. W. 776. Whether or not a retention of title is intended is a matter of conclusion from all the circumstances, and is not determined merely from the stipulation for cash. *Clark v. Greeley*, 62 N. H. 394; *Richardson v. Insurance Co. of North America*, 48 S. E. 733, 136 N. C. 314. If payment is intended to be immediate upon the making of the contract this seems often determinative that the transaction contemplates a title reserved till payment rather than a passing of title with a lien retained by the seller. (See question No. 3.)

For other cases see Decennial Digests, Auctions and Auctioneers $\Leftrightarrow$ 8; Sales $\Leftrightarrow$ 202(1), 318, 324(3).

Q. 12. An elevator company offered to buy from plaintiff 1,000 bushels of described wheat and to "pay cash on delivery." Plaintiff accepted the offer, shipped the wheat, consigned to the company, and sent it the bill of lading. The wheat was received by the company, but before payment was made a receiver had taken possession of all its assets. Did title to the particular wheat pass to him, or was it still in plaintiff?

A. This differs from the preceding case, in that payment was obviously not intended to be coincident with the making of the contract, nor was it specifically demanded by the seller as a condition precedent to his delivery of the wheat. The facts indicate that the

phrase "cash on delivery" connoted in his mind a payment immediately, without any period of credit, a denial of anything like "cash in 30 days," rather than a condition precedent to the passing of title. *Baker v. McDonald*, 104 N. W. 923, 74 Neb. 595, 1 L. R. A. (N. S.) 474. Title, therefore, would be presumed to have passed upon delivery of the wheat to the carrier. (See questions Nos. 3 and 14.)

For other cases see *Decennial Digests*, Sales ¶199.

Q. 13. Heritage sold to Hurff 200 bushels of the corn in his storage bin, the total contents of which amounted to 400 bushels. Before any particular 200 bushels were identified as the subject-matter of the contract a sheriff took possession of all the corn for the benefit of a creditor of Heritage. Had Hurff any titular interest in the corn?

A. The Sales Act provides that, "in the case of fungible goods there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight, or measure of the goods in the mass. * * * By such a sale the buyer becomes owner in common," on a pro rata basis. This merely codifies the common law. The difficulty is in determining when the parties intend to pass such title. In the United States, courts tend to presume an intention to pass title to an undivided part of the mass, when the mass itself is definitely identified and is of "fungible" goods. "Fungible" is defined in the Sales Act as "goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit." The decisions are hardly so broad in their application of the doctrine.

Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334.

Hurff v. Hires, 40 N. J. Law, 581, 29 Am. Rep. 282.

Halsey v. Simmons, 166 P. 944, 85 Or. 324, L. R. A. 1918A, 321.

See *Geoghegan Sons & Co. v. Arbuckle Bros.*, 123 S. E. 387, 139 Va. 92, 36

A. L. R. 399 (shipment in "pool" car for several purchasers).

For other cases see *Decennial Digests*, Replevin ¶4; Sales, ¶209, 210.

Q. 14. Brown ordered of Smith Company one automobile of a given description, to be shipped to him by freight at his expense. The machine was shipped to him, but was destroyed through unavoidable natural causes while in transit. The parties are in dispute as to which must bear the loss. The contract contained no provision directly concerning the matter. Does it make any difference (1) whether the automobile as ordered was a specific, particularized car, or merely a generally described one; or (2) whether the shipment was made deliverable to Brown's order, or the order of the Smith Company?

A. If the car ordered was a particularized, identified one, title presumably passed at the time the contract was entered into, there being no apparent further obligation on the seller's part. (See question No. 3.) The expectation that the company should deliver to the carrier would hardly be treated as such an "obligation to deliver" as presumably holds up title until such delivery is made. In that case it would seem that the subsequent consignment in the name of one party or the other could not affect title, but would affect only the right of possession. (The precise point appears not to have been decided.) Title being in Brown, the risk of loss would be on him, even though the possession was still in the Smith Company. On the other hand, if the subject of the sale was not specified at the time of the contract, title would not pass until appropriation and assent thereto. (See Question No. 6.) Delivery to a carrier of goods consigned to the buyer raises a presumption that the parties intended title to pass at that time. If, therefore, the Smith Company consigned the car to the order of Brown, title would presumably be in him, and he must stand the loss. If, on the contrary, the Smith Company consigned the car to its own order, the legal presumption is that it did not intend to pass the title to Brown at that time, and, the title being still in itself, the risk of loss would still be on it.

Dows v. National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

Henderson v. E. Lauer & Sons, 181 P. 811, 40 Cal. App. 696.

22 Col. Law Rev. 462.

For other cases see Decennial Digests, Pledges ⚡12; Sales ⚡197, 202(6).

SECTION 2.—BUYER'S REMEDIES AND RIGHTS

Q. 15. Defendant ordered of plaintiff seller six rolls of carpet, for which he agreed to pay \$1,000, to be shipped to him as soon as possible. The seller delivered six rolls to a carrier, duly consigned to defendant, but the carrier negligently lost the goods, and the defendant never received them. In delivering them to the carrier, the seller had made an agreement limiting the carrier's liability to \$150. The seller brought suit for the agreed \$1,000. Would it matter, in respect to his recovery, whether or not the contract dealt with specific, identified rolls of carpet?

A. If the contract had contemplated then identified goods, the title would presumably have passed at once. The seller would have been entitled to the price, subject only to a counterclaim for damages for his breach of contract properly to deliver the goods, assuming that the facts implied such a contract. But, if the goods

were not then identified, title would not have passed until delivery to the carrier. But delivery to a carrier in an unreasonable manner would probably not be treated as supplying the buyer's assent to take the title and consequent risk of loss. The facts of this case would seem to bring it within the latter proposition, so that risk of loss would be on the seller, who could recover nothing from the buyer. In neither case could the plaintiff recover as for goods sold *and delivered*. *Thomas L. Leedom Co. v. Rosser-Casebeer Furniture Co.*, 232 P. 405, 105 Okl. 278; *Miller v. Harvey*, 116 N. E. 781, 221 N. Y. 54, L. R. A. 1917F, 559; Sales Act, § 46. In this case, as in the preceding one, it is assumed that delivery to the carrier was not such an obligation to deliver as holds up title, under the rule that, when the seller is obliged to deliver the goods at a particular place, title presumably does not pass until such delivery is made. Were this rule applicable, title might not have passed, even had the carpet been specific at the time of the contract, on the theory that, because of the limitation on liability, the seller had not "delivered" the goods.

For other cases see Decennial Digests, Sales ¶161(1).

Q. 16. Smith, having contracted to sell 30 tons of described fertilizer, consigned what he said conformed to the contract to the buyer, and tendered him the bill of lading. Nothing had been said in the contract as to the time of payment, but Smith demanded payment as a condition of handing over the bill of lading. The buyer refused to pay, unless he were given opportunity to inspect the fertilizer. Smith then sued for breach of contract. Judgment for whom?

A. For the defendant. A buyer has a right to ascertain that the seller has really offered possession of the property contracted for before he is obligated to pay, unless he has agreed to pay, regardless of receipt of the goods, or has otherwise waived the right to know before he pays that he is getting the goods contracted for. *Charles v. Carter*, 36 S. W. 396, 96 Tenn. 607; *Croninger v. Crocker*, 62 N. Y. 151; *Sawyer v. Dean*, 21 N. E. 1012, 114 N. Y. 469; *Lawder & Sons Co. v. Albert Mackie Grocery Co.*, 54 A. 634, 97 Md. 1, 62 L. R. A. 795. In this case the buyer had not agreed to pay immediately on delivery of the bill of lading, nor is there anything else stated from which there might be implied an undertaking to pay before seeing the particular goods tendered.

For other cases see Decennial Digests, Sales ¶82(5), 168(1, 2).

Q. 17. Suppose, in the foregoing case, the question had been, not the liability of the buyer for payment, but the right of the buyer as owner to sue the carrier for nondelivery. Would title have been in him?

A. There is nothing in the facts to indicate that payment was intended as a condition precedent to the passing of title. Delivery to the carrier of goods conforming to the contract, consigned, as these were, to the buyer, presumably passes title to the buyer. His right to inspect before payment is not a condition precedent to the passing of title, but a right to ascertain before payment whether or not title has passed—i. e., whether the proper goods were delivered to the carrier. *Harper v. State*, 121 S. W. 737, 91 Ark. 422, 25 L. R. A. (N. S.) 669, 18 Ann. Cas. 435; *Edelstone v. Schimmel*, 123 N. E. 333, 233 Mass. 45. Presumably, therefore, the buyer would have been in position to maintain a titular action against the carrier. Cf., however, *Garvan v. New York Cent. & H. R. R. Co.*, 96 N. E. 717, 210 Mass. 275. Had this been a "sale on approval," the effect would have been different. In such cases the contract provides that title shall not pass until inspection and acceptance.

For other cases see *Decennial Digests, Intoxicating Liquors* Ⓒ147(1); *Sales* Ⓒ161, 199, 201(4).

Q. 18. Smith contracted to sell and Brown to buy 30 tons of fertilizer having a specified nitrate content. In due course a shipment of fertilizer reached Brown, and he paid Smith the agreed price. On analysis the shipment proved to be far below the stipulation as to nitrate content. Brown notified Smith of the fact, offered to return the fertilizer, and demanded a return of his money. Is he entitled to it?

A. Yes; the fertilizer contracted for was not particularly identified at the time of the contract, and title could not then have passed. That which was tendered in performance of the contract was not such as the seller had agreed to sell. The buyer, therefore, was not obliged to accept title to it. Delivery to a carrier for a buyer of something the consignee has never contracted to buy does not pass the title to him. (See question No. 1.) The buyer's mere physical receipt of a chattel, under the mistaken idea that it is something he has contracted for, either does not amount to an acceptance of the title, or is in legal effect an acceptance with power reserved to revest title on discovery of the mistake. The courts are not explicit as to the theory, but the buyer's right to

reject or return the goods and recover money paid under such circumstances is clear.

Pope v. Allis, 6 S. Ct. 69, 115 U. S. 363, 29 L. Ed. 393.

Brewer v. Housatonic Ry. Co., 104 Mass. 593.

Sedlacek v. Welpton Lumber Co., 197 N. W. 618, 111 Neb. 877.

Kuppenheimer v. Wertheimer, 64 N. W. 952, 107 Mich. 77, 61 Am. St. Rep. 317.

22 Col. Law Rev. 184.

For other cases see Decennial Digests, Sales ⇨ 61, 120, 200(4), 364(8).

Q. 19. Assuming the facts of the preceding question, would it have made any difference how long the buyer had waited before ascertaining the defect in performance, or whether he had used some of the fertilizer before ascertaining the defect?

A. In case of a seller's failure to deliver the goods contracted for, the buyer may, if he chooses, waive the defect in performance and accept the goods tendered. After acceptance he cannot return them. Such acceptance need not be express. A buyer's use of the goods as his own after he knows of the defect, or his retention of them for an unreasonable length of time without an attempt to ascertain whether or not the seller properly performed, will be treated by the courts as amounting to an acceptance of the goods as delivered. *Cream City Glass Co. v. Friedlander*, 54 N. W. 28, 84 Wis. 53, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Barton v. Kane*, 17 Wis. 38, 84 Am. Dec. 728; *Freedman v. Marrow Shoe Mfg. Co.*, 15 A. 690, 122 Pa. 25. But the fact that the buyer has kept the goods long enough to ascertain the truth, or has used part of them in ascertaining it, does not, in itself, amount to acceptance. It is use after knowledge of the defect, or unreasonable delay, that precludes rejection. What is reasonable in this respect is a jury question. *United States v. Dewart Milk Products Co.* (D. C.) 300 F. 448; *Schnitzer v. Lang*, 145 N. E. 65, 239 N. Y. 1; *Philadelphia Whiting Co. v. Detroit White Lead Works*, 24 N. W. 881, 58 Mich. 29. Cf. *Am. Steam Gauge & Valve Mfg. Co. v. Mechanics' Iron Foundry Co.*, 101 N. E. 376, 214 Mass. 299.

For other cases see Decennial Digests, Sales ⇨ 176(3), 178(2, 3, 4), 182(3), 219(2), 288(4), 445(5).

Q. 20. If in the preceding case the buyer should be held to have accepted the goods as delivered, could he nevertheless hold the seller liable for the latter's failure in exact performance?

A. If the buyer be said to have accepted the goods delivered in substitution for those which should have been delivered, there would be no basis for recovery. But if the transaction be treated

as an offer and acceptance of the goods, not as satisfaction of the seller's contract, but rather as part performance, there would remain the seller's liability as to the rest, or, if it can be assumed that the buyer's keeping of the goods is not under the contract at all, there arises a new liability on his part to the seller for the goods, and the seller's original contract remains wholly unperformed. The decisions are in confusion as to the buyer's rights and obligations under the circumstances. In *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, the court held that "the retention of the property by the vendee is an assent, on his part, that the contract has been performed." *South Atlantic Packing & Provision Co. v. York Mfg. Co.* (C. C. A.) 276 F. 509. But in *Temple Bros. v. Munnett*, 123 A. 431, 97 Vt. 395, it was held that the buyer could recover damages, although he was liable for the price. In *Standard Growers' Exch. v. Howard*, 89 So. 345, 82 Fla. 97, the buyer was held not liable for the price and the seller was limited to quantum valebat. Cf. *Greenberg v. Perlson*, 186 N. W. 161, 176 Wis. 84. Sales Act, § 49, provides that acceptance shall not relieve the seller from liability for damages, unless after acceptance the buyer shall fail to give him notice of the breach within a reasonable time.

For other cases see *Decennial Digests*, Sales ⇨ 168(4), 179(1, 4), 188, 288 (4), 340, 405.

SECTION 3.—SELLER'S REMEDIES AND RIGHTS

Q. 21. A, in Chicago, entered into a contract of sale with **B** for the future delivery of goods f. o. b. Norfolk. **B** repudiated the contract before **A** shipped the goods. **A** stored the goods in his warehouse, and sued for the price. What remedy has a seller under such circumstances?

A. If the contract is such that title has passed prior to the tender, the seller may sue for damages for breach of contract to receive the goods and pay for them, or may sue in debt for the agreed price. If title has not previously passed, he may sue for damages resulting from the buyer's refusal to take the title. In such case the damage will be, in general, the difference between the value of the goods, which the seller still owns, and the agreed price. Logically he cannot sue for the agreed price as such, because he had not passed the title, and therefore, even against his will, he is still owner of the goods. A number of courts have held, however, that he may treat the goods as the buyer's, assume that title has passed, and sue for the purchase price. There is much conflict on this point. Sales Act, § 63, allows recovery of the agreed price under

certain circumstances, as where the goods cannot be readily resold.

Acme Food Co. v. Older, 61 S. E. 235, 64 W. Va. 255, 17 L. R. A. (N. S.) 807.

Barrie v. Quimby, 92 N. E. 451, 206 Mass. 259.

Funke v. Allen, 74 N. W. 832, 54 Neb. 407, 69 Am. St. Rep. 716.

Montauk Ice Cream Co. v. Daigger Co., 126 S. E. 681, 141 Va. 686.

Dustan v. McAndrew, 44 N. Y. 72.

Walker v. Nixon, 65 Mo. App. 326.

Liberty Canning Co. v. Lippencott Co., 137 N. E. 283, 80 Ind. App. 184.

23 Mich. Law Rev. 921.

17 Mich. Law Rev. 283.

18 Harv. Law Rev. 298.

22 Col. Law Rev. 51.

For other cases see *Decennial Digests*, Sales ¶¶ 113, 340, 343, 345, 360(1), 370, 384(2).

Q. 22. A put B in possession of certain goods on the understanding that B should pay \$100 a month for the possession for seven months, and that upon a further payment thereafter of \$10 A would sell the goods to him. B made one payment, and then flatly refused either to pay anything more or to redeliver the goods. Could A replevy the goods?

A. Yes. Title had not passed; A was still owner. B had lost his right to continued possession, because of his breach of the contract, under which alone he had any right to possession.

For other cases see *Decennial Digests*, Sales ¶ 479(2).

Q. 23. A sold certain goods to B, and put him in possession thereof, with the understanding that B should pay \$700 for them, at the rate of \$100 per month. After one payment, B refused either to return the goods or to pay anything further. Could A replevy the goods?

A. As nothing appears to have been expressed as to title, presumably, in this case, it had passed. A could not replevy, unless B had acquired possession with the fraudulent intention, existing at the time, not to pay for them. In such case A could rescind the contract because of fraud, and revest himself with title and right of possession. In the absence of such fraud, title having passed, A could not retake possession.

Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co., 128 N. W. 389, 149 Iowa, 272, 30 L. R. A. (N. S.) 1184.

Frech v. Lewis, 67 A. 45, 218 Pa. 141, 11 L. R. A. (N. S.) 948, 120 Am. St. Rep. 864, 11 Ann. Cas. 545.

Bell v. Ellis, 33 Cal. 620.

For other cases see *Decennial Digests*, Sales ¶¶ 45, 100, 202(4), 318, 399.

Q. 24. A sold certain goods to B under such circumstances that title passed, although A still retained possession. (See question No. 3). Nothing was said in the contract about the time and manner of

payment, although the amount was fixed. Could A retain possession until payment against B's desire, even though B was solvent?

A. Yes; unless there is something in the contract whereby the seller expressly or impliedly agrees that the buyer may have possession before payment, the seller is entitled to assert a lien upon the goods and retain possession until payment. Payment and delivery are presumably concurrent conditions.

For other cases see Decennial Digests, Sales ⇨82(3), 300.

Q. 25. A contract of conditional sale provides that the buyer shall pay the price in installments, that he shall have possession so long as he is not in default, that upon default the seller may retake possession, that the whole price shall become due in case of any default, and that title shall remain in the seller until payment. Can a conditional seller, who has started suit for the whole price, on default, thereafter retake possession according to the agreement?

A. The courts are in hopeless confusion on this point. Some permit such retaking. *Matthews v. Lucia*, 55 Vt. 308; *Campbell Printing Press & Mfg. Co. v. Rockaway Co.*, 29 A. 681, 56 N. J. Law, 676, 44 Am. St. Rep. 410. Others deny the right of repossession. Some of these put the denial on the ground that the suit for the price necessarily indicates an intent to pass title. (See question No. 21.) *Turk v. Carnahan*, 57 N. E. 729, 25 Ind. App. 125, 81 Am. St. Rep. 85; *Frisch v. Wells*, 86 N. E. 775, 200 Mass. 429, 23 L. R. A. (N. S.) 144; *Francis v. Bohart*, 143 P. 920, 147 P. 755, 76 Or. 1, L. R. A. 1916A, 922. Others give no explanation, beyond the statement that suit and repossession are alternative remedies only. *Seanor v. McLaughlin*, 30 A. 717, 165 Pa. 150, 32 L. R. A. 467; *Manson v. Dayton*, 153 F. 258, 82 C. C. A. 588; *Ramey v. Smith*, 106 P. 160, 56 Wash. 604; 32 Yale Law J. 191.

For other cases see Decennial Digests, Sales ⇨477(4), 479(1, 5, 11).

Q. 26. Smith sold goods to Brown, payment to be made in six monthly installments; Brown to have possession at once, but title not to pass until final payment. The contract also provided that, in case of default by Brown, Smith might retake possession at any time. Brown defaulted after the second payment. Smith retook possession. He thereafter sued Brown for the unpaid part of the price. Should he have judgment?

A. It is generally held that a seller under a conditional sale contract, who has retaken possession cannot thereafter sue for the price. *Glisson v. Heggie Bros.*, 31 S. E. 118, 105 Ga. 30; *Turk v. Carnahan*, 57 N. E. 729, 25 Ind. App. 125, 81 Am. St. Rep. 85; Mc-

Bryan v. Universal Elevator Co., 89 N. W. 683, 130 Mich. 111, 97 Am. St. Rep. 453; *Crompton v. Beach*, 25 A. 446, 62 Conn. 25, 18 L. R. A. 187, 36 Am. St. Rep. 323; 36 Harv. Law Rev. 489; *Silverthorne v. Simon*, 211 P. 26, 59 Cal. App. 494; 21 Mich. Law Rev. 820. Upon breach by the buyer, the seller may recover the goods or the price, but not both. It has been held, however, in some cases, that regaining possession of the goods does not bar the seller's right to sue for the price. *Rudolph Wurlitzer Co. v. Mandarin Co.*, 188 N. W. 639, 178 Wis. 185. In such case the seller should not be allowed to retain the goods as his own, after the judgment is satisfied. A conditional sale is sometimes said to be essentially an absolute sale with a mortgage back, and the conditional seller should not be allowed to recover more than his debt, or inflict a forfeiture. *Puffer v. Lucas*, 17 S. E. 174, 112 N. C. 377, 19 L. R. A. 682; *Bankston v. Hill*, 98 So. 689, 134 Miss. 288, 37 A. L. R. 88.

For other cases see *Decennial Digests*, Sales ¶318, 479(6, 9, 10, 11).

Q. 26a. On September 1, 1924, John Merchant sold and delivered to Ralph Byers a table. The purchase price of \$100 was to be paid in ten equal installments. It was expressly provided in the sale agreement that title should remain in Merchant until the price was fully paid. Byers paid six installments of the purchase price and then defaulted. After repeated demands for payment, Merchant retook the table on November 1, 1924, and now holds it. Byers now sues to recover back from Merchant the part of the purchase price which he paid. Merchant demurs to the foregoing statement of facts.

A. Sometimes conditional sales, even though providing for forfeiture, have been held to be chattel mortgages, and the vendee has been allowed an equity of redemption. But very severe forfeitures are allowed by the laws of most jurisdictions in conditional sale contracts, and the seller is allowed to resume possession without rescinding the contract or returning payments made, though far in excess of his damages. *Clark v. Barnard*, 2 S. Ct. 878, 108 U. S. 436, 27 L. Ed. 780; *Pfeiffer v. Norman*, 133 N. W. 97, 22 N. D. 168, 38 L. R. A. (N. S.) 891. On principle the courts should follow the analogy between a conditional sale and a chattel mortgage, as if it were a short cut for an absolute sale, with a mortgage back to the seller for the unpaid balance of the price. See 5 Minn. Law Rev. 329; 6 Minn. Law Rev. 422. A forfeiture should not be permitted in exercising security rights.

For other cases see *Decennial Digests*, Bonds ¶134; Sales ¶479(10).

Q. 27. The defendant had contracted to buy from the plaintiff 1,000 bushels of potatoes at \$1.50 per bushel f. o. b. a named carrier. Just as the plaintiff had got together enough potatoes to satisfy the contract and was ready to deliver them to the carrier, defendant notified him that he, the defendant, had changed his circumstances and could not take the potatoes; that they must not be shipped. Plaintiff thereupon sold the potatoes on the open market for \$1,000. Subsequently he sued the defendant for \$500 as damages from defendant's breach of contract. Can defendant make use in any way of the fact that plaintiff did not give him notice that the resale would take place?

A. It is evident from the circumstances that title to the potatoes had not passed to the defendant. The resale without notice was therefore in no sense a conversion or other unauthorized dealing with defendant's goods, to which defendant could object. Plaintiff was selling what were still his own potatoes. But his reasonable damage from defendant's breach is the difference between the value of the goods left in the plaintiff's ownership and the contract price. This value may be shown by evidence of the price at which they could be marketed at the time, less expenses. *Bigelow v. Legg*, 6 N. E. 107, 102 N. Y. 652; *Murray v. Doud*, 47 N. E. 717, 167 Ill. 368, 59 Am. St. Rep. 297; *Mayo v. Latham*, 123 N. W. 561, 159 Mich. 136. The price actually secured by resale is commonly accepted as fixing this value, if the sale is fairly and properly made. The defendant might possibly object to the admission of the evidence furnished by the resale, on the ground that, because of lack of notice to him, it presumably was not so conducted as reasonably to demonstrate the fair market value. In general, however, courts do not require notice to the defaulting buyer as essential to the presumable fairness and accuracy of the resale in showing market value. *Pratt v. S. Freeman & Sons Mfg. Co.*, 92 N. W. 368, 115 Wis. 648; *Moore v. Potter*, 50 N. E. 271, 155 N. Y. 482, 63 Am. St. Rep. 692.

For other cases see *Decennial Digests*, Evidence $\hookrightarrow$ 113(14); Sales $\hookrightarrow$ 337, 340, 384(2, 7).

Q. 28. Suppose that in the preceding question the potatoes had been identified at the time of the contract, so that title had passed, and the defendant had refused to receive possession and to pay for them. Could he have made other use of the plaintiff's failure to give notice?

A. As title had already passed, the plaintiff would have been selling goods belonging to the defendant. The rule is, however, that a

seller left in possession of the buyer's property through the latter's default has a right to resell it and apply the proceeds on the buyer's debt. In reselling, the plaintiff did no wrong of which the defendant could complain. *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147. Furthermore, it has been held that a resale, which otherwise appears fair and proper, is not rendered less so by the seller's failure to give the original buyer notice of the time and place. *Pollen v. Le Roy*, 30 N. Y. 549; *Waples v. Overaker*, 13 S. W. 527, 77 Tex. 7, 19 Am. St. Rep. 727. The courts have not determined definitely just what would be the buyer's rights and remedies in case he had no notice, either directly or by implication from the circumstances, of the seller's intention to resell at some time and place. Probably it would at least preclude the seller from recovering any deficiency from the original buyer. See *Hayes v. Nashville*, 80 F. 641, 26 C. C. A. 59; *Dill v. Mumford*, 49 N. E. 861, 19 Ind. App. 609; *Winslow v. Harriman Iron Co.* (Tenn. Ch. App.) 42 S. W. 698; 35 Harv. Law Rev. 870.

For other cases see Decennial Digests, Sales $\S$ 305, 332, 333.

Q. 29. Smith sold Brown six hogs for a price agreed upon, for which Brown gave his promissory note, due in 60 days. It was agreed that Smith should keep and feed the hogs for 40 days, and then should deliver them to Brown at X town. At the end of 40 days he loaded the hogs into a neighbor's truck, who drove them to Sville, on his way to X town. His truck having broken down at Sville, the hogs were unloaded and left with Jones, who said that he would notify Brown that he had them, and would feed and keep them until Brown came for them. Jones did so notify Brown, who, on getting the word, immediately started to Sville to get the hogs. On arriving there he was informed by Jones that, since he had sent the word, Smith had forbidden the delivery of the hogs to him, as he had learned that Brown was insolvent. Brown had become insolvent since the sale.

(a) Was Brown entitled to have the hogs delivered to him by Jones?

(b) Assume that Brown tendered the money in payment of his not yet due promissory note; would he then be entitled to have the hogs delivered to him?

A. (a) No; on learning of Brown's insolvency, Smith had a right to stop the goods in transitu. Although the goods were no longer in movement from place to place, and although they had come to an end of the journey so far, in a sense, as position was concerned, the technical transit was not yet complete. Goods are in transit until

they reach the buyer, or a possessory agent for the buyer. Here, although Jones was holding the goods for Brown to take possession, he was not a possessory agent of Brown, but a bailee of the truck driver, who was himself agent and bailee of Smith.

Kingman & Co. v. Denison, 48 N. W. 26, 84 Mich. 608, 11 L. R. A. 347, 22 Am. St. Rep. 711.

Buckley v. Furniss, 15 Wend. (N. Y.) 137.

Blackman v. Pierce, 23 Cal. 508.

For other cases see *Decennial Digests*, Sales ⇨296, 327.

(b) Yes; although the insolvency of Brown gave Smith the right to hold the goods, title had passed to Brown, and exercise of the right of stoppage in transitu, without something more, does not divest the buyer of title. On tender of payment, therefore, the buyer, as owner, has a right to their possession.

Babcock v. Bonnell, 80 N. Y. 244.

Diem v. Koblitz, 29 N. E. 1124, 49 Ohio St. 41, 34 Am. St. Rep. 531.

For other cases see *Decennial Digests*, Sales ⇨299, 332.

Q. 30. A sold certain goods to B, and shipped them to B, with bill of lading in B's name. This bill he mailed to B. Subsequently A discovered that B was insolvent, and ordered the carrier to withhold delivery of the goods on that account. Thereafter B presented the bill of lading, which had previously been indorsed in blank, and demanded possession. On learning of the stop order, he said that he was not getting the goods for himself, but was acting as agent of C, to whom he had previously sold them. Assuming this statement to be true, is B entitled to possession?

A. Not unless he proves, also, that at the time of the sale to C he delivered to him the bill of lading. Sale by the original buyer to a subpurchaser, who takes for value and in good faith, if accompanied by transfer of bill of lading, cuts off the right of the original seller to stop in transitu; but such a sale, without transfer of the bill of lading, though it passes title to the subpurchaser, does not defeat the original seller's right to stop.

Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

Shepard & Morse Lumber Co. v. Burroughs, 41 A. 695, 62 N. J. Law, 469.

Dymock v. Midland Nat. Bank, 67 Mo. App. 97.

For other cases see *Decennial Digests*, Sales ⇨291, 295, 297.

SECTION 4.—WARRANTY, EXPRESS OR IMPLIED

Q. 31. The buyer ordered from the seller 100 tons of ice. The ice was delivered at the time and place agreed upon, but it developed on inspection that it was not clear in color, contained dirt of various kinds, and was possibly contaminated. The buyer then refused to

pay the price as agreed. In suit between the parties, would the seller's showing that there was nothing whatever in the written agreement as to the character of the ice to be furnished support a judgment in his favor?

A. The absence of such an express stipulation would not necessarily mean that the seller was not obligated to deliver clear, merchantable ice. Literally, to be sure, his only obligation would have been to deliver ice, and he had delivered ice, thereby fulfilling the literal terms of his undertaking. But the courts give effect to certain unexpressed terms, when the circumstances of the transaction lead to a reasonable inference that they were intended or assumed as part of the agreement. The existence of such implied conditions or warranties depends upon the circumstances of each transaction. Assuming in the instant case, for instance, that the contract was for ice from a stock which the buyer was familiar with, there would be no implication that the ice delivered should be of a quality other than that of the larger mass. If that had not been clear, the seller would not be impliedly obligated to deliver clear ice. On the other hand, if the seller knew that the buyer intended it for resale for ordinary domestic purposes and was contracting with that in mind, there would fairly be implied an undertaking to supply ice fit for that purpose. Again, the fact that the agreed price was such as could reasonably be expected to procure only ice suitable for external refrigeration would tend to negative an implied undertaking to furnish something better.

Cf. question 36.

Wallace v. L. D. Clark & Son, 174 P. 557, 74 Okl. 208, 21 A. L. R. 361.

Johnson v. Foley Milling & Elevator Co., 179 N. W. 488, 147 Minn. 34, 16 A. L. R. 856.

Burgner-Bowman Lumber Co. v. McCord-Kistler Mercantile Co., 216 P. 815, 114 Kan. 10, 35 A. L. R. 242.

For other cases see Decennial Digests, Sales $\S$ 166(1), 264, 273(3).

Q. 32. Smith & Co. were stock and bond brokers, with a large business. Brown entered their office, and announced that he desired to buy a \$1,000 bond of a stated issue. He was told that the market price was 98 plus a one-eighth per cent. brokerage charge. He paid the amount and received a bond at once. That particular bond had been stolen from its owner, and, not being negotiable, was taken from Brown by legal process. Smith & Co. were quite innocent in the matter. Has Brown any action against Smith & Co. arising out of the facts?

A. Brown's right of action must depend upon the legal nature of his transaction with Smith & Co. Did he buy from Smith &

Co., so that they stand in the position of sellers to him, or did he employ them as agents to buy such a bond for him? Was his offer to Smith & Co., "I will buy from you," or "Will you buy for me"? This preliminary question cannot be answered without further investigation of fact. Assuming, however, that Brown bought from Smith & Co., he could sue them for breach of an implied warranty that they were capable of passing a valid title to the bond. *Meriden Nat. Bank v. Gallaudet*, 24 N. E. 994, 120 N. Y. 298; *Royal Exch. Ass'n v. Moore*, 8 L. T. (N. S.) 242. This action for breach of warranty would lie, even though, in buying from Smith & Co., Brown knew that they were not selling their own goods, but were acting as agents for an undisclosed principal. In such a case it has been held that there is an implied warranty by the agent himself that he has power to convey a good title. *McClure v. Central Trust Co. of New York*, 58 N. E. 777, 165 N. Y. 108, 53 L. R. A. 153; *Pugh v. Moore, Hyams & Co.*, 10 So. 710, 44 La. Ann. 209; *Mechem, Agency* (2d Ed.) § 2364, note 10. But, of course, if the purchaser has not relied on the credit of the agent from whom he buys, such a warranty will not be implied. *Worthington v. Cowles*, 112 Mass. 30. Assuming, on the other hand, that Brown did not buy from Smith & Co., either as principals or agents, but merely employed them as his agents to buy for him, he could not set up any warranty of title on their part, for there would have been no sale from them to him. There would, however, be an obligation on their part to use due care in buying for Brown, and he could hold them liable if the facts showed a dereliction of that duty.

For other cases see *Decennial Digests, Brokers* ⇨99; *Principal and Agent* ⇨146(3).

Q. 33. When a buyer orders from a manufacturer a chattel, such as the manufacturer is accustomed to make, and describes it by the trade-name given it by the manufacturer, and at the same time informs the manufacturer that it is to be used for a particular purpose.—e. g., "one of your No. 2 size 'winter-comfort' heating furnaces, for use in a 16-room house"—on what premise can it be said that the manufacturer, in entering into the sale, does not impliedly warrant that the chattel will serve the purpose?

A. An absence of implied warranty is predicated on the assumption that there is no duty on the seller to point out to the buyer that the terms of his order are inconsistent. The trade-name specifically characterizes a certain thing. That thing may not be fitted for the purpose the buyer mentions. The thing expected by the

buyer—i. e., something fitted for the purpose *and* having those established characteristics—may not exist. It may be argued, therefore, and it is so held, that the statement of purpose is extraneous to the description contracted for, and that the seller is under no obligation to negative the buyer's apparent belief that the thing described has this additional characteristic.

Gregg v. Page Belting Co., 46 A. 26, 69 N. H. 247.

Titley v. Enterprise Stone Co., 20 N. E. 71, 127 Ill. 457.

Wilson v. Lawrence, 1 N. E. 278, 139 Mass. 318.

Milwaukee Boiler Co. v. Duncan, 58 N. W. 232, 87 Wis. 120, 41 Am. St. Rep. 33.

Dounce v. Dow, 64 N. Y. 412.

2 Wis. Law Rep. 385.

For other cases see Decennial Digests, Sales $\S$ 267, 272, 273(3, 5), 279.

Q. 34. In a case such as the foregoing, when goods are ordered by a trade-name, or by a catalogue description, can any warranty at all be implied?

A. Section 15 (4) of the Sales Act provides that: "In case of a contract to sell or a sale of a specified article under its patent or trade-name, there is no implied warranty as to its fitness for any particular purpose." This section is somewhat indefinite. Both under it and at common law, however, it would seem logical to imply at least a warranty that the article would be as well made and of as good materials as is commonly characteristic of the articles so described, and also that it would be fit for the particular purpose for which such articles are commonly adapted; that is, for instance, a "No. 2 winter-comfort furnace" might be held impliedly warranted to be as free from defects as is customary in the maker's No. 2 winter-comfort furnaces. There might also reasonably be an implication that it would be as efficient as the general run of furnaces of that particular type and size. There is no necessary antithesis between the trade-named product and reasonable freedom from defects. But, on the other hand, the trade-name might specifically connote goods of an inferior quality, and therefore be inconsistent with freedom from defects. The matter is disputable, and whether such representations will be inferred by the courts is doubtful.

Stoehr & Pratt Dodge Corporation v. Greenburg, 146 N. E. 34, 250 Mass. 550.

Little v. Van Syckle & Co., 73 N. W. 554, 115 Mich. 480.

American Tank Co. v. Revert Oil Co., 196 P. 1111, 108 Kan. 690.

Appalachian Power Co. v. Tate, 111 S. E. 150, 90 W. Va. 423.

Ward v. Great Atlantic & Pacific Tea Co., 120 N. E. 225, 231 Mass. 90, 5 A. L. R. 242.

For other cases see Decennial Digests, Sales $\S$ 267, 273(1, 2, 5), 274.

Q. 35. Plaintiff bought from a retail grocer a loaf of bread made by the defendant baking company. There was in the bread, at the time of its sale by the defendant company to the retailer, a shingle nail, which penetrated the roof of the plaintiff's mouth as he attempted to eat the bread. He desires to sue the baking company for damages from breach of an implied warranty that the bread was free from deleterious substances and fit for human consumption. Would a petition based on these facts be subject to demurrer?

A. That a baking company selling its own bread would be held impliedly to have warranted it free from such deleterious substances is quite probable. But, granting such a warranty to exist, there would be question whether plaintiff could avail himself of it. Assuming a warranty to be in the nature of contract, there would be no privity of contract between the plaintiff and defendant. The only theory on which plaintiff could recover without proving negligence would be that a warranty is a representation made to all the world, for the falsity of which the law imposes a liability other and broader than a strictly contract liability. The decisions are not in harmony as to this. *Pelletier v. Dupont*, 128 A. 186, 124 Me. 269, 39 A. L. R. 972; *Hertzler v. Manshum*, 200 N. W. 155, 228 Mich. 416. The manufacturer is not generally held liable to any one except his immediate vendees for injuries by defects in his product, even though due to his negligence, except as to articles dangerous in their nature, or containing known defects. (See questions on Torts.) The benefit of a warranty will not run with a chattel on its resale, in favor of a subpurchaser. 23 Mich. Law Rev. 919, 18 Mich. Law Rev. 436; 5 Iowa Law Bull. 6, 86.

For other cases see Decennial Digests, Sales $\S$ 255.

Q. 36. Defendant sold to plaintiff a jar of preserved fruit. Defendant was a retail grocer, who had purchased the particular jar, with others, from a reputable jobber, and had no part in the preparation or canning. The plaintiff had not asked for a particular brand, but simply for "a jar" of that kind of fruit, and had accepted the one selected and handed him by the defendant. The defendant made no statements in respect to the chattel whatever. The plaintiff was injured by some deleterious foreign substance in the jar. He sued the defendant for breach of warranty that the contents of the jar were fit for his consumption. Should he have recovered?

A. The conventional expression is that a warranty is a contract supported by the same consideration as the contract to sell, whereby the seller—warrantor intentionally assumes a liability. This liability may be predicated upon implied representations concerning the goods, as well as upon express ones. Where there is no express representation, the fundamental question is whether the particular representation relied on in the action can properly be said to be implied by the circumstances of the case. Ordinarily a seller will not be held impliedly to have made representations as to a fact as to which he obviously and reasonably knows no more than the buyer does. In this case it could not fairly be assumed that the defendant either knew or should have known more about the contents of the jar than did the plaintiff. The only statement reasonably implied is that the seller believed the goods wholesome, a statement of opinion such as does not give rise to a legal obligation to make good in damages. It has been held, however, in some cases, that there is an obligation as for warranty upon the seller, and one justification suggested for so holding is the inability of the person injured to sue the manufacturer. (See the preceding question.)

Davis v. Van Camp Packing Co., 176 N. W. 382, 189 Iowa, 775, 17 A. L. R. 649.

Mazetti v. Armour & Co., 135 P. 633, 75 Wash. 622, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140.

For other cases see *Decennial Digests*, Food ◊25; Sales ◊255, 261(6), 269.

Q. 37. Smith sold to Brown a certain secondhand gas engine, which in due course he delivered to Brown, and for which Brown paid. At the time he made the offer, Smith assured Brown as a fact that the engine would consistently produce 50 brake horse power. Brown would not have bought the engine, had he not relied upon this statement. So soon as he put the engine to use, however, it appeared that Smith had materially overestimated its capacity. Can Brown compel Smith to take back the engine and return the money?

A. The logical difficulty in the way of permitting a return is that Brown got exactly what he contracted for, in an objective sense. Smith agreed to sell him a specific engine, and delivered that engine according to the contract. The statement of capacity was not a condition of performance of the contract, but a collateral representation, or warranty. Brown cannot, therefore, logically return the engine on the ground that it was not what he contracted to receive, as he might have done had Smith agreed to deliver an other-

wise unidentified "50 horse power engine." In such latter case, nothing but a 50 horse power engine would have filled the terms of the contract. To return the goods in this case would involve rescission of the contract and a return of title. Assuming that the misstatement of Smith was not so fraudulent as to permit a rescission on that ground, many courts would refuse to allow a rescission, and would limit Brown to a recovery of the damage caused to him through Smith's misstatement. *H. W. Williams Transp. Line v. Darius Cole Transp. Co.*, 88 N. W. 473, 129 Mich. 209, 56 L. R. A. 939 (but cf. *Sherwood v. Walker*, 33 N. W. 919, 66 Mich. 568, 11 Am. St. Rep. 531); *Worcester Mfg. Co. v. Waterbury Brass Co.*, 48 A. 422, 73 Conn. 554; *Du Pont Chemical Co. v. Buckley*, 126 A. 674, 96 N. J. Eq. 465. Other courts have allowed rescission and return on the ground of mutual mistake of fact. *Sherwood v. Walker*, 33 N. W. 919, 66 Mich. 568, 11 Am. St. Rep. 531; *Newell v. Smith*, 3 A. 674, 53 Conn. 72. Still other courts, and the Sales Act, allow a return of the goods without any definite explanation of the reason. *Sedlacck v. Welpton Lumber Co.*, 197 N. W. 618, 111 Neb. 677; *Smith v. Hale*, 33 N. E. 493, 158 Mass. 178, 35 Am. St. Rep. 485; *Hoyer v. Good*, 161 N. W. 691, 182 Iowa, 148; Sales Act, § 69.

For other cases see Decennial Digests, Cancellation of Instruments ⚡4; Compromise and Settlement ⚡17(1); Exchange of Property ⚡11; Sales ⚡36, 120.

SECTION 5.—ESTOPPEL AND BONA FIDE PURCHASE FOR VALUE

Q. 38. Smith, who was leaving town for a year, leased his piano to Brown at a small monthly rental, with the understanding that Brown might at any time within the year elect to buy it at a stipulated price, and that the rentals already paid should then be applied as part payment of the price, but that title should not pass to Brown until the entire price should have been paid. A few months later, Brown sold the piano to Thomas, who found Brown in possession and enjoyment of the piano and believed him to be owner, and who paid a fair price. Brown, however, had not in any way notified Smith of an intention to buy the piano, nor had he paid Smith the agreed price, although he was not in default as to payment of the rent. Could Smith retake the piano from Thomas, without tender of what Thomas had paid Brown?

A. Assuming that Brown had no power to invest Thomas with any rights under the rental agreement itself, so that Thomas could not hold against Smith as a lessee, Smith could retake. Brown had

not title when he sold to Thomas, and therefore could not transfer title to Thomas. Smith logically still had title. It is true that an owner, who improperly creates an appearance of title in another, upon which a third party reasonably relies, is legally estopped to deny the truth of that appearance, to the detriment of the person relying on it. The courts consistently hold, however, that the doctrine does not apply in a case such as this. It is not clear whether estoppel is absent because Brown's possession was not appearance of ownership, or because Thomas' reliance on Brown's apparent ownership was not reasonable, or because Smith did nothing improper under the circumstances in creating an appearance of ownership in Brown. There is both support for and negation of each possibility in the cases, but the conclusion that Smith is not estopped under such simple circumstances is consistently maintained. There is also a frequently uttered principle that, when one of two innocent parties must suffer loss through the fraud of a third, the loss will fall upon him whose fault made possible the perpetration of the fraud. Courts which give mouth honor to this proposition consistently attribute the fault to the purchaser rather than to the owner, and permit the latter to recover. Smith, therefore, having title, could recover from Thomas. In a few states, this conclusion is not accepted by the courts; upon reasoning which varies they would protect Thomas' possession. *Davis v. First Nat. Bank of Wewoka*, 89 S. W. 1015, 6 Ind. T. 124, 25 L. R. A. (N. S.) 760 (on right of one leaving chattels in another's possession to claim title against the latter's vendees or creditors). In most states there are statutes relative to conditional sales, or other transfers of possession with power to acquire title, which affect the rights of the parties in various ways. Cf. question 42.

For other cases see *Decennial Digests, Bailment* ¶21.

Q. 39. Smith was the owner of a piano, which was in transit to him, and for which he took a bill of lading promising delivery to himself or order. This bill of lading he indorsed in blank and gave to Brown, a servant, with direction to have the piano delivered on its arrival. Brown wrongfully sold this bill to Thomas, who purchased in good faith and for value, and eventually got the piano from the carrier. Could Smith retake it from Thomas, without tender of his payment to Brown?

A. Brown had no title, and therefore could not pass one to Thomas. If Smith were precluded from recovery, therefore, his inability would have to be predicated on estoppel. He would not

have been estopped, had he placed the piano itself in Brown's possession (see question No. 38), and at common law it seems doubtful if giving the bill of lading would be any more disastrous to him. There is statement, however, that one who purchases a bill of lading may be better protected than if he had purchased goods themselves, as the bill is an indicium of title. Under Sales Act, §§ 32, 33, the bill having been "intrusted" to Brown, Thomas would be protected, unless the phrase "any person intrusted" is interpreted as "intrusted for purpose of sale" as such phrases in the Factors' Acts were interpreted.

National Bank of Bristol v. Baltimore & O. R. Co., 59 A. 134, 99 Md. 661, 105 Am. St. Rep. 321.

Stollenwerck v. Thacher, 115 Mass. 224.

Commercial Nat. Bank v. Canal Bank, 36 S. Ct. 194, 239 U. S. 520, 60 L. Ed. 417, Ann. Cas. 1917E, 25.

Willingham's Sons v. McGuffin, 90 S. E. 356, 18 Ga. App. 658.

Purchase for value and estoppel, 6 Minn. Law Rev. 87.

For other cases see Decennial Digests, Carriers ⇨55, 58, 59; Sales ⇨234(3), 294; Warehousemen ⇨17.

Q. 40. Brown bought a piano from Smith, who was planning to move from the city. Brown got it because it was a bargain price, although he had at the time no place to put it. It was agreed between them that Smith should keep it for two or three weeks until Brown's new house was ready for occupancy. Brown paid half the price, and Smith's storage was a matter of courtesy. Subsequently, however, Smith wrongfully sold the piano to Thomas, who bought it in good faith and for value, and at once took possession. Has Brown any right of action against Thomas?

A. Sales Act, § 25, provides: "Where a person, having sold goods, continues in possession, * * * the delivery or transfer by that person * * * of the goods * * * to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same." The common law as to the effect of such retention by the seller is in great confusion. The looseness of thought is illustrated by the Michigan statutes. Section 11856, Comp. Laws 1915, is similar to section 25 of the Sales Act, while section 11985 of the same compilation makes retention of possession fraudulent as against subsequent purchasers only if good faith be not affirmatively shown. At common law, in some states the first sale is without effect as against subsequent purchasers; in others, certain circumstances justifying the retention

of possession will serve to make the first sale effective, even as against the second purchaser; in others, the rights of the two purchasers depend upon proof of absence of fraud in the first transaction. Smith's rights, therefore, would depend upon the jurisdiction.

For other cases see *Decennial Digests*, Sales §§157, 226(3), 228, 234(8).

Q. 41. Smith was approached by a man, X, who introduced himself as Brown, of Brown & Co. This Brown was unknown to Smith, but his credit was well established. Relying on this credit, and supposing the man's representations of identity to be true, Smith sold and delivered to him certain gems. The man was in fact not Brown. He sold the gems to defendant, who purchased in good faith, and absconded. Can Smith recover the gems from defendant?

A. If there was a contract between Smith and the man, X, then X had title, for Smith intended title to pass. Such title, having been procured by X through fraud, could have been rescinded by Smith as between himself and X. It had not been retaken, however, when X sold to defendant; therefore defendant, a bona fide purchaser for value without notice, acquired the title. It is too late for a defrauded seller to retake title after it has passed to a purchaser in good faith. Defendant's title would therefore be effective against Smith. *Levi v. Bray*, 39 N. E. 754, 12 Ind. App. 9; *Pelham v. Chattahoochee Grocery Co.*, 41 So. 12, 146 Ala. 216, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19; *Schloss v. Estey*, 72 N. W. 264, 114 Mich. 429. Under circumstances such as those stated, it has been held that the seller did intend to contract with and pass title to the particular physical person who appeared before him, though mistaken as to his identity. *Edmunds v. Merchants' Dispatch Transp. Co.*, 135 Mass. 283; *Phelps v. McQuade*, 115 N. E. 441, 220 N. Y. 232, L. R. A. 1918B, 973; *Phillips v. Brooks*, [1919] 2 K. B. 243.

For other cases see *Decennial Digests*, Carriers §§82; Sales §§43(1), 45, 234(5), 238, 239.

Q. 42. Smith was approached by one Isaacs, who said that he represented Brown & Co., and that for them and on their account he wished to purchase certain unset gems. Smith delivered the goods to him, and charged the amount to Brown & Co. Isaacs had not in fact any agency relation with Brown & Co. whatsoever, and his statements were fraudulent. Thereafter he went to Brown &

Co. and offered to sell them the gems mentioned. They did buy, and paid Isaacs a fair price in good faith. Has Smith any rights against Brown & Co.?

A. Title did not pass to Isaacs, for the reason that Smith did not so intend. The only contract of sale there even purported to be was between Smith and Brown & Co. Isaacs, having no title, could pass none. Brown & Co. got no title directly from Smith by virtue of the apparent contract of sale, because they were not in fact parties to it. In legal effect, there was no contract of sale for lack of a party. Smith could therefore recover the gems. *Smith Premier Typewriter Co. v. Stidger*, 71 P. 400, 18 Colo. App. 261; *Rogers v. Dulton*, 65 N. E. 56, 182 Mass. 187; *Indianapolis Saddle Co. v. Curry*, 138 N. E. 337, 193 Ind. App. 346. Were Brown & Co. able successfully to assert ratification of Isaacs' alleged agency, so that title would vest in them directly, they would still be liable for the contract price because payment to their own agent would not be payment to Smith.

For other cases see *Decennial Digests*, Estoppel ⇐75; Sales ⇐221, 234(5).

Q. 43. Smith sold to Brown certain identified amounts of lumber with the understanding that Brown should have three months in which to pay for the lumber but might remove it from Smith's yard at any time. Soon thereafter Brown resold to Thomas who, before definitely contracting with Brown, asked Smith to point out just which lumber Brown owned under his purchase from Smith. Smith did point out the lumber, and stated that he was holding it for Brown. Thomas then bought it from Brown and paid him cash. Before any one demanded possession from Smith, however, Smith learned that Brown was insolvent. He then refused to give up possession to either Thomas or Brown, until one of them should pay him the price. Had he a right so to do?

A. Yes; Brown's insolvency revived Smith's lien upon the goods till payment. Brown had thereafter no right to possession before payment. Thomas had admittedly acquired title from Brown, and as among the parties was the legal owner of the goods. His right to possession, however, was no greater than Brown's. Had Smith intimated in response to Thomas' inquiries that Brown had paid for the lumber as well as acquired title, it is probable that he would be estopped now to set up nonpayment and a lien. His statement, however, that Brown had title, was not inconsistent with the fact that he himself had right of possession until payment, and there-

fore would not defeat that right. The purchaser, Thomas, took Brown's title subject to Smith's lien as revived by Brown's insolvency.

McElwee v. Metropolitan Lumber Co., 69 F. 302, 16 C. C. A. 232.

Robinson v. Morgan, 25 A. 899, 65 Vt. 37.

For other cases see Decennial Digests, Sales $\S$ 305, 312, 313.

SECTION 6.—STATUTE OF FRAUDS

Q. 44. A orally contracted to sell B certain styles of shoes, which he was to manufacture for B, and which were not suitable for sale to others in the usual course of the seller's business. The seller tendered the goods to the buyer, who refused to receive them, because there was no writing to evidence the contract. Was this a contract for "the sale of goods," within the meaning of the statute of frauds?

A. According to the so-called English rule, any contract which will result in the transfer of title to a chattel for a price is a contract for the sale of goods. *Lee v. Griffin*, 1 Best & S. 272; *Rex v. Wood Green Profiteering Com.*, [1920] K. B. 55; *Graves v. Hardy*, 1 Cob. & E. 287. The "New York rule" is that the contract is for work and labor, and is not for sale of goods, unless the goods are in existence at the time of making the contract. *Sewall v. Fitch*, 8 Cow. (N. Y.) 215; *Higgins v. Murray*, 73 N. Y. 252; *Meyer Bros. Drug Co. v. McKinney*, 121 N. Y. S. 845, 137 App. Div. 541; *Kellogg v. Witherhead*, 6 Thomp. & C. (N. Y.) 525; *Mead v. Case*, 33 Barb. (N. Y.) 202. Some courts have taken an intermediate position, the so-called Massachusetts rule, to the effect that, if the contract calls for a chattel to be specifically made for the buyer, it is not a contract of sale; but it is a contract of sale, even if the chattel is to be made, if the chattel is such as the seller would normally make for the general market. *Gardner v. Joy*, 9 Metc. (Mass.) 177; *Mixer v. Howarth*, 21 Pick. (Mass.) 205, 32 Am. Dec. 256; *Smalley v. Hamblin*, 49 N. E. 626, 170 Mass. 380; *Atlas Shoe Co. v. Rosenthal*, 136 N. E. 107, 242 Mass. 15; 36 Harv. Law Rev. 111; 22 Col. Law Rev. 767.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 83; Sales $\S$ 4 (3).

Q. 45. The statute of frauds does not require a memorandum if the buyer "shall accept part of the goods so sold and actually receive them." Would it be sufficient to bring a case within this provision for the seller to show that title to the goods had passed?

A. No; he could not show that title had passed unless he could prove the contract, and he could not prove the contract unless he could show acceptance and receipt of the goods. Acceptance of title is not synonymous with acceptance and receipt of the goods. Title may pass, either at the time the contract is entered into, or later, e. g., at the time goods are delivered to a carrier; but, even if the consent to take the particular goods which is implied in passing of title were considered "acceptance," within the meaning of the statute, its conjoined requirement of actual receipt clearly refers to the physical goods as distinct from the legal title. It is necessary, therefore, to prove that the *goods* have been accepted and *received* before the statute is satisfied, and hence before it can be shown that title has passed. Conversely, there may be acceptance and receipt of the goods without any passing of title.

Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316.

Riley v. Bancroft's Estate, 71 N. W. 745, 51 Neb. 864.

Pinkham v. Mattox, 53 N. H. 600.

James Mack Co. v. Bear River Milling Co., 227 P. 1033, 63 Utah, 565, 36 A. L. R. 643 (acceptance where purchaser is in possession of goods at time of sale).

For other cases see Decennial Digests, Frauds, Statute of $\S$ 89(1, 3).

Q. 46. By oral agreement, A contracts to sell and B to buy certain goods, described, but not identified. Subsequently A selects from his stock goods conforming to the contract, and, as was implied in the agreement, ships them by carrier consigned to B. Is the acceptance and receipt by the carrier sufficient to dispense with a written memorandum under the statute of frauds?

A. No; the delivery to the carrier would be sufficient evidence of appropriation and assent to pass the title, but the requirement of the statute that the goods be accepted and actually received by the buyer is not satisfied.

Johnson v. Cuttle, 105 Mass. 447, 7 Am. Rep. 545.

McCormick Harvesting Mach. Co. v. Cusack, 74 N. W. 1005, 116 Mich. 647.

Gard v. Ramos, 138 P. 108, 23 Cal. App. 303.

But cf. Spencer v. Hale, 30 Vt. 314, 73 Am. Dec. 309.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 87, 89(4), 90(3, 4).

Q. 47. Brown bought of Smith an automobile, then in Smith's garage in the country. As grass fires were threatening throughout the district, Smith suggested that Brown would be wise to have it insured while he was in town. Accordingly Brown insured it, as his automobile, with the Blank Company against loss through fire. When, later, Brown went to get the machine, it was discovered that the fires had reached Smith's place and the car was destroyed.

Smith insisted on payment, on the theory that title had passed to Brown before the fire. As the contract was not in writing, nor had anything been paid, Brown can set up the statute of frauds, and will do so unless assured that he can himself collect from the insurance company. Can he do so?

A. Assuming that the fire occurred after the making of the contract, the title had presumably passed to Brown at that time, a presumption strengthened by the statements respecting the insurance. (See question No. 3.) The statute would preclude Smith from showing that title had passed to Brown, but the insurance company, as an outsider to the contract, cannot set it up. The contract is not made void by the statute, but is effective, if provable, and only the parties, or their privies, can set up the statute as a bar to such proof. Therefore Brown can logically succeed against the company.

Northwestern Mut. Life Co. v. Heimann, 93 Ind. 24.

Jackson v. Stanfield, 36 N. E. 345, 37 N. E. 14, 137 Ind. 592, 23 L. R. A. 588.

Bice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

Purdom Naval Stores Co. v. Western Union Tel. Co. (C. C.) 153 F. 327.

For other cases see Decennial Digests, Frauds, Statute of $\S$ 143(1).

SURETYSHIP AND GUARANTY

By MAX RADIN, Professor of Law, University of California

Section

1. Nature of Contract.
2. The Statute of Frauds.
3. Defenses of Principal Available to Surety.
4. Rights of Surety.
 - (1) Indemnity or Reimbursement.
 - (2) Subrogation.
 - (3) Contribution.
 - (4) Exoneration.
5. Discharge of Surety.
6. Judicial and Public Bonds.

SECTION 1.—NATURE OF CONTRACT

Q. 1. P and B make a contract. A for consideration promises B in writing that he will become a surety for P. The contract between B and P is sent to him, and he writes below it: "I guarantee the above contract for P. [Signed] A." B refuses to accept it, and sues A for breach of contract.

A. B will recover. The terms "guaranty" and surety" are often confused, and in practice are frequently intended to be synonymous. But they are not necessarily so. Both "surety" and "guarantor" are bound for the performance of a third person. A surety, however, is bound jointly with the principal debtor, and assumes exactly the same obligation as the latter. A guarantor is bound only if the principal debtor does not perform after due attempt is made to compel him to do so, and due notice of his default is given him. There is accordingly an obligation on B's part to exhaust his remedy against P before attempting to recover from A, and to give A notice of default, if A is merely a guarantor; while, if A is a surety, he may upon P's default at once sue A. Again, in many jurisdictions, principal and surety may be jointly sued, but not principal and guarantor. Under these circumstances, A has broken his contract by signing as guarantor, instead of as surety.

Gage v. Lewis, 68 Ill. 604.

Singer Mfg. Co. v. Littler, 9 N. W. 905, 56 Iowa, 601.

For other cases see Decennial Digests, Guaranty Ⓔ46(1); Indemnity Ⓔ11.

Q. 2. Suppose A, in question 1, writes as follows: "I hereby guarantee that P will perform his obligation under this contract. [Signed] A." Would your answer be different?

A. In this case, A, though merely a guarantor, is liable at once upon B's default, just as a surety would be. He is therefore substantially the same as a surety. But even in this case there may be a procedural advantage in having A sign as "surety," by which he becomes jointly liable with B, and so can be sued in the same action. If there is such a procedural advantage, A has broken his contract in question 2 as well as in question 1.

W. T. Rawleigh Medical Co. v. Tarpley, 59 So. 512, 5 Ala. App. 412.
For other cases see Decennial Digests, Principal and Surety ¶6.

Q. 3. A makes a note payable to B's order. B indorses it in blank to C. Suppose he had inclosed it in a letter, in which he said, "I guarantee this note, but do not wish to be held as indorser," and had then sent it to C in payment of a debt. What is the difference between the liability of B in the two cases?

A. In order to hold B as indorser, C must present the note at the proper time and place, and give proper notice to B, in case A dishonors it. He need do nothing of the sort in the second case, but he cannot recover from B, the guarantor, unless he has unavailingly attempted to collect it from A.

Crosby v. Woodbury, 89 P. 34, 37 Colo. 1.
For other cases see Decennial Digests, Bills and Notes ¶245.

Q. 4. A promises to build a house for B, and to have it finished by July 1, 1926, or pay \$1,000. A, without B's knowledge, makes a contract with the Pacific Surety Company that if, because of labor conditions, he becomes unable to pay, the company will pay the stipulated sum to B. The written contract does not specify consideration, and the local statute makes a statement of the consideration necessary in the case of a suretyship or guaranty contract. A cannot finish the house in time, and pays \$1,000 to B. He sues the company. Result?

A. A will win. This is neither a guaranty nor a suretyship contract, but one of indemnity. In a suretyship or guaranty, the surety or guarantor makes a promise to the creditor that the debtor will or can perform. In an indemnity contract, he makes a contract with the debtor that the debtor shall lose nothing by his default. This will be so, even though in form the contract between A and the company was a suretyship contract, and the word "surety" or "guaranty" was used throughout.

Somers v. United States Fidelity & Guaranty Co., 217 P. 746, 191 Cal. 542.
For other cases see Decennial Digests, Guaranty ¶4; Indemnity ¶1.

Q. 5. P has bought goods from C for \$1,000. C becomes anxious about P's solvency, and consults S on the subject. S writes to him that, if P does not pay, he (S) will. On the due date, P defaults, and C sues S for the money. Result?

A. C will fail. There is no consideration for S's promise to P. A contract, whether of guaranty or suretyship, must have all the elements of an ordinary contract. If C had given S some consideration for his promise, or had agreed, in consequence of it, to extend additional time to P, the contract between C and S would have been good. If S had made the promise before C sold the goods to P, and if C had sold them in consideration of S's promise, the contract would also have been good. It is sometimes said that the same consideration in that case supports both the promise of S and of P. It is better to state that the consideration of the promise of S is the making of the contract between P and C.

Deposit Bank of Sulphur v. Peak, 62 S. W. 268, 110 Ky. 579, 23 Ky. Law Rep. 19, 96 Am. St. Rep. 466.

McNaught v. Fisher, 96 F. 168, 37 C. O. A. 438.

For other cases see *Decennial Digests*, Guaranty §16(3); Principal and Surety §34.

Q. 6. S gives P a letter, addressed to C, to the following purport: "The bearer, P, is financially sound. I guarantee his purchases up to \$5,000. [Signed] S." P shows the letter to C, and buys \$5,000 worth of goods from him. He does not pay. C sues S, whose defense is that he had never received word from C that the letter had been shown or the goods purchased.

A. C will recover. No notice of acceptance of such guaranties is necessary, when the guaranty is fixed and definite in its terms. Notice of acceptance is not usually necessary, in order to make a binding contract, and is required only in guaranties, when the terms are such as to imply that such notice is expected by the guarantor. In a case like the one set, acceptance of S's contract is complete, when C has given credit to P in reliance upon it.

Scribner v. Schenkel, 60 P. 860, 128 Cal. 250.

Midland Nat. Bank v. Security Elevator Co., 200 N. W. 851, 161 Minn. 30, 23 Mich. Law Rev. 783.

9 Minn. Law Rev. 160.

38 Harv. Law Rev. 828.

But see *Contracts*, question 24.

For other cases see *Decennial Digests*, Guaranty §4, 7(1).

Q. 7. Gunn and Wagner signed a bond on January 3, 1920, with the Syracuse Bank, that they would pay all loans, discounts, or renewals thereof the bank should from time to time make to Smith &

Co., if Smith & Co. failed to pay. A note which had been made July 10, 1919, was renewed on January 10, 1920. Likewise other notes were made after January 3, 1920. Smith & Co. became insolvent, and the Bank sues Gunn & Wagner, who admit liability on all but the note originally made in 1919, claiming that the terms of the contract applied only to loans made after January 3, 1920, and renewals of such loans. Result?

A. The bank's contention that the bond covered renewal notes, in place of notes in force at the time of the execution of the bond, would be generally upheld in most American jurisdictions. It was formerly stated that surety contracts are strictissimi juris, and are to be interpreted strictly against the creditor and in favor of the surety. By such an interpretation, since the contract is capable of being so interpreted as to exclude past loans, the rule would require that such loans be excluded. The modern rule, however, is that such contracts are to be interpreted, neither strictly nor liberally, but reasonably, in view of all the circumstances. If, therefore, as seems likely, renewals of past loans were reasonably contemplated by the parties, they would be included in the contract.

Utica City Bank v. Gunn, 154 N. Y. S. 705, 169 App. Div. 295.

Thomson v. Collins (Tex. Civ. App.) 267 S. W. 516.

For other cases see *Decennial Digests, Guaranty* ¶27, 36(3).

Q. 8. S gives P a letter, addressed to the Drovers' Bank, New York City, as follows: "I will be answerable for any discounts that P may wish up to \$5,000 [Signed] S." P discounts one note for \$500 at the bank. Three months later, he discounts another for \$1,000, and, a year later, another note for \$2,000. S claims that he is responsible only for the first discount.

A. S's contention will fail. Whether such a guaranty is a "continuing" guaranty, or not, depends upon the circumstances surrounding it. Unexplained, the normal understanding of the letter would be that P will make use of the bank's facilities for discount at various times, and S will be responsible for any loss to the bank. If a single transaction were contemplated, that ought to appear clearly.

White's Bank of Buffalo v. Myles, 73 N. Y. 335, 29 Am. Rep. 157.

For other cases see *Decennial Digests, Guaranty* ¶38(3).

SECTION 2.—THE STATUTE OF FRAUDS

Q. 9. James owed \$3,000 to Brown, and the same amount to Min-ton. He transferred property worth \$7,000 to Brown, which Brown promised to sell for him and reimburse himself, as well as pay Min-

ton. Brown visited Minton, informed him of the arrangement, and promised that, if he would not proceed against James, he would pay him the \$3,000 owed by James. Brown does not pay, and Minton sues him. Brown's defense is that this is a promise to answer for the debt of a third person, and therefore, under the statute of frauds, should be in writing.

A. Brown's defense will fail. The statute of frauds has no application when the promise is to pay a third person's debt out of property which has been turned over to the promisor for that purpose. This is a case of assumption of the debt of another, a primary and not a secondary liability as guarantor.

Mason v. Wilson, 84 N. C. 51, 37 Am. Rep. 612.

Hughes v. Lawson, 31 Ark. 613.

For other cases see Decennial Digests, Frauds, Statute of §34.

Q. 10. White owed \$5,000 to Smith, secured by a chattel mortgage of machinery. White had previously contracted to sell this machinery to Reynolds, but title had not yet passed. Reynolds went to Smith, and promised to guarantee White's debt, if he (Smith) would execute a release of the mortgage. He did so, and White transferred the machinery to Reynolds. Upon White's default, Smith sues Reynolds as guarantor, who sets up the statute of frauds.

A. The statute does not apply in a case like this, although it is a promise to pay another's debt. It is generally stated that, where the consideration, as in this case, is one which moves directly to the benefit of the promisor, the statute has no application. This has been held particularly where the consideration consists of releasing a lien or other right in the property upon a promise to pay the debt which the lien secures. However, the "consideration" test is impractical, and the same may be said of the "leading purpose" test, since the court can scarcely distinguish between instances in which the "primary" object of the promisor is to benefit himself and those in which the "primary" object is to benefit the principal debtor.

White v. Rintoul, 15 N. E. 318, 108 N. Y. 222.

Carleton v. Floyd, Rounds & Co., 78 N. E. 126, 192 Mass. 204.

Schwoerer v. Stone, 115 N. Y. S. 440, 130 App. Div. 880.

See, on this very difficult matter, 23 Harv. Law Rev. 136. Browne, Statute of Frauds, § 214, 126 Am. St. Rep. 494, 57 Univ. of Pa. Law Rev. 610, and Williston on Contracts, § 472.

For other cases see Decennial Digests, Frauds, Statute of §25, 33(1, 3).

SECTION 3.—DEFENSES OF PRINCIPAL AVAILABLE TO SURETY

Q. 11. John Erwin, an infant 20 years of age, makes a contract with Wm. Patterson, and Weare becomes surety for Erwin. The

latter breaks his contract, and Patterson sues Weare, the surety, who sets up in defense that Erwin was not bound on the contract and that he, the surety, could therefore not be bound; further, that he was unaware of Erwin's infancy when he signed as surety.

A. Weare will fail. Ordinarily, in American law, an infant's contract is voidable, not void. The defense of infancy is personal to the infant, and cannot be used by any one else. It is sometimes stated that, after the infant has rescinded the contract, the contract being now void *ab initio*, the suretyship also fails. That, however, is not the prevailing view. It remains true that the use of this defense was intended by law to be a personal privilege of the minor, and ought not to be available to any one else. Indeed, the surety is often demanded in order to protect the creditor against a possible rescission by the infant debtor. Yet this last circumstance is not essential. The surety is bound, even if he was ignorant of the principal debtor's infancy, unless he had been fraudulently induced by the creditor to believe that the principal was not an infant.

Burner v. Nutter, 87 S. E. 359, 77 W. Va. 256.

International Text-Book Co. v. Mabbott, 150 N. W. 429, 159 Wis. 423.

For other cases see *Decennial Digests, Guaranty* ¶5, 19, 36(2); *Principal and Surety* ¶8.

Q. 12. Arthur made a note payable to Williams for \$500, with interest at 8 per cent. Johnson indorsed the note as surety. The note being unpaid at maturity, Williams sued Johnson, who set up the usurious character of the note as a defense. Williams demurred.

A. The demurrer will be overruled. The principal obligation is void, and its invalidity is created by a rule of public policy, which would be partly frustrated if the person guilty of the illegal act could protect himself against its consequences. The suretyship, therefore, should fall with the principal obligation. It is, however, held in some jurisdictions that, if there was nothing in the original contract to indicate usury, the surety cannot set up the defense.

Hook v. White, 50 A. 290, 201 Pa. 41.

Henry & Co. v. Fry, 137 N. Y. S. 894, 78 Misc. Rep. 130.

For other cases see *Decennial Digests, Guaranty* ¶5; *Principal and Surety* ¶7.

Q. 13. Anson obtained a note from Jones by false pretences. Bradford indorsed the note as surety, without knowledge of the fraud. Anson sues Bradford, who sets up the fraud of the creditor. Result?

A. There is a division of authority on this matter. In the majority of jurisdictions, it is held that, since fraud goes to the root of

the contract, it may be pleaded as a defense by the surety, if the principal has pleaded it or could plead it. In other jurisdictions, it is held that, since fraud makes the contract merely voidable, but not void, it may not be pleaded by the surety, unless the principal has chosen to plead it, or is pleading it, when made codefendant with the surety. In some jurisdictions, finally, it seems that, even in such a case, fraud is not a defense on the part of the surety. The same rules are applied to duress practiced by the creditor on the principal.

City Nat. Bank of Columbus, Ohio, v. Jordan, 117 N. W. 758, 139 Iowa 499.
Ettlinger v. National Surety Co., 117 N. E. 945, 221 N. Y. 467, 3 A. L. R. 865.
 For other cases see *Decennial Digests, Bills and Notes* ¶103(1); *Principal and Surety* ¶48, 143.

Q. 14. Johnson was surety for Harris in a contract between Harris and Bowen, in which Harris agreed to manage a store for Bowen. Some of the goods in the store are stolen, and Bowen claims that the theft is due to Harris' carelessness. He sues him, and gets a judgment by default. Johnson knows nothing of the suit. Bowen then sues Johnson, and seeks to introduce his judgment against Harris in evidence. Result?

A. The authorities on this question are divided. In a large number of jurisdictions, the judgment is evidence of the fact of the principal's liability and its extent; but it is merely *prima facie*, and not conclusive. This is true, whether he had notice of the proceedings or not. In a very small number of jurisdictions, the judgment is conclusive against the surety. In some jurisdictions, the judgment against the principal is not admissible, unless he had notice of the proceedings and an opportunity to defend. If, however, the surety has in terms promised to pay upon the condition of a judgment being obtained against the principal, that judgment is conclusive against him, even if he has no notice of the proceedings. In the case of judicial and official bonds, such a condition is often implied. *State, to Use of Story, v. Jennings*, 14 Ohio St. 73; *Treweek v. Howard*, 39 P. 20, 105 Cal. 434; *Tate v. Norton*, 94 U. S. 746, 24 L. Ed. 222. If the creditor (Bowen) had brought action against both the principal and surety separately, and had lost his suit against the principal, unless the principal's defense was a personal one, judgment is conclusive in the action against the surety, and, if he has already obtained judgment against the surety, the judgment will be vacated.

Ames v. Maclay, 14 Iowa, 281. *Crum v. Wilson*, 61 Miss. 233.

For other cases see *Decennial Digests, Judgment* ¶545, 627; *Principal and Surety* ¶118, 145(1).

SECTION 4.—RIGHTS OF SURETY

(1) *Indemnity or Reimbursement*

Q. 15. Richards made a note for \$5,000 to the Farmers' Bank, which Beaver guaranteed. The note was not paid at maturity, and the bank notified Beaver, who, after some attempts to induce Richards to pay it, paid it himself. Subsequently Richards sued Beaver for the sum of \$3,000, claimed on a totally different transaction. Beaver counterclaimed the \$5,000, which he had paid to the bank. Demurrer is interposed to the counterclaim.

A. The demurrer will be overruled. Originally, at the common law, a surety or guarantor could not sue the principal for money paid to the creditor on his account, unless he had taken counter security from his principal. At equity, however, he could get relief, either by having the creditor's claim assigned to him, or directly without such assignment; but since the eighteenth century common-law courts have entertained such actions. Beaver, therefore, has a claim for \$5,000 against Richards, quite as valid as though it was based on a specific contract between them, and may use it by way of counterclaim, precisely as he could have sued for it directly.

Toussaint v. Martinnant, 2 T. R. 100.

For other cases see *Decennial Digests*, Guaranty ¶100; Principal and Surety ¶173, 174.

Q. 16. Stuart leased his premises by a 20-year lease to Hazen, who covenanted to pay the taxes. Hazen assigned his term to Wolf, and Wolf in turn assigned to Dunlop. Both assignments were in writing, but neither was recorded. The taxes remained unpaid for several years. Stuart finally paid them, and sued Hazen for breach of his covenant. Hazen, after paying the judgment, sues Dunlop, setting up the above facts. Dunlop demurs. Result?

A. The demurrer will be overruled. Since there is privity of estate between the landlord, Stuart, and the second assignee, Dunlop, the latter becomes liable for all covenants of the lease assigned to him, and impliedly promises to perform them. Hazen, who is also liable, stands somewhat in the position of a surety to Dunlop, and, if compelled to pay, has a right of reimbursement or indemnity against him.

Mason v. Smith, 131 Mass. 510.

For other cases see *Decennial Digests*, Landlord and Tenant ¶148(3).

Q. 17. Walters was the maker of a note to Brewster. The latter, without notifying Walters, for consideration procured a guaranty of

the note from Adams. The note remaining unpaid, Brewster applied to Adams, who paid the note. Adams then sued Walters for reimbursement. Result?

A. Adams will fail. In order to have the right of reimbursement, the surety must have signed at the principal's request. Otherwise he is in no better position than a volunteer, who has paid a claim without being legally compellable to do so. This is established by the weight of authority in England and America, though there are a few opposing cases. In some cases it has been held that a person who becomes surety without the knowledge of the principal is not a surety in the ordinary sense, but a purchaser of the note, and that therefore the statute of limitations begins to run against him from the maturity of the note, and not from the time of payment.

Ricketson v. Giles, 91 Ill. 154.

Leslie v. Compton, 172 P. 1015, 103 Kan. 92, L. R. A. 1918F, 706.

For other cases see *Decennial Digests*, Guaranty ¶4, 100; Limitation of Actions ¶56(2); Principal and Surety ¶183.

Q. 18. Arnold was a surety for Brand on a note made by the latter to Carson. The obligation matured on October 1, 1920. Six months earlier (April 2, 1920), at the urgent request of Carson, Arnold paid the debt. On September 3, 1922, Arnold sued Brand for reimbursement. The statute of limitations in that jurisdiction provided that claims based on written contracts are barred in four years, and claims on oral contracts barred in two. Brand pleads the statute. Result?

A. Brand will fail. The claim of a surety who pays the principal debtor's obligation is, it is true, not a claim based on a written instrument. Though enforced in law, it is an equitable claim, based upon the fact of payment. The statute of limitations would therefore ordinarily run from the day of payment. But in this case the surety paid the obligation before it became due, and, since he could not have maintained an action against the principal until the due date, the statute will not begin to run until that time.

Craig v. Craig, 5 Rawle (Pa.) 91.

For other cases see *Decennial Digests*, Contribution ¶4.

Q. 19. A note, made by Crawford as principal and Harrison as surety, is made to Eaton. It is lost by Eaton, and the finder, Marsh, erases the payee's name, substitutes the word "bearer," and transfers the note to Finley. The latter presents the note to Harrison, who pays it without noticing the alteration. Harrison sues Crawford for reimbursement. Result?

A. Ordinarily Harrison will recover. A surety, who in good faith pays an obligation, is entitled to recover from the principal, even though the latter had a good defense against the obligee on the original contract. That would certainly be so if the defense had been lack of consideration, or failure of consideration. Apparently it would be so in a case like this, where the defense is based on material alteration of the instrument. It may be doubted whether the payment can be called in good faith, where, as in this case, the facts constituting the defense could be known by inspection of the instrument. If the surety pays with knowledge, whether actual or implied, of the defense, he is a volunteer, and cannot recover. Nor can he recover if the defense is one which, like infancy, is created for the protection of the debtor.

Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631.

Houck v. Graham, 6 N. E. 594, 106 Ind. 195, 55 Am. Rep. 727.

For other cases see Decennial Digests, Principal and Surety $\S$ 194(6½).

Q. 20. Pelton, as principal, and Orton, as surety, made a note to Henry for \$1,000, payable on August 1. On the due date Henry presents it to Pelton, and, on his refusal to pay it, presents it to Orton. The latter promises to pay it, and gives Henry his own note for \$1,000, payable on demand. Henry accepts it, and surrenders the note of Pelton and Orton. Orton now sues Pelton for indemnity. Result?

A. The authorities are in conflict on this question. Some courts hold that Orton may immediately maintain an action against Pelton, since the original note is extinguished, and Pelton is as much benefited as though it had been paid. Other jurisdictions refuse to give an action to Orton, unless and until he has actually paid it, and only to the extent of the actual money value of what he has surrendered, if he has satisfied the obligation in any other way than payment.

Stone v. Hammell, 23 P. 703, 83 Cal. 547, 8 L. R. A. 425, 17 Am. St. Rep. 272.

Howe v. Buffalo, N. Y. & E. R. Co., 37 N. Y. 297.

For other cases see Decennial Digests, Principal and Surety $\S$ 183, 184.

(2) Subrogation

Q. 21. The Carver Company rented certain premises to Osborn for 30 years. The lease contained a covenant binding the tenant to pay ground rent and taxes, and giving the company the right of re-entry for a breach. Osborn assigned the lease to Harris, who defaults in payment of rent and taxes. Osborn pays both, and then sues Harris for the rent, which was due to the Carver Company. Result?

A. Osborn will recover. When a surety pays a debt due by the principal debtor to the creditor, he is entitled to be subrogated to the claim the creditor had, as well as to the securities he possessed, without any actual assignment of such claim by the creditor to the surety. This right of subrogation was originally purely equitable, but is now available in most common-law courts. In view of its equitable character, it does not depend upon the existence of a formal contract of suretyship, between the one paying the debt and the one whose debt has thereby been discharged. It is sufficient, as in cases of reimbursement, that the party paying is not a volunteer, and that, as in this instance, he has been acting under a practical compulsion to preserve his own interest.

Dunlop v. James, 67 N. E. 60, 174 N. Y. 412.

Stevens v. King, 24 A. 850, 84 Me. 291.

For other cases see Decennial Digests, Subrogation ⇨22, 32.

Q. 22. Graham makes four notes to Clark, each for \$1,000, and each of which Watts signed as accommodation comaker. Graham further gave Clark a mortgage on his property as security for all the notes, but Watts knew nothing of this mortgage. Graham pays the first three, and defaults on the last note, which Watts is compelled to pay. Clark then gave Graham a discharge of the mortgage, and Graham at once sold the property to Cullum, who knew that Watts had paid the last note, and that the property had been mortgaged to secure all four notes. Watts, on learning the facts, sues Cullum to have the property subjected to his claim for \$1,000.

A. Watts will succeed. An accommodation signer is a surety, and is entitled, on payment, to an assignment of all collateral securities. The fact that the mortgage was for all the notes, and not merely for the last one, will not deprive him of his right, since payment of the last one prevented the mortgage from being foreclosed. This right to the securities accrues upon payment, whether the surety knew of the existence of the collateral securities or not, and is available against all but subsequent bona fide acquirers of the property for value without notice, which Cullum is not.

York v. Landis, 65 N. C. 535.

Bank of Commerce & Trusts v. McArthur (D. C.) 261 F. 97, 105, 36 A. L. R. 570.

For other cases see Decennial Digests, Subrogation ⇨31(3).

Q. 23. Davis and Fielding executed, as principal and surety, a joint bond to Boyce, due May 1, 1904. On default Fielding paid it. Seven years later he brings an action against Davis on the bond. The defense is that the bond was discharged by payment by one of

the joint obligors, and that Fielding's right to reimbursement was barred by the statutory period of six years. The statute of limitations for actions on bonds or specialties is 20 years in the assumed jurisdiction. Result?

A. Fielding will recover. The famous decision of Lord Eldon in *Copis v. Middleton*, 1 Turn. & R. 224, which held that subrogation will not lie when the bond which the surety pays is extinguished by payment, is not generally followed in the United States, and has been abrogated by statute in England (19 & 20 Vict.). In a case like the present, Fielding will be subrogated to Boyce's claim on the bond, which will be kept alive for that purpose, and he will have whatever right Boyce would have had. *Sand's Adm'r v. Durham*, 36 S. E. 472, 98 Va. 392, 54 L. R. A. 614; *Lidderdale v. Robinson*, 12 Wheat. 594, 6 L. Ed. 740. This in most jurisdictions is also the case when one of several joint makers of a note, or joint judgment debtors on a judgment, who is in fact a surety, pays the note or judgment, and thus in law extinguishes it. *Lumpkin v. Mills*, 4 Ga. 343; *Mason v. Pierron*, 23 N. W. 119, 63 Wis. 239. Cf. Perkins, R. M., *The Surety's Subrogation to the Primary Obligation*, 10 Iowa Law Bull. 249-252.

For other cases see *Decennial Digests, Principal and Surety* ¶200(2); *Subrogation* ¶1, 7(1, 2).

Q. 24. Hamilton is state treasurer, and as such has given a bond for \$20,000, on which the Guaranty Company is surety. He is guilty of defalcation, and his books show a shortage of \$10,000. The Guaranty Company pays. Hamilton is in bankruptcy, and the company claims to have the same preference which the state would have had. Result?

A. The company's claim is well founded. Being a surety, it is subrogated completely to the creditor's claim, which includes priorities and preferences in insolvency or bankruptcy.

Pond v. Dougherty, 92 P. 1035, 6 Cal. App. 686.

For other cases see *Decennial Digests, Subrogation* ¶7(1).

Q. 25. Cranson and Seldes were cosureties on the bond of Clinton, a county treasurer. Cranson, one of the sureties when Clinton defaulted, gave a mortgage on his property to the county. The county finally sued Clinton and his sureties, and obtained judgment, which Seldes paid. Seldes now seeks to have the county's mortgage assigned to him. Results?

A. Seldes will succeed. The principle of subrogation applies between cosureties, except that one cosurety can only claim from the other the amount the latter ought to contribute.

German-American Sav. Bank v. Fritz, 32 N. W. 123, 68 Wis. 390.

Cummings v. May, 8 So. 790, 91 Ala. 233.

For other cases see *Decennial Digests, Principal and Surety* ⇨194(7);
Subrogation ⇨31(3).

Q. 26. Williams is accommodation indorser on a note, which Arthur makes to Martin. Subsequently, and without Martin's knowledge, Williams takes from Arthur certain bonds as security for any liability he may be compelled to assume on the note. The note is not paid, and Martin, discovering the above facts, without suing either Arthur or Williams demands that the securities be transferred to him. Result?

A. Martin will succeed. A creditor is subrogated to any indemnity security which the surety takes from the principal, whether he knew of its existence at the time of the surety contract or not. This right exists, even though he has not exhausted his remedies against principal or surety, or reduced his claim to judgment.

Courier-Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 F. 699, 41 C. C. A. 614.

Meeker v. Waldron, 87 N. W. 539, 62 Neb. 689.

For other cases see *Decennial Digests, Principal and Surety*, ⇨147(1, 8).

Q. 27. The Rogers Creamery Company owed Cullen \$5,000. Being in need of money, the company borrowed \$10,000 more from Cullen on two notes, in which Chase joined as surety. Chase made an arrangement with J. M. Tunnell, by which the latter was to indemnify him for any loss he might sustain as surety. The Creamery Company became hopelessly insolvent and abandoned its business. Tunnell notified Chase of his impending liability, and paid \$10,000 directly to Cullen. The notes, however, remained in Cullen's hands. Cullen assigns one of the notes for \$5,000, now past due, to Stevens, who sues Chase.

A. The payment by the indemnitor did not discharge the note and a holder in due course could have sued upon it. The note, however, being past due, Stevens is not a holder in due course, and therefore in the same position as Cullen. As far as Cullen is concerned, he cannot equitably proceed against the surety, when his claim on the note has already been satisfied by the indemnitor, and, although this is a suit at law, the rights and obligations of sureties are governed by the same rules as in equity. The fact that there is

an unsecured and unpaid debt of the company to Cullen will not change the equities of the situation.

American Surety Co. v. Creamery Com'rs, 127 A. 289, 98 Vt. 313.

For other cases see *Decennial Digests*, Equity Ⓒ44; *Principal and Surety* Ⓒ142.

(3) Contribution

Q. 28. Williams, Dent, and Gorman are joint makers of a note. In fact, Williams is principal, and Dent and Gorman are sureties; but that does not appear on the note, and is unknown to all the parties thereto. Dent pays the note, and sues Gorman for contribution, who objects to evidence sought to be introduced in order to prove the suretyship relation, on the ground that a written contract cannot be varied by parol evidence. Result?

A. Dent will recover. The contract on the note is between the makers and the payee or holder. The obligation between Dent and Gorman is based upon the fact that they are sureties, which may be proved by parol.

Robertson v. Deatherage, 82 Ill. 511.

For other cases see *Decennial Digests*, Evidence Ⓒ423(8).

Q. 28a. Suppose, when the note in the above case was made, Williams had asked Cooper to indorse it for accommodation of the three makers, without informing Cooper that two of them were in fact sureties. The note is presented to Williams, and on his default Cooper pays it. Dent insists that he is merely a cosurety with Cooper, and need only pay a proportionate share of the loss. Result?

A. Dent will fail. Although in fact both Cooper and Dent are sureties for Williams, Cooper signed it on the assumption that Dent was a principal, and he may hold him as such. The basis of contribution being equitable sharing of a common burden, contribution fails where, as between the parties, the burden is not common, but rests primarily on the one claiming contribution.

Sherman v. Black, 49 Vt. 198.

For other cases see *Decennial Digests*, *Principal and Surety* Ⓒ192.

Q. 29. Hare sued Linn, and obtained an attachment on his property, which attachment was released by a bond in which Higgins was surety. Hare recovered in the court below, and Linn appealed, filing a stay or supersedeas bond, on which Howe was surety. The judgment being affirmed, Hare demanded and received payment from Howe. Howe seeks subrogation, or at least contribution from Higgins.

A. Howe will fail. The supersedeas bond was a wholly different transaction, not entered into with the consent of Higgins, and in no way benefiting him. There is no contribution, because the parties are not under a common burden or obligation, and no subrogation, because the second surety did not become surety for the first surety as well as the principal.

Fidelity & Deposit Co. of Maryland v. Bowen, 98 N. W. 897, 123 Iowa, 356, 6 L. R. A. (N. S.) 1021.

Hartwell v. Smith, 15 Ohio St. 200.

For other cases see Decennial Digests, Principal and Surety ⇨191; Subrogation ⇨7(9).

Q. 30. Lowry sued Tarrel, who appealed to an intermediate court, giving a bond, on which Hart was a surety. The judgment for Lowry was affirmed, and Tarrel appealed to the highest court, giving a new bond, with James as surety. The judgment was again affirmed, and James paid it, and got from Lowry an assignment of the judgment. Claiming that Lowry could have enforced the payment against either Tarrel, or Hart, or himself, James, as assignee of Lowry's rights, sues Hart. Result?

A. James will fail. It is true that successive appeal bonds are cumulative, and on final affirmance the judgment creditor may enforce any one. But as between the successive sureties on appeal bonds themselves they are sureties for each other in the inverse order in which they signed, the last surety being principal to the previous one. In this case Hart, if he had been compelled to pay the judgment, might have sued James, but not vice versa. The second appeal increased Hart's liability by prolonging it.

Wronkow v. Oakley, 31 N. E. 521, 133 N. Y. 505, 16 L. R. A. 209, 28 Am. St. Rep. 661.

For other cases see Decennial Digests, Appeal and Error ⇨1227; Principal and Surety ⇨112.

(4) Exoneration

Q. 31. Hayes and Ward made a note to Wright. Although they are comakers, in fact Hayes is principal and Ward surety. The note is due, and Ward writes to the holder, Adams, informing him that Hayes has the money, and, if he proceeds to collect it promptly, will pay it. Adams disregards the notice, and Hayes subsequently becomes insolvent. Adams sues Ward, who sets up these facts as a defense. Result?

A. In those few jurisdictions which apply the rule of Pain v. Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369, the defense is good.

The surety has the right to exonerate himself by notifying the creditor to proceed against the principal. If, by the creditor's failure to do so, the surety incurs a loss, he is discharged. The notice may be given in any form. In some states, as in California (Civ. Code, § 2845), the rule has been made statutory. In the majority of jurisdictions, *Pain v. Packard* is repudiated. The creditor may sue either principal or surety, and cannot be compelled to pursue any order in so doing, or to begin his action sooner than he chooses to. *Harris v. Newell*, 42 Wis. 687; *Morrison v. Citizens' Nat. Bank*, 20 A. 300, 65 N. H. 253, 9 L. R. A. 282, 23 Am. St. Rep. 39.

For other cases see Decennial Digests, Principal and Surety $\S$ 125, 126(1).

' Q. 32. Gardner is a tenant of Street, and by agreement Gardner is to lay down certain planking, and Street is to purchase it. When the lease expires, Street makes a new lease to Brownson, who agrees in writing with Gardner that he will become surety for Street's obligation to him. Street fails to make the purchase. Brownson seeks to compel him to do so. Result?

A. Brownson will succeed. A surety can compel his principal to exonerate him by performing his obligation. However, both principal and sureties should be made parties to the action.

Street v. Chicago Wharfing & Storage Co., 41 N. E. 1108, 157 Ill. 605.

Carr v. Davis, 63 S. E. 326, 64 W. Va. 522, 20 L. R. A. (N. S.) 58, 16 Ann. Cas. 1031.

For other cases see Decennial Digests, Contracts $\S$ 172; Principal and Surety $\S$ 179.

Q. 33. Williams, as principal, and Monroe, as surety, have given a bond and mortgage to Saunders for \$5,000. The mortgage specifies two pieces of property, one belonging to Williams, and one to Monroe. Either of the two is amply sufficient to satisfy the claim of Saunders. On the due date, Monroe brings an action to have the property of Williams applied first, before his property is sold. Result?

A. Monroe's contention is sound. Where the surety's property, as well as that of the principal, is given as security for a debt, the surety may demand that the principal's property be first used.

Weil v. Thomas, 19 S. E. 103, 114 N. C. 197.

Richards v. Osceola Bank, 45 N. W. 294, 79 Iowa, 707.

For other cases see Decennial Digests, Principal and Surety $\S$ 169.

Q. 34. Ragan, a contractor, bought pipe from the Malone Company for \$5,000. Some time later it issued 50 shares of its own stock to Ragan, and by statute had a lien on that stock for Ragan's

indebtedness to the company. Ragan's contract had been secured by a bond of the Wynn Company. Ragan dies. The Malone Company proceeds against the surety without foreclosing its statutory lien. The Wynn Company seeks to have them compelled to foreclose on the stock before suing on the bond.

A. The Wynn Company will succeed. Ordinarily a surety cannot compel the creditor to resort to his other securities before attempting to collect from the surety. The surety can pay the debt and be subrogated to securities in the creditor's possession. But in this case the statutory lien is not transferable, and therefore will not pass to the sureties. They can therefore in equity compel the company to foreclose it, so that they will be held only for the deficit, if the stock does not bring in enough to cover the debt.

Bingham v. Mears, 61 N. W. 808, 4 N. D. 437, 27 L. R. A. 257.

Franklin Savings & Trust Co. of Pittsburgh v. Clark, 129 A. 56, 283 Pa. 212.

See 9 Minn. Law Rev. 292.

For other cases see *Decennial Digests*, Appeal and Error ¶1240; Principal and Surety ¶114, 125.

SECTION 5.—DISCHARGE OF SURETY

Q. 35. Waters indorsed on the back of Jerome's note the words: "I guarantee the payment of this note. [Signed] J. Waters." When sued by the holder, he set up that the note was never presented, that he had received no notice of nonpayment, and that, if he had received notice, he could have procured the principal to pay it. Result?

A. The defense is bad. A formal surety or absolute guarantor engages that the obligation will be met. Unless he stipulates for notice, he cannot make such notice a condition. If the writing on the back is intended as an indorsement, however, Waters will have the right to notice.

Citizens' State Bank v. Hendrix, 175 N. W. 17, 187 Iowa, 1192.

First Nat. Bank v. Adamson, 54 A. 930, 25 R. I. 73.

For other cases see *Decennial Digests*, Bills and Notes ¶395, 408, 422(2); Guaranty ¶67.

Q. 36. Broom, who is a creditor of Clay, demands payment of the latter, who urges him not to press his claim, but to wait a few months. At the end of this time, he asks for further forbearance. Ultimately Clay becomes hopelessly insolvent. Broom then sues Anderson, the surety. Result?

A. Broom will recover. Mere delay, no matter how long, on the part of the creditor in suing the principal, will not discharge the

surety. Even if the statute of limitations has run against the principal, but not against the surety, by reason of the latter's absence from the state, Broom's delay is no defense for Anderson.

Bernd v. Lynes, 43 A. 189, 71 Conn. 733.

Nelson v. First Nat. Bank, 69 F. 798, 16 C. C. A. 425.

For other cases see Decennial Digests, Principal and Surety $\S$ 66(2), 125.

Q. 37. Watson agrees with Bragg, his debtor, for consideration, to extend the time of payment one month. Williams, surety for Bragg, has not assented to this extension. Bragg does not pay, and Watson sues Williams. Result?

A. Watson will fail. The rule is that a surety cannot, without his consent, be compelled to assume any obligation even slightly differing from that which he has undertaken. If the extension of time had been mere forbearance, as in the previous case, Williams would not be affected; but, since it is a binding extension, it discharges the surety.

McDougall v. Walling, 45 P. 668, 15 Wash. 78, 55 Am. St. Rep. 871.

Capital Sav. Bank v. Reel, 62 Cal. 419.

24 Col. Law Rev. 211.

For other cases see Decennial Digests, Bills and Notes $\S$ 256; Principal and Surety, $\S$ 105(1).

Q. 37a. In the previous case, suppose that Watson, at the time of the agreement for extension, specifically reserves his right against the surety. Would the result be the same?

A. Williams in that case is not discharged. Upon payment, however, he may sue the principal for indemnity. Bragg has consequently gained no real benefit by the extension agreement.

Sohier v. Loring, 6 Cush. (Mass.) 537.

Rucker v. Robinson, 38 Mo. 154, 90 Am. Dec. 412.

For other cases see Decennial Digests, Principal and Surety $\S$ 107, 127.

Q. 38. Dean and Newhall are comakers of a note to Parsons. Subsequently, by agreement among themselves, they agree that Dean shall be principal and Newhall surety. Just before the note is due, Parsons is notified of this fact. On the due date he agrees with Dean, for consideration, to extend the time of payment one week. On Dean's default, he sues Newhall, who sets up these facts as defense. Result?

A. The defense is good. If the creditor does not know that two apparently joint obligors are principal and surety, extension of

time to the principal will not discharge the surety. If the creditor knows that they are, even if he discovers the fact after the contract, he cannot deal with the principal alone. In this case, Newhall is discharged.

Rouse v. Bradford Co. [1894] App. Cas. 586.

Hall v. Johnston, 24 S. W. 861, 6 Tex. Civ. App. 110.

For other cases see Decennial Digests, Principal and Surety, ¶104(1).

Q. 39. Joseph has contracted to build a factory for Thompson, payment to be made on installments, after approval of work by two engineers. The Guaranty Company is surety for Joseph. Thompson pays the first three installments upon approval of only one engineer. Ultimately Joseph defaults, and Thompson sues the company, which defends on the ground that the contract has been altered. Result?

A. The defense is not good. The surety's obligation may not be altered in any particular. In this case, however, the creditor merely waived a provision intended for his sole benefit. If the change had been in the number or amount of the installments, or in the character of the work done, the ordinary rule is that the surety is discharged.

Madison v. American Sanitary Engineering Co., 95 N. W. 1097, 118 Wis. 480.

Smith v. Molleson, 42 N. E. 669, 148 N. Y. 241.

For other cases see Decennial Digests, Principal and Surety, ¶117.

Q. 40. Wilson, a contractor, agreed to build a house for Joslin. The contract contained the usual stipulations that payments were to be made when certain portions of the work were completed. Before the second payment was due, the contractor applied to Joslin for an advance, in order to pay off urgent claims of subcontractors, asserting that, if he could not get it, he would have to abandon the job. Joslin paid the installment, two weeks before it was due. Wilson went on with the work, and completed more than seven-eighths of it. He then abandoned it. Joslin sued the Atlantic Guaranty Company, which was the surety for Wilson. The company claims it was discharged. Result?

A. In the vast majority of jurisdictions, the company's claim will be sustained. Any material departure from the contract between principal and surety discharges the surety, unless he assented to it. It makes no difference that, as in this case, the surety was benefited by the alteration, since, if Wilson had not received the advance, he would have had to abandon the building earlier, and sub-

stantially increase the damage sustained. The surety has a right to have his obligation determined by the letter of his contract.

Calvert v. London Dock Co., 2 Keen, 639, 48 Eng. R. 774.

Equitable Surety Co. v. McMillan, 34 S. Ct. 803, 234 U. S. 448, 58 L. Ed. 1394.

For other cases see *Decennial Digests, Principal and Surety* ⚭100; *United States* ⚭67(1).

Q. 41. Mullins was employed as ticket agent of the R Company in Bradleyboro, and as such agent was under \$5,000 bonds. There was another agent of the R R Company in Bradleyboro at the time, but one that did a smaller business. Without notifying the surety, the R Company consolidated the two offices, and put Mullins in charge of both at the same salary. Mullins was required to be at the smaller office only one hour each day. He failed to account for the tickets sold, and the R Company sues the surety. Result?

A. The surety is discharged. Any change in the duties of an employee principal, not assented to by the surety, operates as a discharge of the latter. No proof is necessary to show that the surety knew what the duties were at the time of the contract. It is sufficient that they have been changed. Nor is it material whether the duties are more or less onerous, or the compensation less or more.

Mumford v. Memphis & C. R. Co., 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

Harrisburg Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 46 A. 910, 197 Pa. 177.

For other cases see *Decennial Digests, Guaranty* ⚭53; *Insurance* ⚭430; *Principal and Surety* ⚭98.

Q. 42. Thomas is the agent of the Brownell Company in the sale of automobiles. Complaints are made to the company by customers that Thomas is frequently intoxicated and guilty of reckless driving. The company admonish Thomas, but continue him in their employ. It appeared, further, that Thomas had been receiving secret commissions from certain customers. The company, in learning this, threatened to discharge him, but on his promise to reform retained him. Subsequently Thomas absconds with the company's funds. The company sues the Fidelity Company, which is the surety for Thomas. Result?

A. The surety is discharged. When an employee is retained after knowledge of his dishonesty, the surety must either consent or it will be discharged. But this does not apply to cases of mere

misconduct or immorality, which have nothing to do with the performance which is guaranteed.

La Rose v. Logansport Nat. Bank, 1 N. E. 805, 102 Ind. 332.

For other cases see Decennial Digests, Principal and Surety ¶122.

Q. 43. Voss obtained a judgment against Andrews, as principal, and Brown, as surety, on a note of \$10,000. Andrews owns certain real estate worth \$5,000. Being desirous of selling it to Smith, he induces Voss to sign a release of the judgment lien on that particular property. Voss then sues Brown for \$10,000, which remain unpaid. Result?

A. Brown can be held only for \$5,000. When the creditor releases any security of any sort which he might have realized on against the principal, he discharges the surety pro tanto. If the value of the security is practically impossible to estimate, the surety is discharged in toto.

Vose v. Florida R. Co., 50 N. Y. 369.

N. H. Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685.

For other cases see Decennial Digests, Principal and Surety ¶97, 115(1).

SECTION 6.—JUDICIAL AND PUBLIC BONDS

Q. 44. Anson sues Balder, and gets an attachment of his account at the Drovers' Bank. The attachment is dissolved by the filing of a bond by Balder, on which the Morton Guaranty Company is surety. Anson later amends his pleadings, omitting certain paragraphs in the original complaint, and adding new ones. He obtains a judgment based in large measure upon proof of allegations contained in the original complaint. The judgment remaining unpaid, he sues the Morton Company. Result?

A. In many jurisdictions, the surety on a bond dissolving an attachment lien is discharged in toto, if the complaint is so amended as to introduce new causes of action, without regard to the fact that the old causes are retained. In others, the sureties are discharged only pro tanto; i. e., to the amount of the judgment which cannot be traced to the allegations of the original complaint.

Townsend Nat. Bank v. Jones, 24 N. E. 593, 151 Mass. 454.

Turner v. Fidelity & Dep. Co., 200 P. 959, 187 Cal. 76.

22 Col. Law Rev. 281.

For other cases see Decennial Digests, Attachment ¶337.

Q. 45. Watson is clerk of the United States District Court, and as such clerk has received from Dowling, a defendant in that court, the sum of \$1,000, to be paid as per stipulation to one Johnson.

Watson deposits the money in his own name, and later uses it for his own purposes. When he was appointed clerk, he gave a bond running to the United States for the faithful performance of his duties as clerk. The Wilton Guarantee Company was surety on the bond. Johnson sues the Wilton Company, which sets up the defense that Johnson was not a party to the bond.

A. Johnson can maintain an action, but must do so in the name of the United States. A surety bond, made out for any public official, inures to the benefit and protection of any person injured by the misfeasance of the officer as to his official acts and duties, even though in terms it is the United States, or a state, or any other public body, in whose favor the bond is made out. *Howard v. U. S. to use of Stewart*, 22 S. Ct. 543, 184 U. S. 676, 41 L. Ed. 754; *Teller v. Gates*, 67 P. 416, 40 Or. 543, 56 L. R. A. 630, 91 Am. St. Rep. 492 (acts for which sureties on official bonds are liable).

In *City of Grand Rapids v. Krakowski*, 174 N. W. 201, 207 Mich. 491, it is held that, on a question whether certain money was in the hands of the clerk by virtue of his office, or received in the performance of his duty, a commercial surety company, which signed the bond of the clerk, and which solicited the business for profit, may not invoke strictly technical relief and construction under the rule of *strictissimi juris*, as could a gratuitous bondsman. Its rights and duties are to be measured as in actions on contracts of insurance. See *Arnold, The Compensated Surety*, 26 Col. Law Rev. 171, 175.

For other cases see *Decennial Digests, Clerks of Courts* ¶74, 75; *Principal and Surety* ¶59; *Sheriffs and Constables* ¶157(5).

TORTS

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Section

1. Recovery for Consequences of Fright.
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SECTION 1.—RECOVERY FOR CONSEQUENCES OF FRIGHT

Q. 1. A and B were crossing a public street on foot, both in the exercise of due care. C carelessly drove his car along the street at a high rate of speed, and, due to his careless driving, narrowly escaped hitting A and B, both of whom were frightened. A suffered no appreciable physical consequences. But B, who was a pregnant woman, suffered a severe nervous shock, which resulted in a miscarriage and serious physical illness. Can either recover from C?

A. A cannot recover. Since C did not intend either to hit or even to frighten any one, he has not committed that wrong known as assault upon A. And for merely negligently inflicted fright, which results in no appreciable physical harm, the law does not, at least at the present time, give a recovery. B's claim for recovery is a subject of sharply conflicting decisions by the courts. In several states, and in England, recovery is allowed; but in others it is denied. The doctrine of the latter cases is that physical injuries, sustained through fright or nervous shock resulting from the negligence of the defendant, if unaccompanied by physical impact, are not recoverable. Whether physical injury does take place through nervous shock is a question of scientific fact, rather than a rule of law. If injuries have so occurred, and from the negli-

gence of a defendant, there should logically be a recovery. Refusal to allow it must be defended on the practical grounds of the difficulty of detecting false and fraudulent claims.

See *Dulieu v. White & Sons*, [1901] 2 K. B. 669.

Simone v. Rhode Island Co., 66 A. 202, 28 R. I. 186, 9 L. R. A. (N. S.) 740.

Spade v. Lynn & Boston R. Co., 47 N. E. 88, 168 Mass. 285, 38 L. R. A. 512, 60 Am. St. Rep. 393.

Mitchell v. Rochester Ry. Co., 45 N. E. 354, 151 N. Y. 107, 34 L. R. A. 781, 56 Am. St. Rep. 604.

For other cases see *Decennial Digests*, Damages ¶52.

Q. 2. Suppose the same facts as that in the preceding question, except that C's car slightly touches both women, but not enough to cause pain or to hurt their clothing. Can either recover from C?

A. A cannot recover. No appreciable harm has been suffered. One recovers from a defendant who has been guilty of negligence only for the injurious consequences of his negligence. If there are no injurious consequences, there can be no recovery. Such is the case here. See *Sullivan v. Old Colony St. Ry.*, 86 N. E. 511, 200 Mass. 303.

B, however, can recover. There has been negligence on the defendant's part, there has been physical impact, and there have been injurious consequences. Even states which deny recovery in situations like that of the preceding question allow it here. The plaintiff's recovery is not limited to the harm done by the impact, but extends to the suffering occasioned by fright as well. See *Homans v. Boston El. Ry. Co.*, 62 N. E. 737, 180 Mass. 456, 57 L. R. A. 291, 91 Am. St. Rep. 324; *Driscoll v. Gaffey*, 92 N. E. 1010, 207 Mass. 102; *Porter v. Delaware, L. & W. R. Co.*, 63 A. 860, 73 N. J. Law, 405.

For other cases see *Decennial Digests*, Damages ¶32, 52; Torts ¶5.

Q. 3. A came up close to B and shook a stick in her face, threatening to strike her. A did not, however, carry his threat of physical violence into effect. B was frightened. From the shock and fright she suffered a miscarriage. Can she recover from A?

A. A is liable. He has in the case stated committed an assault, by threatening B with violence and accompanying his threats with the menacing gestures with the stick. Such conduct is actionable even though no physical injury results. An assault, unaccompanied by physical contact, has been a ground of action ever since the old case of *I. de S. v. W. de S.*, in 1348. Here, added to the assault, is physical suffering caused by it. If the causal connection

is proved, the plaintiff is clearly entitled to damages, unless the defendant can show some justification for his act.

See *Holdorf v. Holdorf*, 169 N. W. 737, 185 Iowa, 838.

For other cases see *Decennial Digests*, Assault and Battery ⚡2; Damages ⚡52.

Q. 4. A without justification burst into a room occupied by B in a hotel and used violent and abusive language toward her, but did not threaten physical violence, nor did he do any act that indicated that he was about to touch B. As a consequence of the nervous shock received through A's conduct, B was made ill. Can she recover?

A. B can recover. Mere insults and abuse do not amount to an assault if no threat of offensive or violent touching are involved. *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442. But here B has suffered bodily harm. Even courts which refuse recovery for bodily harm occasioned by negligence without impact (see question No. 1) distinguish the case where it arises from intentional misconduct of the defendant. Such a defendant is not to be protected by a rule of policy seeking to protect against false claims those whose conduct may have been careless only. See *Boyce v. Greely Square Hotel Co.*, 126 N. E. 647, 228 N. Y. 106; *Rogers v. Williard*, 223 S. W. 15, 144 Ark. 587, 11 A. L. R. 1115.

For other cases see *Decennial Digests*, Assault and Battery ⚡7; Damages ⚡48, 52, 56, 57; Torts ⚡4.

Q. 5. A was a landowner. He saw a boy, B, trespassing in his yard. Angry at B for intruding, he threw a stone at B. B's back was toward A, and B did not know that A had thrown a stone at him. A's aim was bad; the stone went wild and hit C, another trespassing boy, who suddenly appeared from behind a hedge in the yard, just as the stone was thrown. A had not known there was any one behind the hedge. D, C's brother, was behind the hedge also, and, when he saw the stone strike C, he became so frightened that he fainted and fell. In the fall he sprained his wrist severely. What rights have B, C, and D, respectively, against A?

A. (1) B v. A. B, it seems, has no action. He was a trespasser, and a landowner may use force, if necessary, to expel a trespasser. He may not use it unless necessary, however, and he may not lawfully use more force than is reasonably necessary. Throwing a stone at a trespasser is not a reasonable way to expel him, at least without resorting to less violent measures first. If B had been hit by the stone, he could have recovered against A for battery; if

he had been put in apprehension of being hit, he could recover for assault. A's use of force was intentional and without justification. But B was neither hit nor did he have knowledge that force was attempted against him. He has no action, for he has neither suffered bodily harm, nor has he been put in apprehension thereof.

(2) C v. A. C should be allowed to recover. A did an act intended to inflict bodily harm. It was directed at B; it took effect on C. But since A intended to inflict bodily harm, and the act he did caused bodily harm to C, C can recover. See *Talmage v. Smith*, 59 N. W. 656, 101 Mich. 370, 45 Am. St. Rep. 414. C could not recover against A, basing a claim upon negligent conduct of A. C was a trespasser; A did not know he was there. In most states A would owe no obligation to C until his presence was discovered, and A did no new act after C was discovered. Even if there were a duty to use care in learning of the presence of a trespasser, it does not appear that A, as a reasonable man, should have known of C's presence prior to the throwing of the stone.

(3) D v. A. D probably cannot recover. In some states, one cannot recover for physical injuries sustained through fright, even when the fright is caused by defendant's negligence toward the person injured. (See *supra*, questions 1 and 2.) In others, recovery is allowed under such circumstances. But here A is not negligent as to D. He did not know he was there, and, so far as the facts show, there was nothing which would apprise him of the probability of D's presence. A did not intend to hurt D. If he had, even those states which refuse recovery for injuries suffered through fright, when the result of negligence, would allow recovery; the defendant, who has intentionally harmed another by fright, being liable. The only basis on which D could recover would be that A's intent to hurt B, and the act done in pursuance thereof, could be availed of by D, who suffered the harm. It is doubtful whether a court would thus enlarge the doctrine of transferred intent. *Lambert v. Brewster*, 125 S. E. 244, 97 W. Va. 124; 38 Harv. Law Rev. 687; *Hambrook v. Stokes Bros.*, [1925] 1 K. B. 141; 2 Cambridge Law J. 247.

For other cases see Decennial Digests, Assault and Battery ☞15; Damages ☞52.

SECTION 2.—CONSENT OF PLAINTIFF

Q. 6. A went to a physician, B, for a medical examination. With A's consent, B administered an anæsthetic, so that the examination could be conducted without pain to A. Upon examination, B dis-

covered a condition which, in his judgment, called for an operation. While A was still under the anæsthetic, B performed the operation. It was performed with skill, and was successful. Upon learning what B had done, A objected, and brought suit against him. Can he recover?

A. A can recover from B. The latter has committed a battery upon A, unless other facts, not given, would show that A, not only consented to an examination, but to such treatment as, in B's professional judgment, was necessary to effect a cure, or to this particular operation. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." The interference with A's person, not consented to by him, is actionable, even though done with skill, and even though it resulted in improvement of A's health. It was an intentional unpermitted contact. Had the operation been necessary to save A's life, a question of justification for B's act, regardless of A's consent, would have been presented.

See *Mohr v. Williams*, 104 N. W. 12, 95 Minn. 261, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303.

Schloendorff v. Society of New York Hospital, 105 N. E. 92, 211 N. Y. 125, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581.

For other cases see *Decennial Digests*, Assault and Battery ¶6.

Q. 7. A and B were players on opposite sides in a football game. In the course of the game, A tackled B, and threw him to the ground. B was injured. Can he recover from A?

A. B cannot recover. By participating in the game, B consented to such touchings, and the consequences of such touchings, as are incident to the contest. The result is expressed by the maxim, "*volenti non fit injuria*." B will not be heard to complain, in court, of that to which he gave his consent. The principle has been carried so far as to deny to a woman damages against one who has seduced her. *Oberlin v. Upson*, 95 N. E. 511, 84 Ohio St. 111, Ann. Cas. 1912B, 1061. The doctrine is applicable only to participants in the game. An outsider, attacked by one of the players, is not barred from recovery. *Markley v. Whitman*, 54 N. W. 763, 95 Mich. 236, 20 L. R. A. 55, 35 Am. St. Rep. 558; *Reid v. Mitchell*, 12 Session Cas. (Scottish) 1129.

For other cases see *Decennial Digests*, Assault and Battery ¶2, 9; Seduction ¶11.

Q. 8. A and B, becoming angry in course of a dispute, engage in a fist fight. A suffers a broken nose. He sues B for his injuries. May he recover?

A. According to many decisions, either party may recover against the other. The case is different from the football game, because the fight is an unlawful affray. The illegality, it is said, prevents the consent from being operative to bar recovery. Against recovery it may be urged: (1) The fact that the consent was to an unlawful act should not give the plaintiff any better right to receive money damages. Both parties should be criminally prosecuted, as doubtless they could be, despite consent. (2) The general rule of law that the law will leave parties to an unlawful transaction where it finds them, and not help either against the other should be applied. The justification for allowing recovery must be sought in the supposed added deterrent of a civil action, in addition to criminal punishment, in the prevention of this sort of misconduct. See *Bell v. Hansley*, 48 N. C. 131; *Willey v. Carpenter*, 23 A. 630, 64 Vt. 212, 15 L. R. A. 853; *Galbraith v. Fleming*, 27 N. W. 581, 60 Mich. 403; *Lykins v. Hamrick*, 137 S. W. 852, 144 Ky. 80; *McCulloch v. Goodrich*, 181 P. 556, 105 Kan. 1, 6 A. L. R. 386.

An action has been allowed by the administrator of a woman to recover damages from one who performed an abortion, when her death resulted from such wrongful act, even though she consented thereto. It was held that the general rule that one may not recover for injuries from an act to which he has consented does not apply when the public peace or the life of the participant is involved. *Milliken v. Heddesheimer*, 144 N. E. 264, 110 Ohio St. 381, 33 A. L. R. 53. Cp. *Herman v. Julian*, 232 P. 864, 117 Kan. 733; *Hunter v. Wheate*, 289 F. 604, 53 App. D. C. 206, 31 A. L. R. 980; 24 Col. Law Rev. 819; 23 Mich. Law Rev. 80.

For other cases see Decennial Digests. Abortion 16; Action 4; Assault and Battery 11; Death 21; Rape 65; Torts 17.

Q. 9. A statute declared that any man having sexual intercourse with a girl under 18 years of age, not his wife, was guilty of rape, regardless of whether or not the girl consented. The statute was silent on the subject of civil liability. A had intercourse with B, a girl under 18, at her solicitation. Can B recover from A?

A. B can recover. Though she was a consenting party, the statute here is evidently designed to protect young girls, even against the consequences of their own acts. Courts have interpreted the policy expressed by the Legislature in the statute defining this crime as applicable to cases involving civil recovery as well. This statute, unlike one punishing fights, is for the protection of an individual, not solely to preserve the public order. The case is then distin-

guishable from the situation involving a mutual affray, and recovery may consistently be allowed here, even in a state which denies one brawler recovery against the other.

See *Bishop v. Liston*, 199 N. W. 825, 112 Neb. 559.

For other cases see *Decennial Digests*, Rape ¶65.

SECTION 3.—FALSE IMPRISONMENT

Q. 10. A had a legal right to enter a certain building. In order to keep A out of the building, B locked all the doors and windows, and A was unable to get in. A sues B for false imprisonment. **May he recover?**

A. B has not imprisoned A. While it is sometimes said (not decided) that "it is sufficient to show that defendants * * * in any manner * * * prevented (plaintiff) from going where he wished" (as in *Hawk v. Ridgway*, 33 Ill. 473), it is essential, in order to constitute an imprisonment, that one be confined. "A prison may have its boundary large or narrow, * * * but a boundary it must have." In this case A was not confined, for he was at liberty to go anywhere in the world, except this particular place. He may be entitled to some other action for interference with his legal right to enter this building, but he has not been imprisoned.

See *Crossett v. Campbell*, 48 So. 141, 122 La. 659, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362; *Bird v. Jones*, 7 Q. D. Rep. 742.

For other cases see *Decennial Digests*, False Imprisonment ¶6.

Q. 11. A was asleep in a room high above the ground, with no available means of exit but one door. B, knowing that A was in the room, locked the door from the outside, though he had no legal authority to do so. Before A awoke, B unlocked the door, so that when A was ready to leave he did so. Later A learned that B had locked him in the room, and brings action against him. **Can he recover?**

A. A should probably not be allowed to recover. If he had tried to get out, and had been unable to do so, because he was locked in, he would have had an action against B, though the restraint was but momentary; but, since A was conscious of no restraint, he has suffered no harm. The purpose of a tort action is to compensate one who has suffered an injury, such as the law recognizes as a basis for compensation. Since A has suffered no real interference with his freedom, he should not be given damages. The authorities are not clear. Recovery has been denied under similar circumstances. *Herring v. Boyle*, 1 Cr. & M. 377, 40 R. R. 610;

McIntosh v. Cohen, 24 N. Z. L. Rep. 625. But a later decision, not mentioning the former cases, has decided the question in favor of recovery. Meering v. Graham White Co., 122 L. T. 44.

For other cases see Decennial Digests, False Imprisonment ¶1, 2.

Q. 12. A was a patron in B's restaurant. As A was about to leave the place, he was detained by B, while an investigation was made to see whether or not A had paid his bill. It being found that A had paid, he was allowed to go. A later brought an action against B for false imprisonment. Can he recover?

A. A should be allowed to recover. He has been deprived of his liberty by B, when B detained him. It may be assumed that "detained" means held by force or threats thereof. A has suffered a wrong in thus being confined by B, for which he can recover, unless B can show justification. B is not justified in confining A, merely because he thinks A has taken property of his. He would, in certain cases, be entitled to arrest A without a warrant, and detain him for such reasonable time as would be necessary before turning him over to the public authorities and securing a proper warrant. But, in case of offenses known as misdemeanors, such an arrest without warrant is only justified for a breach of the peace committed in the presence of the one making the arrest, unless a statute gives a greater privilege in this regard. If A had committed an offense, it was no more than a misdemeanor. In no sense was it such a disturbance of public order as to be called a breach of the peace. A may then sue B for false imprisonment.

Compare Jacques v. Childs Dining Hall Co., 138 N. E. 843, 244 Mass. 438, 26 A. L. R. 1329.

Johnson v. Norfolk & W. R. Co., 97 S. E. 189, 82 W. Va. 692, 6 A. L. R. 1469.

For other cases see Decennial Digests, Arrest ¶64; False Imprisonment ¶5, 6, 10, 15(3).

SECTION 4.—ASSAULT AND BATTERY

Q. 13. In the course of an angry altercation, A pointed an unloaded gun at B and threatened to shoot him. The gun was empty, and A knew it, but B did not. B sues A for assault. May he recover?

A. B should recover. Though the gun was unloaded, so there was no possibility of the threat being carried out, B was put in apprehension of immediate bodily harm, and A's conduct intentionally produced that apprehension. That is sufficient to make A liable in a civil action for assault, though, on the question of wheth-

er this creates criminal liability for assault, the authorities are divided.

Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373.

People v. Bennett, 173 P. 1004, 37 Cal. App. 324.

For other cases see *Decennial Digests, Assault and Battery* ⇐5, 56.

Q. 14. A, to play a practical joke on B, who was asleep in the sunshine, held a magnifying glass in such a way as to focus the sun's rays on B's head. This he kept up until B awoke from the pain caused by the heat, and compelled A to stop. B's head was painfully burned. Can he recover from A?

A. B can recover. A has committed a battery upon B, by intentionally burning him. The method by which he brings the force to bear upon B is immaterial; the glass is as effective as a hot iron, or an electric needle, and should be attended with the same legal consequences. In this case the touching (by the means of the condensation of the sun's rays) was both offensive and harmful. The result should be the same in this litigation, even if A's act had not caused the severe pain to B, since it was an offensive touching, not warranted by the usages of society. The fact that A did it as a joke does not excuse him from liability, unless B consented to this sort of conduct, either expressly or by such a previous course of dealing between the parties that the fact of consent may be inferred.

See *Reynolds v. Pierson*, 64 N. E. 484, 29 Ind. App. 273.

For other cases see *Decennial Digests, Assault and Battery* ⇐2, 3.

Q. 15. John, a boy eight years of age, in company with a group of other boys, had repeatedly played on defendant's lumber pile, which defendant kept on his own land. The defendant had repeatedly ordered the boys off the premises, and John himself had been ejected several times before. Seeing the boys on the pile of lumber, the defendant picked up a stick and ran toward the boys, shaking the stick and shouting to them to "get out of there." John, frightened, ran out into a nearby street, where he was struck by a passing automobile, which was being operated with reasonable care by the driver of the car. Is defendant liable for his injuries?

A. In a case arising upon a very similar set of facts, it was held that no recovery could be had. *Miller v. Oscar Schmidt* (N. J. Err. & App.) 126 A. 309. John was a trespasser. It is clear that a landowner may employ, if necessary, reasonable force to expel a trespasser from his premises. He cannot kill the trespasser, nor inflict serious bodily harm. Ordinarily the question of what is rea-

sonable force is one for the jury to decide, upon consideration of all the circumstances, among which, no doubt, is included the fact that these boys, though repeatedly ordered off the premises, had as often returned. See *Hoberg v. Collins, Lavery & Co.*, 78 A. 166, 80 N. J. Law, 425, 31 L. R. A. (N. S.) 1064 (causing trespasser to jump from moving wagon as actionable misconduct).

For other cases see Decennial Digests, Negligence ⚡33(1,3), 56(1).

SECTION 5.—TRESPASS TO LAND

Q. 16. A, in his airplane, flew over B's land without B's permission. The flight did no harm to B. B sues A in an action of trespass q. c. f. Is A liable?

A. A is probably not liable. Statements in the law books as far back as the time of Lord Coke state that the owner of the soil owns down as far as the center of the earth, and up as far as the heavens; and there is no doubt that an unpermitted entry upon the land of another, unless legally justified or excused, constitutes an actionable trespass, even though no actual harm is done. So, if the old statements are to be taken literally, A has here made himself liable for at least nominal damages in a suit by B; but it is doubtful whether the old statements are applicable in a day of air navigation. If the flight is at a height far enough above the land, so as not to interfere with the owner's use of it, the mere temporary passage over the property ought not to be actionable. A permanent object, maintained over the land of another without permission, has been held actionable. *Smith v. Smith*, 110 Mass. 302; *Butler v. Frontier Tel. Co.*, 79 N. E. 716, 186 N. Y. 486, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858. But the scope of possible trespass ought to be limited, in the words of Pollock on Torts, to "effective possession." See *Hannabalsen v. Sessions*, 90 N. W. 93, 116 Iowa, 458, 93 Am. St. Rep. 250; *Whittaker v. Stangvick*, 111 N. W. 295, 100 Minn. 386, 10 L. R. A. (N. S.) 921, 117 Am. St. Rep. 703, 10 Ann. Cas. 528.

For other cases see Decennial Digests, Ejectment ⚡18; Trespass ⚡12, 43(4).

SECTION 6.—NEGLIGENCE

Q. 17. A, a 12-year old boy, while riding his bicycle on a public highway, ran into B. B claimed that the accident was caused by A's negligence, and sued A. At the trial the judge was requested to charge, in effect, that A was negligent if he failed to use such care as persons of ordinary prudence ordinarily use. The

request was refused, and B assigns error. What result should be reached?

A. The request was correctly refused. It contains at least two errors. In the first place, there is no such thing as due care in the abstract. Care required by the law of an individual is that of a person of ordinary prudence under the same or similar circumstances as those under consideration. Different precautions would be required for the exercise of due care on a crowded city street than upon a country road, and an instruction to a jury which omitted mention of circumstances would be erroneous. See *Yerkes v. Northern Pac. Ry. Co.*, 88 N. W. 33, 112 Wis. 184, 88 Am. St. Rep. 961. In the second place, it is now generally recognized that children are not held responsible for the exercise of the same standard of care required of adults. It is not so clear whether the standard is that of a child of ordinary prudence of the age of the one in question, under the circumstances, or whether, in addition, the individual's experience, knowledge, and discretion may also be considered. The latter is probably preferable, for a classification based on age alone is inadequate, because of the great differences in children of the same age. To this extent an individual rather than a general standard is adopted in cases where children are concerned. It seems to extend well toward the age of majority. See *Collins v. Weise*, 194 N. W. 450, 110 Neb. 552; *Briese v. Maechtle*, 130 N. W. 893, 146 Wis. 89, 35 L. R. A. (N. S.) 574, Ann. Cas. 1912C, 176.

For other cases see *Decennial Digests*, Infants ⚡61; Negligence ⚡85 (2), 141(4).

Q. 18. A was engaged in removing the dirt from around a foundation of a building which he was tearing down. He did not notice that the wall was swaying and about to fall on him. B saw A in danger, rushed in, attempted to brace the wall, and helped A get out of danger. A escaped, but B was hurt by the falling wall. May he recover for his injuries from A?

A. B has no cause of action against A. There are many cases which hold that, where one person is hurt in risking danger to rescue another, put in peril by the negligence of a third, the rescuer is not to be conclusively met with the charge of contributory negligence. See *Eckert v. Long Island Ry. Co.*, 43 N. Y. 502, 3 Am. Rep. 721. In those cases there is still some difficulty about allowing a recovery, for the rescuer is only put in danger by his own voluntary act, and ordinarily a violation of duty to take pre-

cautions for the safety of one man will not be grounds for recovery by another. Here the difficulty of the plaintiff's case is even greater. If A was careless at all, it was only for his own safety. B was not in danger. To make out negligence toward B, it would have to be said that A, thus endangering himself, created a situation where some generous person would be called upon to rescue him and run a risk of injury, and that this was lack of due care toward B. This seems too fantastic a foundation for recovery. See *Saylor v. Parsons*, 98 N. W. 500, 122 Iowa, 679, 64 L. R. A. 542, 101 Am. St. Rep. 283. Compare the situation where the rescuer is hurt in an endeavor to save a third person from the consequences of defendant's negligence. *Wagner v. International Ry. Co.*, 133 N. E. 437, 232 N. Y. 176, 19 A. L. R. 1; *Laufer v. Shapiro*, 206 N. Y. S. 189, 210 App. Div. 436. See 23 Mich. Law Rev. 30, note.

For other cases see Decennial Digests, Negligence ¶74.

Q. 19. Parsons, a day laborer, was walking along the track of the X Railroad on his way home. The evening train, "The Thunderbolt," struck Parsons, throwing him upon a public crossing some feet away. The engineer on the train was reading a newspaper and did not see the accident. The fireman saw it, but said nothing about it. A few minutes later Daniels, who had a store nearby, picked up Parsons, who was unconscious and apparently dead, carried him into his warehouse, and locked the door. The next day it was discovered that Parsons had crawled as far as the warehouse door, where he lay dead. (a) Does an action lie against the railroad? (b) against Daniels?

A. An action may not be brought against the railroad, probably, but probably can against Daniels. As to either, the existence of a "death by wrongful act" statute must be supposed, for at common law an action for personal injuries died with the party.

(a) If the railroad is held, it is because of the wrongful acts done by its employees within the scope and course of the employment. Apparently Parsons was a trespasser. The facts state nothing from which it may be inferred that he had permission to be on the company's land. As to a trespasser, there was no obligation imposed upon the railroad to discover his presence, by the rule in most states. Even if the engineer was negligent as regards the passengers, that will not help Parsons. The fireman saw the accident, but we do not know that he saw Parsons for enough ahead, prior to the accident, to have prevented it. In the absence of such

facts, there is no basis for liability in hitting Parsons. After he was hit, nothing was done for the injured man, though defendant's employee had knowledge of his condition. Since the company was not liable for the accident, it has been held that it is not liable, any more than any stranger, for failure to render aid. Some authority looks the other way, though decided cases are few. Probably the holding of no liability represents the present law, though there may be a development in the direction of imposing liability in such a case. See *Union Pac. Ry. Co. v. Cappier*, 72 P. 281, 66 Kan. 649, 69 L. R. A. 513.

(b) Daniels had no legal obligation to help Parsons. But, if he acted at all, he was liable if, by his want of due care, he made his condition worse. Parsons was upon a public crossing. Some one might have rendered him assistance. Daniels locked him up, where help could not be given or received. He should not have done so, unless he was sure Parsons was dead; at least his conduct here presents a jury question as to whether he exercised due care. There is a further question whether any possible aid could have saved Parsons. Upon this the facts are incomplete. See *Northern Cent. Ry. Co. v. State, to Use of Price*, 29 Md. 420, 96 Am. Dec. 545; *Black v. New York, N. H. & H. R. Co.*, 79 N. E. 797, 193 Mass. 448, 7 L. R. A. (N. S.) 148, 9 Ann. Cas. 485; *Gates v. Chesapeake & O. Ry. Co.*, 213 S. W. 564, 185 Ky. 24, 5 A. L. R. 507; 7 Cal. Law Rev. 312; 56 Univ. Pa. Law Rev. 217, 316.

For other cases see Decennial Digests, Carriers ⇨320(1); Negligence ⇨2, 3, 8, 121(1); Railroads ⇨398(1).

Q. 20. Suppose the engineer of a train is running on a straight track along which he can see for a sufficient distance to stop his train. On the track some distance ahead is a sleeping child, ten yards further on a cow, and ten yards further still a large boulder, with a drunken man resting asleep upon it. The engineer carelessly fails to keep a vigilant look out, and by successive collisions kills the child, the cow, and the man on the boulder. The train is wrecked by striking the boulder, so that a number of passengers are injured. To whom is the railroad company liable?

A. To make out negligence, there must be a breach of duty to exercise care owed by defendant to the plaintiff. Even if the defendant owes a duty to some one else, but does not owe it to the plaintiff, no action will lie. It is generally held the railroad company owes no duty to look ahead and discover the presence of trespassers; so there is no negligence with reference to the sleep-

ing child, the cow, or the drunkard. The company would, however, be guilty of culpable breach of duty toward the passengers.

But see *Palmer v. Northern Pac. R. Co.*, 33 N. W. 707, 37 Minn. 223, 5 Am. St. Rep. 839.

Garland v. Boston & M. R. R., 86 A. 141, 76 N. H. 556, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924.

Pickett v. Wilmington & W. R. Co., 23 S. E. 264, 117 N. C. 616, 30 L. R. A. 257, 53 Am. St. Rep. 611.

For other cases see *Decennial Digests, Railroads* ¶276(1), 370, 390, 415(5).

Q. 20a. Due to the negligence of the train crew of the D Railroad in not keeping proper lookout, D's train collided with a loaded coal truck at a public crossing. The truck, belonging to A, was smashed. In the collision B, a passenger on the train, was hurt; also a tramp, C, who, unknown to the train crew, was riding the "blind baggage" at the time. The truck had stalled on the crossing, due to no fault of the driver, who would have had ample time, in the ordinary course of events, to have crossed the track considerably before the oncoming train. Attempts at warning by the driver of the truck were unnoticed by the train crew. What rights have A, B, and C against D?

A. (1) A should recover from D for the damage to the truck. A was guilty of no negligence; the train crew was negligent. There is no doubt of the duty owed by the railroad to look out for persons rightfully using public crossings.

(2) B, the passenger, can clearly recover. He was obviously guilty of no negligence; the failure by the company, through its employees, to keep a proper lookout, imperiled, not only the persons at the crossing, but passengers in the train; and clearly the company owed to the passenger the duty of care.

(3) C could not recover. In most states there is no duty to discover the presence of a trespasser, such as C was; and, even were there such a duty, no facts are stated from which it may be inferred that the train crew would have reason to suppose that C was on the train. The carelessness of the train crew to A and B cannot be availed of by C. "Actionable negligence is the failure to discharge a duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be to the person injured." *Mitchell, J.*, in *Akers v. Chicago, St. P. & M. R. Co.*, 60 N. W. 669, 58 Minn. 540, 544.

For other cases see *Decennial Digests, Railroads* ¶362(1).

SECTION 7.—PROXIMATE CAUSE

(Cases under this section contributed by editor.)

Q. 21. D, a taxi driver, with A, his passenger, rapidly drives his car over a square box in the road. This might have been expected to cause a jolt to A, or possibly break a spring in the car. The box contained dynamite, which exploded and injured A. Are D and his employer, F, liable to A for the injuries received?

A. In negligence cases, it is important to observe that there are two distinct problems:

(1) Is there a breach of duty toward the plaintiff? The test of this ordinarily is whether a reasonable person would foresee that the act in question would probably cause damage to the plaintiff, or subject him to undue risk. It would seem that in this case there was negligence, not only for the comfort, but for the safety, of A.

(2) The second question is: What consequences should be regarded as proximately caused by defendant's wrongful act? Various tests have been attempted to limit liability to those damages for which the defendant is justly responsible: (1) The "but for" rule is too broad. (2) The "probable and natural consequence" rule, limiting liability to what ought to have been foreseen as likely, is too narrow. (3) The "natural or direct consequence" rule seems too vague to settle anything. No mechanical rule or formula seems satisfactory. In the present case it is doubtful whether the explosion can be regarded as proximately caused by D's negligence, though it is a direct result. It was a very improbable consequence, for which the defendant is not justly responsible. If D had driven over the box maliciously, for the purpose of causing a jar or injury to A, it might be reasonable to hold him for the unexpected harmful result; but liability for negligence should not be so extensive as that for willful wrongs. But see *In re Polemis, etc., Co., Ltd.* [1921] 3 K. B. 560.

H. W. Edgerton, *Legal Cause*, 72 *Univ. Pa. Law Rev.* 211, 343.

Beale, *Proximate Consequences*, 33 *Harv. Law Rev.* 633.

Burke, *Legal Cause*, 15 *Cal. Law Rev.* 1.

For other cases see *Decennial Digests*, Negligence ◊56-60; Torts ◊15.

Q. 22. Norcross came into Sage's office with a satchel. He handed Sage a letter, threatening to drop the bag on the floor unless Sage gave him \$1,200. Sage drew his employer, Laidlaw, in front of him to serve as a shield. Norcross exploded the dynamite and Laidlaw was seriously injured, but Sage escaped. Laidlaw

sues Sage for damages for using his body as a screen from the impending explosion. Is Sage liable?

A. No; defendant is not liable, unless it is shown that the plaintiff's injuries were increased by the defendant's act. There is no evidence of any relation of cause and effect between the act of the defendant, even if it was a wrongful trespass, and the explosion which caused the injury. Defendant did not increase plaintiff's danger, but merely changed his position a few inches. The "but for" can be applied negatively, viz. that, if plaintiff's injuries would have been the same, regardless of defendant's wrongful act, the defendant is not legally responsible for them.

Laidlaw v. Sage, 52 N. E. 679, 158 N. Y. 73, 44 L. R. A. 216.

Id., 25 N. Y. S. 955, 73 Hun, 125.

For other cases see Decennial Digests, Torts ⚡15.

Q. 23. A and B held different oil leases and negligently permitted crude oil to escape into a creek nearby, where it was ignited by the negligence of C and flowed down and destroyed the barn of D. D sues A and B in separate actions for the entire loss. Can he recover judgments against both?

A. It has been held that he can, although there is some doubt. Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce a single injury, it is said that each is responsible for the entire result, even though his act or neglect alone might not have caused it. *Northrup v. Eakes*, 178 P. 266, 72 Okl. 66. The normal rule would seem to be that each is only liable for the damage actually caused by him. The doctrine that each contributor, acting without concurrence, is responsible for the whole damage, should not be extended beyond the necessities required by the difficulty of apportioning the responsibility. *Farley v. Crystal Coal Co.*, 102 S. E. 265, 85 W. Va. 595, 9 A. L. R. 933; *Mitchell Realty Co. v. West Allis*, 35 A. L. R. 409, 184 Wis. 352, 199 N. W. 390.

For other cases see Decennial Digests, Mines ⚡121; Negligence ⚡15, 61(1); Torts ⚡22; Waters ⚡71.

Q. 24. A fire started by B's negligent operation of a railroad train spread one mile, until it met a fire having no responsible origin coming from another direction. After the union the combined fire swept on to burn A's property. Either fire, if the other had not existed, would have reached A's property and caused its destruction. Is B liable?

A. There are two opposing views. One is that the independent fire became a superseding cause and that the chain of responsible

causation was broken, so that B's fire was only a remote cause. The loss would have happened just the same from the fire of unknown origin, regardless of the defendant's negligence. The "but for" rule is applied as a negative test.

The other view follows the rule applied where there are two independent, responsible wrongdoers, either of which would have been sufficient to produce the result, and holds the defendant, even though either fire would have destroyed the plaintiff's property.

Cook v. Minneapolis, St. Paul & S. S. M. Ry. Co., 74 N. W. 561, 98 Wis. 624, 40 L. R. A. 457, 67 Am. St. Rep. 830.

Anderson v. Minneapolis, St. Paul & S. S. M. R. Co., 179 N. W. 45, 146 Minn. 430.

For other cases see *Decennial Digests*, Negligence ⇨61; Railroads ⇨464, 465.

Q. 25. A fire was communicated to an old hemlock stump, owing to a defective spark arrester on one of the B Railroad Company's engines. A was lumbering on a tract of land nearby, and sent an employee to extinguish the fire. He threw water on it, waited half an hour, and went away, satisfied that the fire was out. The next day another person, X, found the stump still smouldering about the roots, and he did all that seemed reasonably necessary to put out the fire. Later a hurricane swept the locality, and carried the fire through the dry grass, where it burned over A's land, destroying his logs. Is the B Railroad Company liable?

A. Probably not. The hurricane or gale was so out of the usual course of nature as to be considered an act of God and the intervention of a new, independent cause. It may also be argued that B's active negligence had come to rest in a condition of apparent safety, and that B's responsibility was superseded by the intervention of A's employee and X, each of whom took charge of the situation and exercised reasonable care to put out the fire. The subsequent injury to A was not a natural and probable consequence of B's negligence, nor did it follow in the usual course of events, without the intervention of new, responsible causes.

See *Haverly v. State Line & S. R. Co.*, 19 A. 1013, 135 Pa. 50, 20 Am. St. Rep. 848.

For other cases see *Decennial Digests*, Negligence ⇨62; Railroads ⇨484(1).

SECTION 8.—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE

Q. 26. P carelessly stopped in the middle of a busy street, which ran north and south, to watch a parade which was coming up the hill from the south. D was driving a truck, south-bound, on the same

street. He carelessly failed to observe P until within 25 feet of him. There was no room to turn out. D shouted and put on his brakes. P did not hear the warning. D was unable to stop his truck in time to avoid injuring P, because he had negligently allowed his brakes to get into a defective condition. P was hit and hurt. Can he recover?

A. P cannot recover. He was negligent in stopping in the middle of a busy street to watch the parade. D was careless, also. On the facts so far, both parties have been careless, and, if both were hurt, neither could recover, because of the rule which bars a plaintiff from recovery from a defendant when plaintiff's own negligence has contributed to his injury. But defendant did discover plaintiff's peril before the accident. If by the exercise of due care at that time he could have prevented the accident, the plaintiff could have recovered under the doctrine known as the "last clear chance." But, after discovering the danger, D did all that could be done to avert the catastrophe. He could not prevent it. It is true that it was his prior negligence, in not taking care of his brakes, that made it impossible for him now to prevent the injury. But it was plaintiff's prior negligence that left plaintiff in the perilous position. It seems, then, a case of mutual antecedent negligence, and that there is no room for the application of the exception to the contributory negligence rule. The contrary has been held in some jurisdictions, however.

See *Trigg v. Water, Light & Transit Co.*, 114 S. W. 972, 215 Mo. 521, 20 L. R. A. (N. S.) 987.

Smith v. Norfolk & S. R. Co., 19 S. E. 863, 923, 114 N. C. 728, 25 L. R. A. 287.

Cf. *British Col. Ry. Co. v. Loach*, [1916] 1 A. C. 719, commented upon in 66 Univ. of Pa. Law Rev. 73.

For other cases see *Decennial Digests*, Negligence ⇨83; Railroads ⇨387, 390.

Q. 27. A negligently drove his automobile at a speed of about 5 miles per hour across D's railroad track and was struck by a train. The fireman on the train negligently failed to keep a lookout. If he had done so, he would have discovered the peril of A in time to avert the accident. May A recover in spite of his contributory negligence?

A. Yes; according to the law of some jurisdictions. The last clear chance rule is a means of avoiding the harshness of the doctrine of contributory negligence, where the defendant might have avoided the consequences of the plaintiff's negligence, as when the plaintiff is on a railroad trestle in front of an on-coming train and is helpless to save himself. Some courts refuse to apply the doctrine, except when the defendant has failed to use reasonable care after

discovery of the plaintiff's peril, and so A could not recover here. Other courts hold that the doctrine is applicable whenever the defendant, in the exercise of ordinary care, should have known of the plaintiff's peril. This is limited by some to cases where plaintiff's negligence has terminated, and he is helpless to extricate himself from the peril.

Logan v. Chicago, B. & Q. R. Co., 254 S. W. 705, 300 Mo. 611.

Wallis v. Southern Pac. Co., 195 P. 408, 184 Cal. 662, 15 A. L. R. 117.

Leftridge v. City of Seattle, 228 P. 302, 130 Wash. 541.

8 Minn. Law Rev. 329.

22 Col. Law Rev. 745; 21 Mich. Law Rev. 586.

For other cases see Decennial Digests, Negligence $\Leftrightarrow$ 83.

Q. 28. A was a passenger in B's motor bus. B negligently drove on the tracks of the C Railroad in front of an approaching train. The gates were lowered as B went on the track, so that he could go in neither direction. The crew of the train saw the bus and its peril, but negligently failed to take precautions to stop the train quickly enough to prevent a collision. The train could have been stopped, had the servants of C used due care as soon as they discovered the danger. A was hurt in the collision. What are his rights?

A. A may recover from either B or C, but is, of course, not entitled to be paid twice for his injuries. The negligence of the driver of the motor bus is not to be imputed to the passenger. A, so far as it appears, was not himself guilty of any want of due care. B was negligent in running the bus upon the tracks in front of the train; C was negligent in running into the bus. The combined negligence of the two hurt A. Where the combined negligence of two persons hurts a third, himself in the exercise of due care, he may recover from either.

See Cordiner v. Los Angeles Traction Co., 91 P. 436, 5 Cal. App. 400.

Washington & G. R. Co. v. Hickey, 17 S. Ct. 661, 166 U. S. 521, 41 L. Ed. 1101.

For other cases see Decennial Digests, Carriers $\Leftrightarrow$ 305(6), 306(4).

Q. 29. Assume facts like those in the foregoing question. B's motor bus is injured in the collision. Can B recover against C?

A. B can recover. While B has been negligent, his negligence has left him in a position where he is now powerless to avert the accident. C can, by the exercise of due care here and now, avoid the catastrophe. His failure to do so makes him liable. Sometimes the liability is based upon what is called the doctrine of "last clear chance"; sometimes it is called the doctrine of "discovered peril"; other courts call C's conduct, under the circumstances "reckless and

wanton," or "wanton negligence," as in *Alger, Smith & Co. v. Duluth-Superior Traction Co.*, 101 N. W. 298, 93 Minn. 314. This, however, seems hardly an accurate use of language. See *Sutzin v. Chicago M. & St. P. Ry. Co.*, 63 N. W. 709, 95 Iowa, 304; *McDivitt v. Des Moines St. Ry. Co.*, 68 N. W. 595, 99 Iowa, 141; 8 Minn. Law Rev. 329, 333.

For other cases see *Decennial Digests, Negligence* ⇨100; *Railroads* ⇨103(3), 390.

Q. 30. A was hurt when he was crossing a street, in the exercise of due care, by the collision of cars belonging to B and C, both of whom were negligent in handling their vehicles. A sued C and recovered. C, having satisfied the judgment, now asks B to pay to him half the amount he had to pay A. May he recover?

A. C could recover in some jurisdictions. It was said in the English case of *Merryweather v. Nixon*, 8 T. R. 186, that there is no right of contribution between tort-feasors. Courts in both England and the United States, however, have cut down this broad rule. A more modern view limits it "to cases where the transaction out of which the judgment arises involves moral turpitude." *Herr v. Barber*, 13 D. C. (2 Mackey) 545. See, also, *Mayberry v. Northern Pac. Ry. Co.*, 110 N. W. 356, 100 Minn. 79, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754. No moral turpitude is shown on the part of either B or C here, and there is respectable authority for allowing contribution. See *Mitchell v. Raymond*, 195 N. W. 855, 181 Wis. 591; *Horrabin v. Des Moines*, 199 N. W. 988, 198 Iowa, 549, 38 A. L. R. 554.

For other cases see *Decennial Digests, Contribution* ⇨5.

Q. 31. A was driving his automobile on the public highway. He had not complied with the law regarding the securing of a license and license plates to be attached to the car. In other respects he had complied with the law, and was operating his car with due care. The car fell through an unsafe bridge in the defendant city, and A was hurt. The condition of the bridge was due to the negligence of the defendant, and its officials had sufficient notice of the defect to render them liable. May A recover?

A. A should be allowed to recover. He was a violator of the law in not having secured the required license, but obviously his car would have fallen through the bridge just as readily, whether it bore license plates or not. A's illegality had no causal connection with his injury, and should not, therefore, bar him from recovery against the admittedly negligent defendant. In a few states the opposite view has been taken; A would be regarded as a trespasser on the

highway, and not permitted to recover, unless something more than negligence on defendant's part is shown.

See *Hemming v. City of New Haven*, 74 A. 892, 82 Conn. 661, 25 L. R. A. (N. S.) 734, 18 Ann. Cas. 240.

Muller v. West Jersey & S. R. Co., 122 A. 693, 99 N. J. Law, 186.

Lockridge v. Minneapolis & St. L. Ry. Co., 140 N. W. 834, 161 Iowa, 74, Ann. Cas. 1916A, 158.

Contra: *Dudley v. Northampton St. R. Co.*, 89 N. E. 25, 202 Mass. 443, 23 L. R. A. (N. S.) 561.

Cf. *Bourne v. Whitman*, 95 N. E. 404, 209 Mass. 155, 35 L. R. A. (N. S.) 701.

For other cases see *Decennial Digests, Municipal Corporations* 801(1); *Negligence* 75; *Railroads* 324(3), 335(5).

Q. 32. A invited B as his guest to take a drive in A's automobile. B accepted the invitation. Due to A's negligence in handling the car, it collided with a truck and B was hurt. May B recover from A, B having personally exercised due care throughout?

A. B should be allowed to recover. B was being carried gratuitously, but nevertheless A should be held responsible for injuries caused by his lack of care. The case is analogous to that of a person who is a licensee on another's land. While there is little responsibility on the part of the owner as to the condition of the premises, he is responsible in most states for what has been called "superadded negligence"—acts carelessly done, which harm the person properly there. And, in general, the duty to use due care in the doing of acts which affect another does not depend upon whether or not the actor is receiving compensation for what he does. In some states, however (though a minority), the guest may recover only where the driver has been guilty of "gross negligence."

For majority views, see *Perkins v. Galloway*, 69 So. 875, 194 Ala. 265, L. R. A. 1916E, 1190.

Fitzjarrell v. Boyd, 91 A. 547, 123 Md. 497, and *Beard v. Klusmeier*, 164 S. W. 319, 158 Ky. 153, 50 L. R. A. (N. S.) 1100, Ann. Cas. 1915D, 342.

For minority view, see *Massaletti v. Fitzroy*, 118 N. E. 168, 228 Mass. 487, L. R. A. 1918C, 264, Ann. Cas. 1918B, 1088.

For other cases see *Decennial Digests, Carriers* 280(7); *Negligence* 13, 16, 22½, 93(1).

Q. 33. Suppose, in the previous case, that B had been hurt by the combined negligence of A and C, the truck driver, other facts the same. Could B recover from C?

A. B should be allowed to recover from C. C has negligently caused harm to B. B has been guilty of no negligence. One injured by the combined negligence of two persons may recover against either. The only thing which would preclude B would be the doctrine of "imputed negligence," by which the negligence of A would be imputed to his guest to bar recovery against C. There seems no

justification for such a doctrine here, as it is clear that A is in no sense B's servant or agent. In most states, recovery would be allowed, though in Michigan (with some exceptions) the negligence of the driver is imputed to the guest.

See *Reiter v. Grober*, 181 N. W. 739, 173 Wis. 493, 18 A. L. R. 362.

Withey v. Fowler Co., 145 N. W. 923, 164 Iowa, 377.

Westover v. Grand Rapids R. Co., 147 N. W. 630, 180 Mich. 373.

Brubaker v. Iowa County, 183 N. W. 690, 174 Wis. 574, 18 A. L. R. 303.

For other cases see *Decennial Digests*, Negligence ¶75, 93(1, 2).

Q. 34. Assume, in the case considered in the two foregoing questions, that at the time of the accident, and for some time prior thereto, A had been driving at an excessive rate of speed; that B knew it, and said or did nothing; that the excessive speed was a proximate cause of the collision in which B was hurt. Could he recover from A?

A. B, in the situation supposed, could probably not recover. Though the negligence of the driver is not imputed to the guest, he must nevertheless use due care for his own safety, if he is to recover against another for injuries sustained by the other's negligence. Whether the guest has exercised due care is ordinarily a question to be determined upon all the facts by the jury. If the case is too clear for reasonable difference of opinion, the court will direct the jury on this point. Thus, if one rides with a driver known to be intoxicated, he is careless and cannot recover. *Lynn v. Goodwin*, 148 P. 927, 170 Cal. 112, L. R. A. 1915E, 588. So, too, there is authority that for one knowingly to ride with a driver who is traveling at excessive speed, without protest, is negligence per se. See *Howe v. Corey*, 179 N. W. 791, 172 Wis. 537; *Hubbard v. Bartholomew*, 144 N. W. 13, 163 Iowa, 58, 49 L. R. A. (N. S.) 443. Cf. *Hermann v. Rhode Island Co.*, 90 A. 813, 36 R. I. 447.

For other cases see *Decennial Digests*, Carriers ¶325; Highways ¶175 (1); Negligence ¶68, 93(1); Railroads ¶327(12).

Q. 35. Plaintiff was riding in an automobile driven by her husband. She was thrown from the car and hurt, owing to careless driving by her husband and a defect in the public street, which the defendant city negligently maintained. At the time of the injury plaintiff and her husband were moving to another city, where they intended to reside. Plaintiff was in the back seat of the car. Plaintiff sues the city to recover for her injuries. Will the action lie?

A. Plaintiff should be allowed to recover, if she was not herself contributorily negligent, and the facts do not indicate that she was. By the majority and better view, the driver's negligence is not im-

puted to the passenger, so as to bar the latter's recovery against a careless third person, who has caused the passenger injury. The only thing that might bar the plaintiff is the fact that it is arguable that she and her husband were, at the time of the accident, engaged in a "common," a "joint," enterprise. If they were, the husband's negligence would bar the wife from recovery against the defendant; the contributory negligence of one of the joint undertakers being imputed to the others. *Shindelus v. St. Paul City R. Co.*, 83 N. W. 386, 80 Minn. 364. Were the husband and wife engaged in such an enterprise here? They were riding together, and engaged in moving to another town, a matter in which they were both concerned. But the test for the existence of a joint enterprise is not alone a community of interest, but an equal power to control and direct the movements of the other participants. *Lawrence v. Sioux City*, 154 N. W. 494, 172 Iowa, 320; *Cram v. Des Moines*, 172 N. W. 23, 185 Iowa, 1292. It would seem that here the driving was the husband's job alone, and the plaintiff should not be barred by his negligence. *Brubaker v. Iowa County*, 183 N. W. 690, 174 Wis. 574, 18 A. L. R. 303.

For other cases see Decennial Digests, Negligence ⇨93(1, 2), 99(14).

Q. 36. A, while crossing a street in the exercise of due care, slipped and fell. Before he could get up, he was struck by B's motor car. B saw A fall and applied his brakes, but was unable to stop in time to avoid striking A. The brakes had negligently been allowed by B to get into defective condition. Can A recover from B?

A. A can recover. Guilty of no negligence himself, he has been hurt by B, whose previous negligent conduct now makes it impossible to avoid harm. The negligence is still active, and a proximate cause of A's harm. The case is to be contrasted with that shown in question 26, where both parties had been guilty of prior negligent conduct, and neither could prevent the injury at the time danger threatened.

Q. 37. A, a boy of 16, was injured by the negligence of B. At the trial, upon the question of contributory negligence on A's part, the court instructed the jury "that, in determining the degree of care which a boy 16 years of age should exercise, the jury should consider his age, experience, and discretion, as the law only requires such care as one of his own age and experience would exercise under the same or similar circumstances." To this instruction the defendant excepted. Should the exception be sustained?

A. No; the exception should be overruled. It is well established that the care required of children is not the same as that required of adults. Some children are too young to be capable of exercising care. This line is drawn, by courts, somewhere around 6 or 7 years; and for older children the cases are clear that age of the child is to be considered. Most courts also state that the jury may also consider the individual child's experience and discretion, thus making the test a "subjective" one for the individual child, rather than an "objective" one, wherein children of one age are considered as a class. And the special rules for children seem to be applied well up toward the age of majority.

See *Collins v. Weise*, 194 N. W. 450, 110 Neb. 552.

Snow v. Inhabitants of Provincetown, 120 Mass. 530.

Stanley v. Chicago, M. & St. P. Ry. Co., 87 S. W. 112, 112 Mo. App. 601.

For other cases see *Decennial Digests, Master and Servant* ¶296(6); *Municipal Corporations* ¶819(7); *Negligence* ¶85(2).

Q. 38. P, a child of less than 4 years, was negligently left unattended on a busy street by his parents. He suffered injuries when he was struck by a motor car negligently driven by D. P, by next friend, sues D. Can he recover?

A. P should be allowed to recover. He is himself too young to be held responsible for exercising care. The facts state that D was negligent. The only thing that would bar P would be an imputation of the negligence of his parents to him. This ground was made the basis of a refusal to allow recovery in the case of *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273. Such a doctrine has been called "a pure interpolation into the law; nor is it sustained by legal analogies." Certainly the infant is helpless to choose his custodian, and to bar him because of that person's negligence seems both harsh and arbitrary. *Hartfield v. Roper* represents the law in some states, however.

See *Newman v. Phillipsburg Horse Car R. Co.*, 19 A. 1102, 52 N. J. Law, 446, 8 L. R. A. 842.

Sullivan v. Chadwick, 127 N. E. 633, 236 Mass. 130.

Zarzana v. Neve Drug Co., 179 P. 203, 180 Cal. 32, 15 A. L. R. 401.

For other cases see *Decennial Digests, Negligence* ¶95(1), 96.

Q. 39. In an action under a statute for damages for the wrongful death of decedent, it was shown that the negligence of the husband of the deceased contributed to her death. The action was brought by decedent's administrator for the benefit of six beneficiaries, one of whom was the husband. Will the latter's negligence bar the action?

A. Recovery should be allowed. Actions for causing death of a human being are the creation of statutes. Whether required by express language of the statute or not, there will be no recovery if the decedent's own negligence contributed to his death. And if the sole beneficiary has, by his negligence, contributed to the death of decedent, most courts, though not all, hold that such beneficiary cannot recover, whether he be the nominal party plaintiff or not. *Richmond, F. & P. R. Co. v. Martin*, 45 S. E. 894, 102 Va. 201. *Contra: Wymore v. Mahaska County*, 43 N. W. 264, 78 Iowa, 396, 6 L. R. A. 545, 16 Am. St. Rep. 449. But, if only one of the beneficiaries has been contributorily negligent, it seems unjust that his lack of care should bar meritorious claims for redress. *Kokesh v. Price*, 161 N. W. 715, 136 Minn. 304, 23 A. L. R. 643. The argument on the other side, which has appealed to some courts, is that the cause of action is indivisible, and the negligence of one bars all. See *Hazel v. Hoopeston-Danville Motor Bus Co.*, 141 N. E. 392, 310 Ill. 38, 30 A. L. R. 491. See *Wigmore, Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death*, 2 Ill. Law Rev. 487.

For other cases see *Decennial Digests, Death* ⇨ 24, 91.

SECTION 9.—LIABILITY FOR VIOLATION OF STATUTE OR ORDINANCE

Q. 40. An ordinance required abutting owners to remove snow and ice from sidewalks adjacent to their premises, and subjected them to a fine for failure to do so. The ordinance, however, was silent on the subject of civil liability. Defendant failed to remove the snow and ice from his walk, and the plaintiff slipped and fell, sustaining injury as a result. Can plaintiff recover from defendant?

A. Plaintiff cannot recover. At common law there was no duty on the part of the owner to keep the walks clear from ice and snow. *Kirby v. Boylston Market Ass'n*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502. The duty could be imposed by statute. But here the statute simply provided punishment for the criminal offense; it gave no civil rights. To impose civil liability because of the statute is to put into it what the Legislature omitted, but which the Legislature could have put in, had it desired to do so. The implication is reasonable that civil liability was not imposed, because the criminal responsibility was considered sufficient. Since neither common law nor statute imposes liability, the plaintiff cannot recover from defendant. See *Sewall v.*

Fox, 121 A. 669, 98 N. J. Law, 669, 28 A. L. R. 1357; 12 Col. Law Rev. 749.

For other cases see Decennial Digests, Action ¶19; Municipal Corporations ¶808(5, 7).

Q. 41. A statute required all persons leaving horses unattended on the public streets of towns over a certain size to see that the animals were securely tied. For violation, prosecution and fine were provided. Nothing was said concerning civil recovery. A left his team untied at the edge of the curb in a city (which was of a size to be within the terms of the statute). He intended to be gone for but an instant, and the horses were gentle, and not timid. They became frightened in A's absence, however, and ran away, injuring B, who was exercising due care. They would not have run away, had they been tied as required. Can B recover from A?

A. B can recover. Without the statute, A is responsible for the exercise of due care in the handling of his team. The case thus differs from the one involved in question 40. Ordinarily it is a jury question whether one has exercised such care. But here the legislative body has forbidden leaving the team in a certain way. That furnishes a standard below which a man of ordinary prudence must not fall, for an "ordinarily prudent man" must be a law-abiding citizen. There was a duty to use care at common law; the statute has substituted a minimum requirement of "due care" for what would ordinarily be a question of fact for the jury. The violation in such case is, as some courts put it, "negligence per se." Other courts call it evidence of negligence. Another theory is that, where the statute prohibits an act for the protection or benefit of individuals, one who disobeys it is liable to those for whose protection the statute was enacted. A new statutory duty is impliedly created, and not merely a standard of care fixed for a common-law duty.

Schaar v. Conforth, 151 N. W. 275, 128 Minn. 460.

Bott v. Pratt, 23 N. W. 237, 33 Minn. 323, 53 Am. Rep. 47.

See Osborne v. McMasters, 41 N. W. 543, 40 Minn. 103, 12 Am. St. Rep. 698.

Cf. Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488.

On the whole subject, see Thayer, Public Wrong and Private Action, 27 Harv. Law Rev. 317, reprinted in Selected Essays on Torts, 1924.

For other cases see Decennial Digests, Highways ¶181(3); Municipal Corporations ¶705(4); Negligence ¶6, 56(3), 134(9); Poisons ¶6.

Q. 42. A violated a traffic statute by parking his car on the left side of the street. B, a child of C, ran out from behind A's car and was killed by a passing automobile, through no fault of the driver. The undisputed evidence showed that, if A's car had been legally parked, facing in the opposite direction, the obstacle to the child's

vision and that of the driver of the passing car would have been as great as it was with A's car illegally parked. Can C recover from A for B's death, under a statute allowing recovery for death by wrongful act?

A. There can be no recovery. A has been guilty of a public offense, and his doing what he was thus forbidden to do by statute may be called "negligence per se." But one is liable in a civil action, not for the abstract existence of negligence, but for its harmful consequences to another. Since A's car would have been an equally great obstacle to vision of both B and the driver of the passing car, whether facing in the proper direction or not, it is clear that A's act, in parking the car facing as it did, did not cause the injury. Hence he is not liable.

See *Powers v. Standard Oil Co.*, 119 A. 273, 121 A. 926, 98 N. J. Law 730, 893.

For other cases see *Decennial Digests, Municipal Corporations* ¶705(11), 706(9); *Torts* ¶15.

SECTION 10.—LIABILITY OF MANUFACTURERS AND PERSONS NOT IN PRIVACY

Q. 43. The A Company manufactured and sold a portable gasoline stove to B, a wholesaler, who sold it to C, a retailer. C sold it to D, a customer. In using the stove, in the exercise of due care, D was injured. It was found that the explosion which caused D's injury was due to negligence in manufacturing the article. Can D recover from A?

A. D can recover in most states. The common-law rule was that the manufacturer was not liable to a consumer, not a party to a contract with him, who was injured by defects due to the negligence of the manufacturer. To this rule two exceptions were made: (1) When the manufacturer knew of the defect and concealed it; (2) when the article was "inherently" or "imminently" dangerous to life or limb. See the leading case of *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865, 57 C. C. A. 237, 61 L. R. A. 303. Recently some courts have placed the consumer's recovery upon the ground of a duty of care owed by the manufacturer to the consumer, regardless of privity, for the consumer is the person for whom the goods are made and distributed. In the instant case recovery could be had on this ground, or on the ground that a defective gasoline stove is imminently dangerous. See *Coakley v. Prentiss-Wabers Stove Co.*, 195 N. W. 388, 182 Wis. 94; *MacPherson v. Buick Motor Co.*, 111 N.

E. 1050, 217 N. Y. 382, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440; 35 Harv. Law Rev. 661, 662.

For other cases see Decennial Digests, Negligence ¶27.

Q. 44. A employed B, who was in business as a public weigher, to weigh a quantity of beans; payment for the service was to be made by A. B knew that C had purchased the beans from A, and at A's request furnished C a duplicate copy of the weight certificate. The weight was incorrectly reported, owing to negligence on B's part. C paid A for the beans, paying for the amount called for according to the weight shown in the certificate. Upon discovering the weight was inaccurate, he sues B for the difference in value between what he got and what the certificate called for. May C recover from B?

A. C may recover. He was not a party to the contract, and may not recover upon it. But B knew that C was to rely upon the certificate. He acted carelessly. While C's rights are not enlarged by the contract between A and B, they should not be restricted by it. There are many instances in the law where one who is not obliged to act, but where, if he does act carelessly, and injures another, that other may recover. The instant case is one. There are decisions by respectable courts, however, which have denied recovery on facts not greatly dissimilar to those here stated.

See, allowing recovery, *Glanzer v. Shepard*, 135 N. E. 275, 233 N. Y. 236. 23 A. L. R. 1425.

Cf. *National Iron & Steel Co. v. Hunt*, 143 N. E. 833, 312 Ill. 245, 34 A. L. R. 63, on liability of one, who makes a certificate or report, to a third person, who acts in reliance thereon.

See, also, 21 Mich. Law Rev. 200.

For other cases see Decennial Digests, Negligence ¶2; Weights and Measures ¶8.

SECTION 11.—LIABILITY OF OWNERS OF REAL ESTATE TO INVITEES, LICENSEES, AND TRESPASSERS

Q. 45. A invited B to come to his house for dinner. B fell through the porch floor, due to defective condition of the porch. The defect was unknown to A, but could have been discovered in the exercise of ordinary care. B was not negligent. Can he recover from A?

A. B cannot recover. To an "invitee," or person coming to premises on business with the occupier, the latter owes a duty to use reasonable care to provide safe premises, or at least to give notice of defects of which he knows, or could learn in the exercise of ordinary care. To the licensee, or one coming upon premises for his own purposes, the occupier has no obligation to make the premises safe, or do more than warn of concealed dangers of which he knows. The

social guest, A in this case, could be said to come for a purpose mutual to himself and his host. There is express authority, however, for treating him as entitled to no more care than a licensee. See *Greenfield v. Miller*, 180 N. W. 834, 173 Wis. 184, 12 A. L. R. 982; *Southcote v. Stanley*, 1 H. & N. 274; *O'Shea v. Lavoy*, 185 N. W. 525, 175 Wis. 456, 20 A. L. R. 1008. A licensee can only recover for setting a trap or for active negligence. This applies also to a gratuitous passenger in an automobile. As to liability of inviter, see *Sutcliffe v. Clients Inv. Co., Ltd.*, [1924] 2 K. B. 746; 2 Cambridge Law J. 256.

For other cases see *Decennial Digests*, Negligence ¶22½, 32(1).

Q. 46. X was a guest at defendant's hotel. At the invitation of X, plaintiff went to the hotel for the purpose of visiting X in his room and playing cards for money. Gambling was a criminal offense. The elevator shaft was in a dark place, and plaintiff sustained injuries by falling into the open shaft, when he thought he was stepping into the elevator itself. Can he recover from the innkeeper?

A. Plaintiff cannot recover. To the guest at the hotel, the innkeeper owes an obligation to use due care to keep the premises safe, and not to hurt the guest by acts carelessly done; and he owes the same duty to one who comes on proper business with the guest, as, for instance, a merchant, who comes to inspect a salesman's samples. But this plaintiff has come for an unlawful purpose, not proper business of the hotel or the guest, and cannot claim the benefit of the duty owed to an invitee whose mission is lawful. He is a mere licensee or trespasser.

Jones v. Bland, 108 S. E. 344, 182 N. C. 70, 16 A. L. R. 1333.

See *Powers v. Raymond* (Cal. Sup.) 239 P. 1069.

For other cases see *Decennial Digests*, Innkeepers ¶10; Negligence ¶32(2, 3), 76.

Q. 47. A gratuitously lent B his automobile to go for a ride. The car was defective, and B was injured. A did not know of the defect, though a reasonably thorough inspection would have revealed it. May B recover from A?

A. B cannot recover. If A had for hire let B the car with a hidden defect, the existence of which he was aware of, he would have been liable. But the gratuitous bailor is not liable to the bailee for more than this. The liability of the occupier of premises to the licensee is an analogy. See *Johnson v. H. M. Bullard Co.*, 111 A. 70, 95 Conn. 251, 12 A. L. R. 766. A guest of the borrower has no greater rights against the lender than the borrower.

For other cases see *Decennial Digests*, Bailment ¶21.

Q. 48. The plaintiff, a son of defendant's tenant, while standing in a courtyard used in common by all the tenants of the defendant's apartment house, was injured by the fall of a fire escape from the wall of the building. The defective condition of the fire escape could have been discovered by the defendant, had he exercised due care in ascertaining the condition of the premises. Plaintiff was not himself negligent. May he recover against defendant?

A. The plaintiff should be allowed to recover. A landlord is not, in the absence of agreement to repair, liable to a tenant for injuries sustained on the leased premises, unless there are concealed defects, of which the landlord knows, but does not warn the tenant. But, as to those parts of the building over which the landlord retains control, he is under a duty to use ordinary care in seeing that they are kept in safe condition, by the prevailing view. And this duty cannot be delegated. *Koskoff v. Goldman*, 85 A. 588, 86 Conn. 415. Since the fire escape was a part of the building over which the landlord retained control, he is liable for injuries resulting from his failure to exercise due care in regard to its condition. See *Hussey v. Long Dock R. Co.* (N. J. Err. & App.) 126 A. 314; *O'Brien v. Staiger* (N. J. Sup.) 126 A. 319.

For other cases see *Decennial Digests, Landlord and Tenant* ⇨150(1), 162, 164(1, 2), 169(6); *Trial* ⇨337.

Q. 49. The plaintiff, wife of a railroad employee, accompanied her husband on an errand upon the premises of the railroad in an automobile. The car was struck by defendant's train through no fault of any one. The plaintiff was found under the automobile, jammed between the train and a nearby building. In trying to extricate her, the train crew negligently moved the train in such a way as to inflict additional injuries upon the plaintiff. Has she any claim for damages against the company?

A. The plaintiff ought to be able to recover for the additional injuries sustained, when the train was negligently handled in the effort to extricate her, though a recent decision indicates the contrary. *Rainey v. Oregon Short Line Ry. Co.*, 231 P. 807, 64 Utah, 445. Plaintiff was a trespasser. No duty of care was owed, in most jurisdictions, to discover her presence. Further, since the original collision was no one's fault, no cause of action arises from it in favor of the plaintiff. Did the defendants then owe any duty to help the plaintiff, injured by their act, though not through their fault? Some courts have held any obligation to do so is a moral obligation only, and not the basis for legal action. *Griswold v. Boston & M.*

R. Co., 67 N. E. 354, 183 Mass. 434; *Union Pac. Ry. Co. v. Cappier*, 72 P. 281, 66 Kan. 649, 69 L. R. A. 513. Other courts have said that the person causing the injury owes a legal duty, even to a trespasser, to extricate him from his peril. *Northern Cent. Ry. Co. v. State*, to use of Price, 29 Md. 420, 96 Am. Dec. 545. *Whitesides v. Southern Ry. Co.*, 38 S. E. 878, 128 N. C. 229. There are good arguments for the latter view. See discussion, 7 Cal. Law Rev. 312. Whether the legal duty existed or not, defendants did assume the responsibility. They should be held responsible for acting with due care in this undertaking. Some authority would say that even here the defendant's only obligation is to refrain from wanton or willful injury, since the plaintiff was a trespasser.

For other cases see *Decennial Digests*, Negligence ⇨2, 8; Railroads ⇨389(1), 390, 398(1).

Q. 50. The top girders of a bridge carrying a street over defendant's railroad tracks were 23 feet above street level. The defendant had strung bare electric wires on cross-bars placed 6 feet above the top girders. The plaintiff, a boy 8 years of age, climbed upon the top of the bridge and was injured by coming in contact with the wire. Can he recover from defendant?

A. It was held, in this case, that the plaintiff could not recover, in the absence of any evidence that it directly or by implication invited or licensed the plaintiff to climb to a point from which he could touch the wire. *New York N. H. & H. R. Co. v. Fruchter*, 43 S. Ct. 38, 260 U. S. 141, 67 L. Ed. 173. See, also, *United Zinc & Chemical Co. v. Britt*, 42 S. Ct. 299, 258 U. S. 268, 66 L. Ed. 615, 36 A. L. R. 28. The general rule is well settled that a landowner owes no duty to make his premises safe for trespassers. An exception has been made in many states, where the trespassers were children, hurt upon unguarded turntables on railroad property. A leading case is *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745. This doctrine has been called the "attractive nuisance" doctrine. Some courts have rejected it altogether; others have extended it, more or less widely, to include other agencies on land dangerous and attractive to children; still others have limited it pretty closely to injuries from turntables, the type of case in which the doctrine had its inception in this country. *Hardy v. Missouri Pac. R. Co. (C. C. A.)* 266 F. 860, 36 A. L. R. 1. See 32 Yale Law J. 200; 30 Yale Law J. 870.

It has been held that to constitute an "attractive nuisance" under the "turntable doctrine," there must be an artificial agency, usually machinery, as contrasted with a natural condition, which must invite the children to trespass. A mining camp shack and a box of

dynamite caps therein were held not an attractive nuisance. *Hayko v. Colorado & Utah Coal Co.* (Colo. Sup.) 235 P. 373, 39 A. L. R. 482.

For other cases see Decennial Digests, Electricity Ⓒ15(1); Negligence Ⓒ16, 23(1), 33(1, 3), 39.

SECTION 12.—LIABILITY FOR ANIMALS

Q. 51. Defendant, a bee keeper, kept his bee hives on his land near a public street. Plaintiff drove up to the premises adjoining those of defendant on a business errand, and tied his horses there. The bees, during plaintiff's absence, attacked the horses, and stung one of them to death. It appeared that bees frequently attack sweating horses, and that the defendant knew that his bees had previously stung horses. Is defendant liable?

A. The defendant is liable. It could be argued that bees are the type of "animal" that an owner keeps at his peril, as a lion, or bear, or a bull known by the owner to be of a dangerous disposition. The courts have not extended this insurer's liability to bee keepers, however, showing a disposition not to extend the rule of insurer's liability for animal keepers, and being unembarrassed by early decisions on the subject of bees. But there is liability for failure to exercise care. The defendant, as a keeper of bees, ought to know of their disposition to attack sweating horses; he did know that his bees had stung horses, yet he left his hives close to a public street, where those rightfully using the highway were exposed to this danger. He should be held liable because of his negligent conduct.

See *Ammons v. Kellogg*, 102 So. 562, 137 Miss. 551, 39 A. L. R. 351.

Parsons v. Manser, 93 N. W. 86, 119 Iowa, 88, 62 L. R. A. 132, 97 Am. St. Rep. 283.

For other cases see Decennial Digests, Animals Ⓒ80.

Q. 52. The defendant's dog had been in the habit of following and barking at automobiles, and this fact was known to defendant. The plaintiff was riding with her husband in a Ford car, when suddenly the defendant's dog jumped in front of them. By running over the dog, the car was thrown against an embankment, and the plaintiff injured. Plaintiff sues defendant to recover for the injuries. What judgment?

A. Judgment should be given for the defendant. It is clear that a dog is an animal for which the owner is not liable as an insurer for the damage the beast does, unless the owner has knowledge of the dog's dangerous propensities. This is, of course, apart from liability which may be imposed by statute. There is nothing in the facts

recited to show that this dog had a propensity for overturning automobiles. Still less would the fact that the owner knew the dog barked at cars charge him with notice of such an unusual trait.

See *Melicker v. Sedlacek*, 179 N. W. 197, 189 Iowa, 946, 11 A. L. R. 259.

For other cases see *Decennial Digests, Animals* ¶53.

Q. 53. A owned a flock of chickens. B, his neighbor, lived across the road from A, and had a freshly planted garden. A's chickens, though the yard was inclosed by a fence, got out, and went into B's garden, doing considerable damage before they could be removed. **Can B recover from A for the damage?**

A. B can recover. At common law an owner of animals was liable for trespasses committed by his animals, even though he had used due care to keep them restrained. This rule was, however, declared inapplicable in some of the Western states in this country, because it was not appropriate to local conditions; it being the common custom for animal owners to use unfenced lands generally for stock grazing. See, applying this rule to chickens, *Kimple v. Schaffer*, 143 N. W. 505, 161 Iowa, 659, 48 L. R. A. (N. S.) 179, Ann. Cas. 1916A, 244. Statutes as to fences, straying animals, etc., have greatly modified common-law rights and liabilities in many states. See *Adams Bros. v. Clark*, 224 S. W. 1046, 189 Ky. 279, 14 A. L. R. 738.

For other cases see *Decennial Digests, Animals* ¶90, 97.

SECTION 13.—LIABILITY WITHOUT FAULT

Q. 54. The A Powder Company maintained a powder mill for the manufacture of gunpowder upon its premises. The A Company also maintained on its premises a large artificial reservoir for the storage of water used in connection with its business. P owned land, on which he resided, adjacent to the A Company's land. W, as a practical joke, opened the flood gates of the reservoir, causing the water to flood P's land and destroy P's crops. The powder mill was struck by lightning and exploded, and P's house was damaged by the concussion. To what, extent, if at all, may P recover his damages from A?

A. P probably has no claim against A for any of the damage. In the first place, there is given no fact which shows a lack of care on A's part in maintaining either the reservoir or the mill. Negligence is not presumed. So, if there is to be recovery, it must be on some other ground. As to the powder mill, we do not know in what kind of neighborhood it was maintained. If the region was so populous that this mill created that degree of danger to the com-

munity that makes it a nuisance, then A would be liable for the damage done by the explosion of the mill, even though the immediate cause of the explosion was a stroke of lightning or act of a third party. See *Kleebauer v. Western Fuse & Explosives Co.*, 71 P. 617, 138 Cal. 497, 60 L. R. A. 377, 94 Am. St. Rep. 62; *Id.* (Cal. Sup.) 69 P. 246, 60 L. R. A. 377. But there is no evidence of this. The reservoir is probably in no sense a nuisance, and it will be assumed that the powder mill is not.

But in the leading case of *Fletcher v. Rylands*, 3 H. L. 330, where an occupier of land was held liable for the damage occasioned by the escape of water from a reservoir on his land, though without fault on his part, it was said that "the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril. * * *" This case is law in England, and has been followed by some, though rejected by other, courts in this country. But the rule, even in England, is not applicable when the escape of the dangerous substance is caused by a vis major (*Nichols v. Marshland*, L. R. 2 Ex. Div. 1), or the act of an independent third party (*Box v. Jubb*, 4 Ex. Div. 76). There being no negligence shown, and no nuisance, and the *Fletcher v. Rylands* rule not being applicable, it would seem that there is no basis upon which the plaintiff can recover. *Sutliff v. Sweetwater Water Co.*, 186 P. 766, 182 Cal. 34; 8 Cal. Law Rev. 192, 29 Harv. Law Rev. 801; *Eikland v. Casey* (C. C. A.) 290 F. 880; *Henderson v. Sullivan*, 159 F. 46, 86 C. C. A. 236, 16 L. R. A. (N. S.) 691, 14 Ann. Cas. 590 (*Storage of Explosives as a Nuisance*).

For other cases see Decennial Digests, Explosives ⚡8; Nuisance ⚡61; Waters and Water Courses ⚡172, 179(2).

SECTION 14.—FRAUD AND DECEIT

Q. 55. D applied to P for the sale of goods on credit. Communication was by mail. P looked D up in Bradstreet, and found D listed with assets of \$125,000 to \$200,000. This listing had been made upon information furnished by D. The information was true when made, some time before the transaction between P and D. A short time before this sale, Bradstreet had asked D for further information, and D had replied: "Stock the same as last report." While goods on hand, bills receivable, etc., were worth about this amount, D had just placed a heavy mortgage on all his property. P sold the goods, relying on Bradstreet's rating. D went bankrupt. Has P a tort claim against D?

A. P has a tort claim against D for deceit. D has made a false statement. He has said he had assets of a large amount, while they were subject to a heavy mortgage. The total impression he has created is a false one. "To tell half the truth is to conceal the other half." See *Busterud v. Farrington*, 31 N. W. 360, 36 Minn. 320; *Foster v. Charles*, 7 Bing. 105. The representation, however, was not made direct to the plaintiff, but to the credit agency. It is a requirement in deceit that representations be made to the party injured. But here defendant must have known that the securing of the information by the credit agency was for the purpose of supplying it to persons who were interested in extending credit to him. He is not in a position to insist that he did not intend that the persons receiving it and relying on it were strangers. See *Tindle v. Birkett*, 64 N. E. 210, 171 N. Y. 520, 89 Am. St. Rep. 822. Cf. *Warfield v. Clark*, 91 N. W. 833, 118 Iowa, 69; *Davis v. Louisville Trust Co.*, 181 F. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011. No right of action, however, arises in favor of one who relies without invitation upon a representation addressed to another class. *Cheney v. Dickinson*, 172 F. 109, 96 C. C. A. 314, 28 L. R. A. (N. S.) 359; *Peek v. Gurney*, L. R. 6 H. L. 377; 35 Harv. Law Rev. 656.

For other cases see *Decennial Digests*, *Fraud* ⇨ 1, 21, 29; *Sales* ⇨ 47.

Q. 56. Richard Harper, eminent banker and business man, had bought a farm, Blackacre, through his agent, who had assured him it was a good investment. Needing money, he decided to sell it. He had never seen Blackacre. He went to P, an inexperienced young man, who had inherited a small fortune, and said, among other things: "Blackacre would be a fine investment and make you some money. There is not an acre on it that is not splendid corn land." P, without further investigation, relying on Harper's recommendation, bought Blackacre for \$15,000. It was not good corn land, and was worth only \$10,000. Can P recover from Harper?

A. P should be allowed to recover. Harper misrepresented the farm to P. He had never seen it, and from the facts knew nothing of it, except that he had been advised it was a good investment. Yet he stated specifically that it was good corn land. While in many states in this country and in England it is required that defendant, to be liable, must have made a conscious misrepresentation (*Peek v. Derry*, 14 App. Cas. 337, is a leading case), yet this defendant has done this in making an assertion of his own knowledge when he knows that he knows nothing about it. See *Chatham Furnace Co. v. Moffat*, 18 N. E. 168, 147 Mass. 403, 9 Am. St. Rep. 727; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313. The state-

ment of the fitness of the land for corn land seems clearly a statement of objective fact, not mere opinion. Many cases speak of a buyer's duty to investigate. It is to be noted here, however, that the defendant is an experienced authority on investments; the plaintiff without experience. The defendant, having induced action by P, should not be allowed to say that his victim should not have been credulous. See *Mattauch v. Walsh Bros. & Miller*, 113 N. W. 818, 136 Iowa, 225; *Picard v. McCormick*, 11 Mich. 68.

For other cases see *Decennial Digests*, *Fraud* ⇨9, 11(2), 13(2, 3), 23.

Q. 57. P sold and delivered an automobile to A for \$1,000 on credit. P acted in reliance upon A's statement that he was expecting that X would shortly pay him (A) the sum of \$1,000, owing to A from X, and that he would use such money when received to pay P for the automobile. In fact, X owed no money to A, as A well knew. Has P an action against A in tort?

A. P, it seems, should recover. Aside from his obvious remedy in contract for the price of the car, he should also be given an alternative recovery for deceit. The difficulty in the case is to find a false representation of present or past fact, for it is clear that a mere failure to keep a promise to do something in the future is no basis for an action in deceit. But where a company got money, saying it intended to use money for one purpose, when it intended in fact to use it for another, it was held liable in deceit for such misrepresentation of intention; the court saying that "the state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, 29 Ch. Div. 459. But compare *Gallager v. Brunel*, 6 Cow. (N. Y.) 347. And a man who bought goods on credit, never intending to pay for them, has been held liable in deceit on the same basis. *Swift v. Rounds*, 35 A. 45, 19 R. I. 527, 33 L. R. A. 561, 61 Am. St. Rep. 791. The substance of A's statement to P is that A has a claim against a solvent debtor, X, that he expects pay shortly, and that he intends to use it to pay P. The existence of the claim, as also A's intention as to use of the money, are material facts. A knows the falsity of the statements. P has relied on them, and let A have a car on credit. He ought to be able to recover in deceit.

For other cases see *Decennial Digests*, *Fraud* ⇨12.

SECTION 15.—MALICIOUS PROSECUTION

Q. 58. D subscribed and swore to a written complaint before a magistrate, charging P with burglary. The magistrate thereupon

issued a warrant, upon which P was arrested by the sheriff and detained in the county jail in default of bail, until he was brought to trial on the criminal charge. When the case came for trial, the prosecution was dropped, because D refused to participate further in the proceedings. Has P a claim in tort against D?

A. P has no claim on the facts shown. There was no false imprisonment, because the proceedings were under legal process. To maintain an action for malicious prosecution, P must show: (1) Institution of the prosecution by D; (2) termination in P's favor; (3) want of probable cause for the prosecution; (4) malice (bad motive). P here shows the first. The dropping of the case through failure to prosecute, without solicitation or compromise on P's part, is, by the better view, sufficient favorable termination. *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35. But there is no showing of facts meeting the last two requirements, and without them P cannot recover. To sustain the action there must be some proof that the defendant acted without probable cause and was actuated by malice. *Dent v. De Arman*, 100 So. 122, 211 Ala. 189.

For other cases see Decennial Digests, Malicious Prosecution ⇨ 16, 35(1).

Q. 59. In a suit for malicious prosecution, it was proved that the plaintiff had been discharged in the criminal action, that the facts which defendant knew at the time of instigating the prosecution furnished reasonable ground for defendant's belief in the plaintiff's guilt of the crime charged, but that the defendant's main purpose in urging prosecution was to satisfy a grudge against the plaintiff. Can plaintiff recover on these facts?

A. Plaintiff cannot recover. He has laid the foundation of his action by showing the previous prosecution instituted by defendant and its termination in his (accused's) favor. He also shows the bad motive of the defendant. But he must establish the lack of probable cause for the original prosecution, and this he has not done. In truth, the facts show that there was in fact probable cause for the prosecution. In such a case, no action will lie. If probable cause exists, there can be no recovery, no matter how black the defendant's motives may have been. While a jury may be permitted to infer bad motive from lack of probable cause, they are not permitted to infer lack of probable cause because bad motive is shown.

Franzen v. Shenk, 221 P. 932, 192 Cal. 572, noted in 12 Cal. Law Rev. 310. *Barton v. Woodward*, 182 P. 916, 32 Idaho. 375, 5 A. L. R. 1090.

For other cases see Decennial Digests, Malicious Prosecution ⇨ 20, 64(2).

Q. 60. X brought nine successive civil suits against A, regarding the same subject-matter, all of which suits were decided in A's favor. X did not at any time cause the arrest of A, nor the seizure of A's goods. Has A a cause of action against X?

A. No; for aught that appears, the suits may have been reasonably founded, and X have been actuated by proper motives. Even had there been no probable cause for suit, and had X been suing from ulterior motives, there is much authority holding that no action will lie for such a prosecution of a civil action, where there has been no arrest of person or seizure of goods. *Wetmore v. Melinger*, 18 N. W. 870, 64 Iowa, 741, 52 Am. Rep. 465; *Luby v. Bennett*, 87 N. W. 804, 111 Wis. 613, 56 L. R. A. 261, 87 Am. St. Rep. 897. The argument is that the courts are open to all persons to assert claims, that to give an action against a person who has asserted an ill-founded claim would require giving it against one who has set up an equally ill-founded defense, and litigation would never end. Other authority, and a growing body of it in this country, takes the position that costs are no recompense to the defendant who won the first suit, and that, if he has been sued maliciously and without probable cause, a wrong has been done him, for which he should have a remedy. *Brand v. Hinchman*, 36 N. W. 664, 68 Mich. 590, 13 Am. St. Rep. 362; *Kolka v. Jones*, 71 N. W. 558, 6 N. D. 461, 66 Am. St. Rep. 615; *Shedd v. Patterson*, 134 N. E. 705, 302 Ill. 355, 26 A. L. R. 1004.

For other cases see *Decennial Digests*, Malicious Prosecution, ¶11.

Q. 61. D procured an information and caused P's arrest and trial on a criminal charge. P was convicted, but the conviction was reversed and P discharged. P then sued D for malicious prosecution. Evidence was offered of P's former conviction, to prove that there was probable cause for the prosecution. Should it be received?

A. The evidence should be received. The general rule is that conviction by the now plaintiff in the original criminal prosecution is conclusive that there was probable cause for instituting the proceeding against him. The reason is that, since an unbiased trier of the facts has found the accused guilty beyond a reasonable doubt, he cannot later be heard to say that there was not reasonable cause for the prosecution. Sometimes it is said that the conviction is only *prima facie* evidence that there was probable cause, but that to overthrow it there must be evidence of fraud or an equivalent to overcome it. In either way of stating the point, the evidence is

clearly admissible, and a contrary holding in *Dickson v. Young*, 200 N. W. 210, 199 Iowa, 589, seems incorrect. See *McElroy v. Catholic Press Co.*, 98 N. E. 527, 254 Ill. 290; 18 R. C. L. 38; L. R. A. 1916F, 196; *Kennedy v. Burbidge*, 183 P. 325, 54 Utah, 497, 5 A. L. R. 1682.

For other cases see *Decennial Digests*, Malicious Prosecution ⇨24(5), 58(3), 59(7), 71(2).

SECTION 16.—SLANDER AND LIBEL

Q. 62. A went into P's store to purchase a pair of shoes. On learning that P wanted an exorbitant price for the shoes, A angrily said to him: "You are a highway robber." B, another customer, was the only other person present during the transaction. B heard the entire discussion between A and P. B wrote a letter to his (B's) wife, in the course of which he stated: "A says that P is a highway robber." May P recover against A or B?

A. P has no cause of action. A charged P with a felony. That type of charge, even if oral, is actionable without proof of special damage. And there was publication, because the charge was made in the presence of a third party. But the liability for defamation comes in the impression which the words create upon the reader or hearer. *Hankinson v. Bilby*, 16 M. & W. 442; *Schaefer v. Shoenborn*, 111 N. W. 843, 101 Minn. 67. If the persons in whose presence they are spoken do not understand them in the defamatory sense, there is no liability. *Sullivan v. Sullivan*, 48 Ill. App. 435. So here, as B had heard all the conversation, he no doubt understood A's words as merely angry protest at the price P was asking for his shoes. And mere abuse, not charging crime or loathsome disease, or disparaging a man in his occupation, is not actionable, if spoken, in the absence of specific damage.

When B wrote that "A says P is a thief," he got no immunity, when he repeated another's statement. Tale bearers are as bad as tale makers, and a defamer gets no immunity because he repeats another's story. *Brewer v. Chase*, 80 N. W. 575, 121 Mich. 526, 46 L. R. A. 397, 80 Am. St. Rep. 527. A communication by a man to his own wife has been said not to be a publication, and so not a source of liability. *Wennhak v. Morgan*, 20 Q. B. D. 625. It would seem that this stretched the fiction of identity of the spouses further than necessary, and the same result might be reached by saying the communication in such cases was privileged.

For other cases see *Decennial Digests*, Libel and Slander ⇨7(1, 17), 24, 56(3).

Q. 63. John Smith was a speaker at a public meeting. The report of his speech, as published in the X newspaper, contained a libel on the plaintiff. Smith explained the matter to a reporter as follows: "It was a mistake. That part belonged to another address, and I did not deliver it last night. It must have got mixed with the manuscript of last night's address, when I handed the copy of it to the reporter. The two were close together on my desk during their preparation. I am not sure whether I should ever have delivered that part in its present form." Assuming Smith's statement is true, can there be a recovery against him or the newspaper?

A. The plaintiff can recover against either Smith or the newspaper. Smith handed a defamatory statement to the reporter. By turning it over to him, he of course authorized its publication. He mistook the defamatory statement for an innocent one, but nevertheless did authorize publication of the very statement printed. His situation is not different from other defendants, who have been held for libel, even though it was due to a mistake. See, for example, *Taylor v. Hearst*, 40 P. 392, 107 Cal. 262; *Hulbert v. New Nonpareil Co.*, 82 N. W. 928, 111 Iowa, 490.

The newspaper has published a libel. The occasion of the meeting is not stated. It might be that the meeting was such that a report of the proceedings would be a privileged report, as, for instance, a meeting of the state Legislature. But, even so, the privilege is limited to "fair" reports. This means an accurate report of what occurred, and this newspaper has published in its account something which was never said at the meeting at all. There is no privilege then, and the publisher is liable. See *Corrigan v. Bobbs-Merrill Co.*, 126 N. E. 260, 228 N. Y. 58, 10 A. L. R. 672; *Newby v. Times-Mirror Co.*, 160 P. 233, 173 Cal. 387, Ann. Cas. 1917E, 186.

For other cases see Decennial Digests, Libel and Slander ¶2, 21, 42(1), 49.

Q. 64. The defendant, A, published an account in his newspaper charging that Ralph Lomax had misappropriated public funds and that he was an embezzler. The address and occupation of Ralph Lomax were given. It appeared that Randolph Lomax was the person who had in fact been guilty of the offense, and that Ralph's name was used by mistake, but in good faith and without negligence on A's part. Ralph Lomax sues A for libel. Can he recover?

A. Ralph can recover. The charge is clearly defamatory, and there is no doubt that he is the person described in the article, even

though A meant to describe the person who had committed the crime. While it is still said that "malice" is an ingredient of an action for libel, it is well settled that, where the matter is not one concerning privileged communications, malice is "implied," which means that it is pure fiction. The defendant did publish the story; it was defamatory; the plaintiff was defamed. No more is necessary.

See *Landati v. Stea*, 117 A. 422, 44 R. I. 303, 26 A. L. R. 450.

Taylor v. Hearst, 40 P. 392, 107 Cal. 262.

Hulbert v. New Nonpareil Co., 82 N. W. 928, 111 Iowa, 490.

Washington Post Co. v. Kennedy, 3 F.(2d) 207, 55 App. D. C. 162.

10 Cornell Law Quart. 527.

38 Harv. Law Rev. 1100.

98 Cent. Law J. 222.

For other cases see Decennial Digests, Libel and Slander, ¶2, 21, 42(1).

Q. 65. A told B that C was a thief. B repeated the story to D and others. C sued A for slander, and evidence was admitted, over objection, of the reiteration of the statement by B to D and the others. A excepted. Should the exception be sustained?

A. The exception should not be sustained, though much, perhaps the numerical weight, of judicial opinion would support A's exception. A charge of crime is actionable slander. No occasion of privilege is shown. So A is clearly liable for the publication to B. But it has frequently been held that the original utterer of a defamation is not liable for its unauthorized repetition. This rule is based in part upon the fiction that such repetition is not a probable consequence of the first publication. Such a fiction hardly accords with the universal human characteristic of repeating an interesting story. In part it is rested upon the point that the third person's repetition is an independent tort, which cuts off the original defamer's responsibility. That it is also a tort by the person repeating seems no reason for removing liability from the original utterer, since it seems clearly a natural result of his act.

See *Prime v. Eastwood*, 45 Iowa, 640.

Sawyer v. Gilmers, Inc., 126 S. E. 183, 189 N. C. 7.

Maytag v. Cummins, 260 F. 74, 171 C. C. A. 110, 16 A. L. R. 712.

(liability of one responsible for original libel or slander for its repetition by third persons).

For other cases see Decennial Digests, Libel and Slander ¶28, 74, 101(1), 108, 123(9).

Q. 66. In a petition for a pardon for a convicted client, the defendant, a lawyer, alleged that the prosecution was instigated by A in conspiracy with others to ruin his client's reputation, and that A was a person of immoral character and unworthy of credence.

These allegations were made on the strength of the client's statements to counsel, who made no further investigation, and were in fact false. A brings suit against defendant for libel. Can he recover?

A. A cannot recover. Clearly the statements are defamatory. Had they been made in the course of the trial, there would have been no liability. Statements made by parties, witnesses, counsel and the judge in the course of judicial proceedings are not only privileged, but are what is called "absolutely privileged." The immunity is not lost by bad motive, unlike qualified privilege. In England, the rule of exemption is somewhat wider, at least as to counsel, than in this country, where it is required that, to be thus absolutely privileged, the statements must be pertinent to the case. Compare *Munster v. Lamb*, 11 Q. B. D. 588, and *La Porta v. Leonard*, 97 A. 251, 88 N. J. Law, 663, L. R. A. 1916E, 779, Ann. Cas. 1917E, 167. But here the statements are clearly pertinent, and there should be an absolute privilege, regardless of counsel's motive, if the application for pardon is to be treated, for this purpose, the same as the trial. It would seem that it should be, for it is a continuation of the legal process which is to terminate either in punishing the prisoner or letting him go free. And it has been so held. *Connelley v. Blanton* (Tex. Civ. App.) 163 S. W. 404; *Carpenter v. Ashley*, 83 P. 444, 148 Cal. 422, 7 Ann. Cas. 601.

For other cases see *Decennial Digests, Libel and Slander* ¶36, 38(5).

Q. 67. A letter charging him with theft was sent to the plaintiff. It was written partly by the manager and partly by the bookkeeper of the defendant corporation, and before being mailed was shown both to the bookkeeper and collector, to see if the statements were in conformity to the facts as they understood them. The charges were honestly and reasonably made, though in fact untrue. Can plaintiff recover from defendant?

A. Plaintiff cannot recover. The letter was defamatory clearly. The two questions are: (1) Was there a publication to a person other than the recipient? (2) Was the publication privileged? Some cases have held under similar facts that there was a publication, and that it was not privileged. *Pullman v. Hill* [1891] 1 Q. B. 524; *Gambrill v. Schooley*, 48 A. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414. Cf., however, *Boxsius v. Goblet Frères* [1894] 1 Q. B. 842, and *Edmondson v. Birch*, [1907] 1 K. B. 371. Other courts have said that when, as here, the persons who saw the communication were all employed by the same company, in whose

business the libelous matter was sent, there was no publication. *Owen v. J. S. Ogilvie Pub. Co.*, 53 N. Y. S. 1033, 32 App. Div. 465. It would seem, however, that a better view is to admit that there has been a publication, but to hold it privileged, since, under modern business conditions, the communication often cannot be directly between sender and recipient. Such privilege would not, of course, sanction unnecessary or unreasonable publicity. See *Globe Furniture Co. v. Wright*, 265 F. 873, 49 App. D. C. 315, 18 A. L. R. 772.

For other cases see Decennial Digests, Libel and Slander ¶25, 44(3), 51(4).

Q. 68. The defendant newspaper published an account of proceedings before the city council. The report was an accurate report, but it contained matter which defamed the plaintiff, who now seeks to recover against the newspaper. Will he succeed?

A. The plaintiff should not recover. It is a well-settled rule that reports, published with proper motives, of certain proceedings, are privileged, even though they contain matter defamatory of individuals. Such are reports of proceedings in courts of justice and reports of proceedings in Parliament or Congress. How far beyond this such reports give immunity for liability for defamation contained in them is not clearly settled. In England and several of our states, among which are New York, Wisconsin, California, and Texas, the matter has been regulated by statute. Even without statute, however, it would seem that the official proceedings of a city council are matters of such public interest that a report thereof should be privileged.

See *Leininger v. New Orleans Item Pub. Co.*, 101 So. 411, 156 La. 1044.

But compare *Trebbly v. Transcript Pub. Co.*, 76 N. W. 961, 74 Minn. 84, 73 Am. St. Rep. 330.

For other cases see Decennial Digests, Libel and Slander ¶42(2).

Q. 69. A had published several books in favor of artificial prevention of conception, and had established in a poor district in London a mother's clinic for teaching methods of birth control. She sues B and C, the author and publisher of a controversial book designed to expose the dangers of artificial birth control. A's activities were denounced as a "monstrous and a more serious crime than that for which Charles Bradlaugh was condemned to jail." Defendants set up the so-called "rolled-up plea," that in so far as the words complained of consist of allegations of fact they are true in substance, and in so far as they consist of expressions of opinion they are fair comments, made in good faith and without

malice on a matter of public interest. Is this a plea of justification in part, or a plea of fair comment only?

A. The House of Lords held it to be a plea of fair comment only, and that it is for the jury to say what is fact and what is opinion, and whether the facts are true and the opinions are fair comment. The averment that the facts are true is a necessary basis for the defense on the ground of fair comment. *Sutherland v. Stopes*, [1925] A. C. 47; *Triggs v. Sun Printing & Pub. Ass'n*, 71 N. E. 739, 179 N. Y. 144, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326; *Eikhoff v. Gilbert*, 83 N. W. 110, 124 Mich. 353, 51 L. R. A. 451. It is held in a few states that the qualified privilege protecting communications concerning the acts of a public officer is not lost because the commission of a crime is charged, and that probable ground of belief is a defense, though the charge is false in fact. *Snively v. Record Publishing Co.*, 198 P. 1, 185 Cal. 565. "The weight of authority favors what may be considered the narrow view—that while fair criticism and comment on the merits and demerits of candidates for office are privileged, if made in good faith, false statements of fact are not privileged." *Black v. State Co.*, Ann. Cas. 1914C, 997; 10 Cal. Law Rev. 84; 18 Mich. Law Rev. 104; *State v. Colby*, 126 A. 510, 98 Vt. 96, false charge of crime against candidate for office, though made in good faith, for beneficial purpose, and with belief in its truth, is not privileged.

For other cases see Decennial Digests, *Libel and Slander* ⇨2, 48(2, 3) 97, 149.

Q. 70. A said to B in confidence: "I advise you not to trust C, or have any dealings with him. I know of an instance in which he defrauded a poor woman, and robbed her of all she had." B repeated this to D, who was about to buy a farm from C, but because of this statement decided not to do so. C sued A for damages, based upon B's repetition of A's statement to him, claiming special damages by reason of the loss of the sale. Should he recover?

A. A is probably not liable. A short answer might be that B's apparently unauthorized repetition of A's statement is no ground for liability against A. This view would have considerable authority to support it, though some courts have been getting away from this holding as an absolute rule. See question 65. The rule of nonliability for repetition has been held not applicable, however, where the repetition was privileged and the original utterer held liable. *Bordeaux v. Joles*, 25 West. L. R. 894 (Alberta); 27 Harv. Law Rev. 389. If the communication from B to D was privileged,

there would then be a possibility of A's being held liable. The statement, though made orally, is actionable per se, since it charges a crime involving serious moral turpitude. If A made it to B in answer to a request from B, in contemplation of dealings with C, or to preserve some other legitimate interest B had in knowing about C, then A's statement is privileged, if made in good faith. If he was privileged in making it, he is not liable for making the statement, nor, it would seem, for its repetition. Whether the statement by B to D was privileged is not entirely clear from the facts. Some courts have said that one is not privileged in communicating to another defamatory matter in which the other only is concerned, in the absence of a request by the other, or some special relation between them that creates stronger moral duty to communicate than exists between persons who, so far as the law is concerned, are strangers. See *Joannes v. Bennett*, 5 Allen (Mass.) 169, 81 Am. Dec. 738. It would seem, however, that the better policy would give the privilege, where the communication was made in good faith, and where the recipient had a legitimate interest in the subject-matter.

For other cases see *Decennial Digests, Libel and Slander* ¶44(2).

Q. 71. P and D were rival undertakers in a small town. D printed and sent to X, a citizen of the town, whose wife was at the time seriously ill, a card reading as follows: "Bear in mind our undertaking department. Satisfaction guaranteed. [Signed] P." Has P a cause of action against D—

- (a) Upon proof of special damage?
- (b) Without proof of special damage?

A. P should have an action.

(a) Obviously D is not doing this advertising to help his business rival. He has intentionally taken this means of hurting P. He has made it appear that P is so greedy for business that he solicits it from one under circumstances at which a sense of decency and regard for other's feelings revolts. The impression thus created by D about his rival is, of course, a false one. P never sent the card. So D has intentionally harmed P, and, if P can show actual loss, he should clearly have recovery. The competition between P and D does not justify D's resorting to such fraudulent practices to injure his rival for business.

(b) Even without a showing of special damage, P ought to recover. The message sent in this way makes it appear that P is a vulture, wanting in human feelings and regard for others. This

impression is created by D's act, even more completely than if he had said it in so many words. Defamation may be by act, by picture, or by caricature. The liability should be no less because D's means are cruelly ingenious. See *Hughes v. Samuels Bros.*, 159 N. W. 589, 179 Iowa, 1077, L. R. A. 1917F, 1088.

Where the meaning of a written defamatory charge is clear on its face, the injury to reputation is actionable per se, without proof of special damage of a pecuniary nature. But if the meaning is covert, or hidden, or equivocal, some courts say that the charge is not libelous per se, and that the plaintiff must not only show by proper averment that the words have a defamatory meaning, and were so understood by the hearers, but must also allege and prove special damage, as in slander cases. It is believed that this is erroneous and represents a confusion between the rules applicable to libel and slander. The law protects the reputation as such against written defamation, but only against certain gross cases of spoken defamation or slander, except where pecuniary loss is shown. *Wiley v. Oklahoma Press Pub. Co.*, 233 P. 224, 106 Okl. 52, 40 A. L. R. 573; *Reid v. Providence Journal Co.*, 37 A. 637, 20 R. I. 120; *Hughes v. Samuels Bros.*, 159 N. W. 589, 179 Iowa, 1077, L. R. A. 1917F, 1088.

For other cases see *Decennial Digests, Libel and Slander* ¶1, 6(1), 7(7). 16, 19, 32, 80, 89(1).

SECTION 17.—INTERFERENCE WITH BUSINESS, CONTRACTS, ETC.

Q. 72. The defendant was using a city fire hydrant with the city's permission, one of the terms of which was that the defendant should only use it when not needed by the city in any of its departments. Fire broke out in the plaintiff's house, near the hydrant. The city fire department responded to an alarm, but the firemen were prevented from connecting the hose to the hydrant by the forcible interference of defendant's servants. As a consequence of the delay, the plaintiff's property was destroyed. Is defendant liable to plaintiff?

A. The defendant is liable. Plaintiff could not have recovered against the city, had the department failed to respond to the alarm. In that sense he had no "legal right" to fire protection. That fact, however, is not inconsistent with the existence of a right against one who, without justification, intentionally interferes with his opportunity to get it. A merchant has no "legal right" to compel customers to come to his store. But one who by force or intimidation prevents the customers from coming to the merchant is

liable. *Garret v. Taylor*, Cro. Jac. 567; *Tarleton v. M'Gawley*, Peake, 205. So here defendant, having intentionally prevented plaintiff from securing a benefit, should be liable for the loss. *Kiernan v. Metropolitan Const. Co.*, 49 N. E. 648, 170 Mass. 378; *Concordia Fire Ins. Co. v. Simmons Co.*, 168 N. W. 199, 167 Wis. 541; *Hurley v. Missouri, K. & T. Ry. Co.*, 156 S. W. 57, 170 Mo. App. 235.

For other cases see *Decennial Digests*, *Municipal Corporations* ⚡739(2), *Railroads* ⚡222(1); *Torts* ⚡11.

Q. 73. Defendants, representatives of a labor union, induced A to discharge C from his employ. C was employed by A under a contract which had several months to run. Defendants knew of the contract. They were actuated by no ill will toward C, but desired his discharge, so that the position could be filled by another of their own union. Can C recover from defendants?

A. C can recover. It is generally recognized now that, where one knowingly induces another to break a contract with a third person, an actionable tort is committed against that person, unless the procuring of the breach of contract is justified. What is justification is not clearly established. It is recognized, however, that absence of personal ill will toward the person injured is not sufficient to justify the tort; neither is the promotion of the economic interests of the actor or those whom he represents.

See *R. and W. Hat Shop v. Sculley*, 118 A. 55, 98 Conn. 1, 29 A. L. R. 551.

Beekman v. Marsters, 80 N. E. 817, 195 Mass. 205, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332.

George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, 79 A. 262, 77 N. J. Eq. 219, 41 L. R. A. (N. S.) 445.

For other cases see *Decennial Digests*, *Injunction* ⚡63, 101(2); *Master and Servant* ⚡339; *Torts* ⚡12.

Q. 74. A, a producer of plays, had a contract with B, an actor, to act for him in a certain play for a season of 30 weeks. C, a rival producer, knowing of the contract between A and B, induced B to repudiate his contract with A and to come and act for him. Can A maintain an action against C?

A. C is liable to A. The leading case on the subject is the English decision in *Lumley v. Gye*, 2 E. & B. 216, followed in *Bowen v. Hall*, 6 Q. B. D. 333, and *South Wales, etc., Federation v. Glamorgan Coal Co.*, [1905] A. C. 239. The doctrine probably had its foundation in the law growing out of the old statute of laborers, under which it was held actionable for one to entice away a servant in the employment of another. Applied first to contracts of

personal service, it was soon extended to other types of contracts, such as a contract to convey land, in *Kock v. Burgess*, 149 N. W. 858, 167 Iowa, 727, and the extension has been adopted by a majority, though not all, of the states in this country. It may be said, in general, that one who knowingly and intentionally procures a breach of an existing contract is liable, unless he can set up a justification. *Campbell v. Gates*, 141 N. E. 914, 236 N. Y. 457.

For other cases see *Decennial Digests, Torts* ⇨12.

Q. 75. Plaintiff was the manager of a theatrical troupe, and employed several chorus girls on a percentage scale of wages, with a minimum of \$8 a week. Certain actor's unions had formed a committee to set minimum wage rates, and defendants, as members of this committee, had concluded that \$15 a week was the smallest wage for which the service could be performed, and still permit the actors to live decently. Having been informed that at least one of the chorus girls employed by plaintiff was living in immoral relations with a male member of the troupe to augment her meager wages, the defendants, with the avowed intention of driving the plaintiff out of business, induced theater owners to break their contracts with the plaintiff. These contracts provided for exhibitions by plaintiff's troupe in various theaters. The plaintiff sues defendant to recover for damages sustained by the breaking of these contracts. Can he recover?

A. This set of facts came before the English court in *Brimelow v. Casson*, [1924] 1 Ch. 302, 93 L. J. Rep. 256, and it was held that no recovery could be had. The question presented is: What is sufficient justification for intentionally procuring a breach of contract? This has not, as yet, been marked out by the courts. It is clear that advancement of the economic interests of the one inducing the breach is not sufficient justification. *Beekman v. Marsters*, 80 N. E. 817, 195 Mass. 205, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332; *Westinghouse Electric Mfg. Co. v. Diamond State Fibre Co.* (D. C.) 268 F. 121. Nor is it sufficient for immunity from liability that the defendant has no hostile motive toward the plaintiff. *Read v. Friendly Society*, [1902] 2 K. B. 88. A father, who induces his child to break an engagement to marry, is not liable, however. *Jackson v. Morgan*, 94 N. E. 1021, 49 Ind. App. 376. And the same immunity has even been extended to a stranger, who induced a breach of an agreement to marry. *Homan v. Hall*, 165 N. W. 881, 102 Neb. 70, L. R. A. 1918C, 1195. In the question above, it may be urged that to induce a breach of the

contract was justifiable from the standpoint of the public's interest in good morals, since defendant was not paying his employees enough to live in decency. Whether they would be any better off if the defendant's business was broken up, and they deprived of employment altogether, is a serious question. 34 Yale Law J. 213, 32 Yale Law J. 171; 38 Harv. Law Rev. 115.

For other cases see Decennial Digests, Injunction ⚡63; Torts ⚡12.

Q.76. Defendants, members of a labor union, threatened to strike unless the employer would discharge all the nonunion men in his employ, and agree to hire only union men thereafter, if they were available. Is such conduct legal?

(a) Suppose defendants threaten labor troubles against the employer's customers, to coerce him indirectly?

A. It is clear that workmen may combine to bargain collectively with employers for better hours, working conditions, etc. They may strike, or threaten to strike, for this purpose. If they may bargain collectively, there seems strong argument for saying that they may use the strike, or threat of it, to secure the kind of organization that will make such bargaining effective. This, it may be urged, can come only through a so-called "closed shop." Fraud, violence, intimidation, and inducing breach of contract may be laid aside as illegal, no matter what the object is that the action is intended to secure. Strikes for closed shop and closed shop agreements have met with divergent treatment by courts, and even individual judges of the same court. See *Kemp v. Division* 241, 99 N. E. 389, 255 Ill. 213, Ann. Cas. 1913D, 347; *Curran v. Galen*, 46 N. E. 297, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496; *National Protective Ass'n of Steam Fitters and Helpers v. Cumming*, 63 N. E. 369, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648.

(a) A secondary boycott, coercing third persons not to deal with the employer by threat to strike, in order to compel him to unionize his plant, is unlawful by most authorities, and will be enjoined. *Auburn Draying Co. v. Wardell*, 124 N. E. 97, 227 N. Y. 1, 6 A. L. R. 901; *Duplex Printing Co. v. Deering*, 41 S. Ct. 172, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196 (on the boycott as a weapon in industrial disputes).

For other cases see Decennial Digests, Contracts ⚡116(3); Injunction ⚡101(1, 2); Master and Servant ⚡341; Monopolies ⚡12(1); Torts ⚡10; Trade Unions ⚡1, 8.

Q. 77. The plaintiff had for many years been in the business of making watches at Waltham, Mass., and these watches had become known to the buying public as "Waltham" watches. The defendant, another manufacturer of watches, opened up a factory in Waltham, and began manufacture, describing his product also as Waltham watches, and so placing the name on the dial and in the case of the watch. Evidence showed that buyers were led to believe that the product of the defendant was that of the plaintiff. Plaintiff seeks an injunction to prevent the defendant from selling his product as Waltham watches, unless he gives such additional description as to indicate that the product is not that of the plaintiff. Should relief be granted?

A. It should. There is no doubt of the defendant's right to engage in the business of making watches. Nor can the plaintiff claim a trade-mark upon the geographical name. But he has the right not to have business rivals deceive those who might be customers of his, by making the possible customers think that they are getting the plaintiff's goods, when in fact they are getting those of another. Such "passing off" is unfair competition, and constitutes a tort, for which the plaintiff is entitled to appropriate equitable or legal relief.

See *American Waltham Watch Co. v. U. S. Watch Co.*, 53 N. E. 141, 173 Mass. 85, 43 L. R. A. 826, 73 Am. St. Rep. 263.

Trapney v. McIlheny Co. (C. C. A.) 281 F. 23.

For other cases see *Decennial Digests*, Trade-Marks ¶9, 71.

Q. 78. Defendants, members of a labor union, called a strike to force their employer to discharge A, the employer's foreman. The foreman was not objected to because of any conduct inimical to the welfare or comfort of the men, but because they disliked the foreman. The employer discharged A. Can he recover from defendants?

A. It has been held on similar facts that A could recover. *De Minico v. Craig*, 94 N. E. 317, 207 Mass. 593, 42 L. R. A. (N. S.) 1048. The defendants have caused an injury through pressure on a third party, their common employer. They have not done this in furthering any legitimate interest of their own, such as better working conditions or hours, but to gratify personal ill will. This seems an insufficient justification. The case, however, is very close to one where defendants might have exercised their undoubted privilege of ceasing work for whatever reason they pleased. Had they quit,

and, upon inquiry, told the employer why, and he induced them to come back by discharging A, could the latter complain?

For other cases see Decennial Digests, Master and Servant ⚡341.

Q. 79. The D Insurance Company had insured X, a manufacturer, against liability to his employees; the policy contained a provision that it might at any time be terminated by the D Company upon five days' notice. P, a day laborer in the employ of X, was injured in the course of his employment, and brought action against X to recover compensation for his injuries. The D Company, which was defending the suit, notified X that his policy would be terminated unless X promptly discharged P. This was done for the purpose of forcing P to agree to a settlement in the suit. X thereupon discharged P. Has P a cause of action against the D Company?

A. The plaintiff should recover, though the case is a close one, and authorities are divided. The defendant has intentionally caused injury to the plaintiff, because it has caused him the loss of his employment. What reason has defendant to set up to show he is not liable to the plaintiff for the loss so inflicted? It might be said that defendant had a "right" to terminate the insurance contract any time it pleased. Compare *Raycroft v. Tayntor*, 35 A. 53, 68 Vt. 219, 33 L. R. A. 225, 54 Am. St. Rep. 882. It does not follow that because it could so terminate the contract, it could threaten to do so, in order to secure injury to a stranger to it. Defendant and plaintiff had a clash in economic interest, of a sort perhaps broader than is commonly called competition. Here defendant uses its power to inflict injury by pressure on a third person, and to compel the surrender of a right not connected with the employment. This, it has been held, is an actionable invasion of P's right, for which he can recover. *London Guarantee & Accident Co. v. Horn*, 69 N. E. 526, 206 Ill. 493, 99 Am. St. Rep. 185; *United States Fidelity & Guaranty Co. v. Millonas*, 89 So. 732, 206 Ala. 147, 29 A. L. R. 520.

For other cases see Decennial Digests, Insurance ⚡93; Master and Servant ⚡341.

Q. 80. The defendant, superintendent of an Old Soldiers' Home, forbade the men who lived in the home to visit the plaintiff's restaurant, which plaintiff maintained a short distance from the home, and which was much frequented by the men. The ground on which the order was made was defendant's honest belief that the premises were being used for the illegal sale of liquor. Can plaintiff recover?

A. Plaintiff cannot recover. He has suffered an injury in being deprived, through pressure by defendant, of the patronage of those who live at the home. But the defendant, acting in his official capacity, and bona fide for what he believes for the best interests of the men, has a complete justification for his conduct.

See *Rowan v. Butler*, 85 N. E. 714, 171 Ind. 28.

See *Lewis v. Huie-Hodge Lumber Co.*, 46 So. 685, 121 La. 658.

For other cases see *Decennial Digests*, Army and Navy §52; Conspiracy §8; Torts §10.

Q. 81. Defendant was the proprietor of a successful patent medicine business. Plaintiff, a newspaper owner, published in his paper a series of articles attacking the defendant and the business in which he was engaged. Defendant thereupon bought X, a rival newspaper in the same city, and secured so many subscribers and advertisers, that plaintiff's paper failed from want of patronage. One of defendant's motives in becoming a rival publisher was to revenge himself upon the plaintiff for the latter's attacks. Can the plaintiff recover?

A. The plaintiff cannot recover. One way of answering the question would be to say that a man has a "right" to engage in lawful business, and the motives with which he exercises the "right" do not matter. A better way is to start with the premise that intentional damage inflicted upon another is actionable, unless justified. See *Aikens v. Wisconsin*, 25 S. Ct. 3, 195 U. S. 194, 204, 49 L. Ed. 154. But injuries suffered by one person in fair business competition with another are not the basis of recovery of damages. This is a rule of policy, based upon the desirability of free competition. But, if one pretends to compete with another, for the sole purpose of satisfying animosity toward the other, it has been held that an action will lie. *Tuttle v. Buck*, 119 N. W. 946, 107 Minn. 145, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807. However, this must not be widely extended. Personal animosity between business rivals is not uncommon; if bad motive on the part of a competitor made his competition actionable in every case, freedom of competition would be seriously affected. The action should be limited to cases of "disinterested malevolence." See *Beardsley v. Kilmer*, 140 N. E. 203, 236 N. Y. 80, 27 A. L. R. 1411; 22 Mich. Law Rev. 57; 32 Yale Law J. 194; 38 Harv. Law Rev. 121.

For other cases see *Decennial Digests*, Conspiracy §8, 30; Torts §10.
Note.—For questions on conversion, see *Bailments and Personal Property*.

TRUSTS

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Section

1. Trusts Distinguished from Other Transactions.
2. Creation of a Trust.
3. Resulting Trusts.
4. Constructive Trusts.
5. Invalid Trusts.
6. Charitable Trusts.
7. Duties and Liabilities of Trustees.
8. Rights and Remedies of Cestui.
9. Termination of Trusts.
10. Purchase for Value Without Notice.

SECTION 1.—TRUSTS DISTINGUISHED FROM OTHER TRANSACTIONS

Q. 1. Bank A sent to bank B a draft drawn on C, payable to bank A, and indorsed by bank A to bank B "for collection." After collecting the draft from C, the cashier of bank B directed a clerk to credit bank A on their mutual account. Before this credit has been given, and on the next day, bank B is closed as insolvent. Can bank A obtain from the receiver of bank B the whole amount of the collection, or merely a part?

A. A part only. In order to recover the whole amount, bank A would have to prove that bank B was a trustee of the fund. This it cannot do. Bank B was a debtor. The funds collected were usable by bank B as its absolute property. There was no duty to send to bank A the coins and bills received from C. The specific "res" or subject-matter, required in a trust, is absent.

Plumas County Bank v. Bank of Rideout, Smith & Co., 131 P. 360, 165 Cal. 126, 47 L. R. A. (N. S.) 552.

Tinkham v. Heyworth, 31 Ill. 519.

For other cases see *Decennial Digests, Banks and Banking* ⇨ 156, 166(4), 216.

Q. 2. A pays \$200 to the B bank on the promise of that bank to cable to Paris, France, to the C bank a credit for A of a certain sum in francs. Before cabling the credit, the B bank fails. What are the rights of A against the representatives of the B bank?

A. A cannot recover the \$200, but merely a dividend out of the assets of the bank. He is a creditor, who has bought foreign credit. The \$200 became the absolute property of the B bank. It was not to be held by it separately as a trust fund.

Legniti v. Merchants & Metals Nat. Bank, 130 N. E. 597, 230 N. Y. 415, 16 A. L. R. 185.

For other cases see *Decennial Digests, Trusts* ⇨ 33, 101.

Q. 3. A devises to her son B a farm, "with the obligation to support C for the rest of his (C's) life, and such duty to support is made a lien upon the farm." B accepts the devise, but refuses to support C. Can C enforce a trust against B?

A. Most courts would construe this to create an equitable charge, and not a trust. While B's duty relates to a specific subject-matter, namely, the farm, B is entitled to the income from the farm over and above what is necessary to support C. A trustee does not receive the income of the trust property for his own benefit.

Merchants' Nat. Bank v. Crist, 118 N. W. 394, 140 Iowa, 308, 23 L. R.

A. (N. S.) 526, 132 Am. St. Rep. 267.

Loder v. Hatfield, 71 N. Y. 92.

For other cases see *Decennial Digests*, Wills ¶673, 821(1).

Q. 4. An uncle writes to a nephew: "I have a \$1,000 Pa. R. R. bond No. M2654, which I am going to hand you Saturday when I see you. It will be yours to use as you like." The uncle and nephew have an engagement to meet the following Saturday, but the uncle dies Friday. Can the nephew enforce a trust in the bond, which is found among his uncle's papers?

A. No; the uncle intended a gift of the legal interest in the bond, to be perfected by delivery on Saturday. He did not desire to create a trust of the bond, and thus give the nephew an equitable interest in it. Equity will not turn an incomplete gift of a legal interest into a trust.

Smithwick v. Bank of Corning, 130 S. W. 166, 95 Ark. 463.

For other cases see *Decennial Digests*, Trusts ¶34(2).

Q. 5. A is named in a will as executor and trustee, and directed to hold the balance of the estate in trust for B, after the payment of all claims. A has paid all debts of the testator, and converted all the property into money, which now stands in his name as executor in a bank; but he has not set up any trust fund, or made any trust investments. Can B enforce a trust against the bank account?

A. Yes; the duties of executor and trustee are distinct. Where the same person occupies both positions, he will be treated as a trustee, when he has completed his duties as executor and ought to have set up the trust fund, although he has not actually done so.

Fenton v. Hall, 85 N. E. 936, 235 Ill. 552.

Jones v. Broadbent, 123 P. 476, 21 Idaho, 555.

For other cases see *Decennial Digests*, Trusts ¶156, 171.

SECTION 2.—CREATION OF A TRUST

Q. 6. A leaves all his property by will to his son, B, and includes in the will the following clause: "I request B to make such provision as is possible for the wants of my sister, C, either out of the income of the farm, or from the dividends on my stocks." B accepts the gift, but fails to pay anything to or for C. Can C enforce a trust?

A. No; this precatory expression of the testator will not be held to create a trust, because of the indefiniteness of the duties and the subject-matter. If a trust had been intended, either the farm or the stock would have been fixed as the subject-matter. The discretion left to B shows that he is to be under no legal or equitable obligation.

Williams v. Worthington, 49 Md. 572, 33 Am. Rep. 286.

Whitesel v. Whitesel, 23 Grat. (Va.) 904.

For other cases see Decennial Digests, Wills ⌘675.

Q. 7. A agrees with B that he (A) will henceforth hold in trust for B a farm of which A is the fee owner. There is no writing to show the understanding. Later A writes B a letter, fully describing the farm and the terms of the oral trust. Later A repudiates the trust. Can B enforce it?

A. Yes; in most states. In a majority of states, a trust of realty is required to be "manifested or proved" by a writing. This does not mean that the creation of the trust must be accomplished by a written instrument. A writing made after the trust was created is satisfactory.

Gaylord v. City of Lafayette, 17 N. E. 899, 115 Ind. 423.

White v. Fitzgerald, 19 Wis. 480.

For other cases see Decennial Digests, Trusts ⌘21 (2), 25 (1).

Q. 8. A father states to his son that he will create a trust of certain definite bonds for the son, and will deliver the necessary papers to a trust company on the next day. The father changes his mind. The son is disappointed, and inquires whether he can enforce a trust.

A. No; the father's promise to create a trust was without consideration. Equity will not compel the settlor of an incomplete voluntary trust to perfect it, nor is there any reason for the creation of a constructive trust.

Estate of Webb, 49 Cal. 541.

Hamilton v. Hall's Estate, 69 N. W. 484, 111 Mich. 291.

For other cases see Decennial Digests, Trusts ⌘13, 30½ (1).

Q. 9. A husband transfers to a trust company \$100,000 in bonds, to be held in trust for his wife. For this the wife pays no considera-

tion. The transaction is entirely voluntary on the part of the husband. Later the wife procures a divorce, and the husband directs the trust company to cease paying income to his former wife. Has she any remedy?

A. Yes; she may enforce the trust. Lack of consideration is of no importance in the case of a completely established trust. The husband has no control over the trust.

Padfield v. Padfield, 72 Ill. 322.

Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505.

For other cases see *Decennial Digests*, Trusts $\S$ 13.

Q. 10. A executes a deed of his farm to a trust company and has it recorded. The deed provides for a trust in favor of A's wife. Shortly thereafter A dies. The widow and the trust company learn of the deed for the first time after A's death. Is the trust enforceable by the widow?

A. Yes; neither knowledge of the trust nor acceptance of it by trustee or beneficiary is necessary to the creation of a trust. Acceptance on the part of both is presumed. The trust was complete prior to A's death.

Adams v. Adams, 21 Wall. 185, 22 L. Ed. 504.

For other cases see *Decennial Digests*, Trusts $\S$ 22, 38.

Q. 11. A deposits \$1,000 of her own money in a bank, and directs the account to be made out, "A in trust for B." This is done. B is a nephew of A. Thereafter A tells B about the account. A dies, leaving the account untouched. Can B enforce a trust in the account?

A. Yes; while the mere deposit is regarded as equivocal, and not of itself sufficient to show an intent to create a trust, the subsequent conduct of the depositor in notifying B and leaving the money there till death shows an intention to establish a real trust.

Alger v. North End Sav. Bank, 15 N. E. 916, 146 Mass. 418, 4 Am. St. Rep. 331.

Farleigh v. Cadman, 53 N. E. 808, 159 N. Y. 169.

For other cases see *Decennial Digests*, Gifts $\S$ 49(1); Trusts $\S$ 34(1).

SECTION 3.—RESULTING TRUSTS

Q. 12. A buys land and directs the seller to make the deed run to B, who is a friend of A, but knows nothing of the transaction. The entire purchase price is paid out of A's funds. The deed is made out as directed, and is recorded. B learns of this, and claims the property as his own. Has A any remedy?

A. Yes. He may have B declared a resulting trustee of the land in favor of A. The law presumes that A did not intend to give B this land, but that A intended to get value for his money by the establishment of a trust for his (A's) benefit.

Spradling v. Spradling, 142 S. W. 848, 101 Ark. 451.

Summers v. Moore, 18 S. E. 712, 113 N. C. 394.

For other cases see *Decennial Digests, Trusts* ¶72.

Q. 13. A pays for land and has the seller make the deed to B. B refuses to hold for A, and claims that no trust is enforceable, because there is no written evidence of a trust in land. Is B right?

A. No. The statute of frauds has no application to resulting or constructive trusts. They may be proved by oral evidence.

Cable v. McCollum, 27 Ala. 461.

Lehring v. Lehring, 115 P. 556, 84 Kan. 766.

For other cases see *Decennial Digests, Trusts* ¶18(1), 63½.

Q. 14. A deeds property to a trustee, to pay over the net income to A's wife during her life or widowhood. A dies and his widow remarries. The deed contains no provision regarding the property in this event. What should the trustee do with it?

A. The trustee holds under a resulting trust for the persons who took the land of A at his death—either his heirs or devisees. The express trust for the widow has been completely executed because of her remarriage. The law implies a trust for the settlor or his successor, as presumably intended by the settlor.

Drew v. Wakefield, 54 Me. 291.

Broadrup v. Woodman, 27 Ohio St. 553.

For other cases see *Decennial Digests, Trusts* ¶68.

Q. 15. A owned a vacant lot. B advanced money to contractors to enable A to construct a house on the lot. The house is complete, and B claims a resulting trust in the land on account of his advances. What result?

A. There is no trust. Payments made for improvements on land do not cause a resulting trust to arise. The payment must be for the original purchase price of the land.

Bodwell v. Nutter, 3 A. 421, 63 N. H. 446.

Krauth v. Thiele, 18 A. 351, 45 N. J. Eq. 407.

For other cases see *Decennial Digests, Trusts* ¶63¾.

Q. 16. W inherited from her father a one-fourth interest in a farm of 100 acres, worth \$10,000. H, the husband of W, bought the farm from the heirs, paying \$7,500 of his own money, and receiving \$2,500 credit on the purchase price on account of W's interest. Later H

died, without having paid anything to W on account of her contribution to the price of the land. Can W enforce a trust against the farm?

A. Yes; to the extent of a one-fourth interest. There is no presumption of a gift from wife to husband. The wife paid an aliquot part of the purchase price, and title was taken in the name of the husband. The law presumes an intent on the part of the wife that she shall receive an interest in the land in return for her money.

Hinshaw v. Russell, 117 N. E. 406, 280 Ill. 235.

For other cases see *Decennial Digests, Trusts* ¶79.

Q. 17. H paid \$6,000 for a lot of land, and had the title taken in the name of W, his wife. W repudiates any trust for H. H offers to prove that there was an express understanding that there should be no gift to the wife, and that she would hold subject to her husband's order. Should this offer of testimony be accepted?

A. Yes. Although there is a presumption that the husband made a gift to his wife, arising out of his duty to support her, yet this presumption may be overcome by evidence of an agreement for a trust or by evidence contradicting a gift.

Price v. Kane, 20 S. W. 609, 112 Mo. 412.

Woodward v. Woodward, 131 N. W. 188, 89 Neb. 142.

For other cases see *Decennial Digests, Trusts* ¶81(2), 88.

Q. 18. P, a principal, consents that A, his agent, shall take \$1,000 of P's money and buy land in the name of A, with no mention of the agency in the deed. Later A claims that he may hold for himself, and denies any rights in the land in favor of P. What are P's rights?

A. P may have it adjudged that A is a resulting trustee for P. The law presumes an intent on the part of P that he should get the benefit of the purchase. He did not get the legal title, but the law will give him the equitable.

Thompson v. Hartline, 16 So. 711, 105 Ala. 263.

Waterman v. Buckingham, 64 A. 212, 79 Conn. 286.

For other cases see *Decennial Digests, Trusts* ¶84.

SECTION 4.—CONSTRUCTIVE TRUSTS

Q. 19. T steals a bag of money, and with it buys negotiable bonds, the seller knowing nothing of the theft. A, from whom the money was stolen, asks whether he has any rights in the bonds.

A. A may have T declared a constructive trustee of the bonds. T obtained the legal title to them, but they are the proceeds of A's

money, and equity will trace the proceeds and fasten to them a constructive trust, to prevent unjust enrichment.

Pioneer Mining Co. v. Tyberg, 215 F. 501, 131 C. C. A. 549, L. R. A. 1915B, 442.

Lamb v. Rooney, 100 N. W. 410, 72 Neb. 322, 117 Am. St. Rep. 795.

For other cases see *Decennial Digests*, Trusts ¶95.

Q. 20. A orally agrees with B that he will purchase land for B from C. A purchased the land with his own money, but repudiates his promise. Has B any remedy against A on the theory of a constructive or resulting trust?

A. No; the statute of frauds makes A's promise unenforceable, and refusal to perform a promise which the law will not enforce is not fraud, in the view of a court of equity. Otherwise, the statute of frauds would be avoided in this case. B must show that the land was bought with his money, and not merely for his benefit.

Lyons v. Bass, 34 S. E. 721, 108 Ga. 573.

Ostheimer v. Single, 68 A. 231, 73 N. J. Eq. 539.

For other cases see *Decennial Digests*, *Frauds*, *Statute of* ¶74(1); *Trusts* ¶18(6), 66, 72, 77, 99.

Q. 21. A conveys realty to B on B's oral agreement to hold the land in trust for A. B intended to keep his promise, but later changed his mind, and denies that he made any such agreement. Has A any remedy in the law of trusts?

A. No; generally not. The statute of frauds requires trusts of realty to be proved by writing, and equity does not regard violation of a verbal promise to hold for the grantor as fraud sufficient to give rise to a constructive trust, unless the grantee solicited the conveyance, or had an actual fraudulent intent at the time of the promise, or violated some confidential relation.

Jasinski v. Stankowski, 125 A. 684, 145 Md. 58, 35 A. L. R. 275.

Titcomb v. Morrill, 10 Allen (Mass.) 15.

Patton v. Beecher, 62 Ala. 579.

For other cases see *Decennial Digests*, Trusts ¶13, 96.

Q. 22. A, a girl just 21 and with no business experience, conveys land to B, her brother, aged 40, who has managed all her business affairs for her for years, on B's oral promise that he will hold the land in trust for A and convey as she directs. Later B denies the promise and holds for himself. Has A any remedy?

A. Yes; she may charge B as a constructive trustee. Equity will not permit B to take advantage of the confidential relation existing between him and A to obtain an unconscionable advantage over the

confiding beneficiary. The courts say the trust arises from the abuse of the confidential relationship.

Bradley Co. v. Bradley, 131 P. 750, 165 Cal. 237.

Erdman v. Kenney, 167 S. W. 685, 159 Ky. 509.

See Jasinski v. Stankowski, 125 A. 684, 145 Md. 58, 35 A. L. R. 275.

For other cases see Decennial Digests, Trusts $\Leftrightarrow$ 18(6), 92½, 96, 100.

Q. 23. A devised realty to B. After A's death, and after B had accepted the devise, an informal paper was discovered in A's handwriting, directing B to hold the property in trust for C and pay C the income thereof. B declines to do this, and C seeks to establish the trust. What result?

A. B may hold absolutely. He is under no duty to C. Since B did not obtain the property with knowledge that he was expected to hold it in trust, there is no inequity in allowing him to keep it for himself. To graft a trust on the devise would be to violate the statute of wills, which requires wills to be written and witnessed.

Bryan v. Bigelow, 60 A. 266, 77 Conn. 604, 107 Am. St. Rep. 64; Nash v. Bremner, 92 A. 938, 84 N. J. Eq. 131.

For other cases see Decennial Digests, Trusts $\Leftrightarrow$ 35(3), 97.

Q. 24. A owns a farm, and asks B if B will hold the farm in trust for A's sons, X and Y, provided A devises the farm to B. B replies in the affirmative. Later A makes his will accordingly, and dies leaving the farm to B. B now holds for his own benefit, and repudiates any trust for X and Y. Have they any remedy?

A. Yes; they may hold B as a constructive trustee for themselves. Equity regards this as such fraud as to create a constructive trust for the purpose of preventing B's unjust enrichment.

Ahrens v. Jones, 62 N. E. 666, 169 N. Y. 555, 88 Am. St. Rep. 620.

Orth v. Orth, 42 N. E. 277, 44 N. E. 17, 145 Ind. 184, 32 L. R. A. 298, 57 Am. St. Rep. 185.

37 Harv. Law Rev. 653.

For other cases see Decennial Digests, Trusts $\Leftrightarrow$ 35(3), 96.

Q. 25. C, a client, transfers property directly to his attorney, and later desires to get the property back. What are his rights?

A. Because of the confidential relationship, equity scrutinizes such a transfer with great care. The burden is on the attorney to show its fairness. If he can show openhanded dealing, full knowledge by the client, and a fair price, any presumption of fraud will be overcome, and C's attempt to have the attorney declared a constructive trustee will fail.

Yeamans v. James, 27 Kan. 195.

Gray v. Emmons, 7 Mich. 533.

For other cases see Decennial Digests, Attorney and Client $\Leftrightarrow$ 123(1, 2).

SECTION 5.—INVALID TRUSTS

Q. 26. T leaves a will, by which he gives realty and personalty to B in trust for C. No purposes or details of administration are given. What are C's rights?

A. The trust is passive. Under the Statute of Uses, C is the holder of the legal title to the realty. By analogy, many courts give C the title, or the right to the title, to the personalty. There is no reason for keeping the trust alive.

Marshall v. Fisk, 6 Mass. 24, 4 Am. Dec. 76.

Prince de Bearn v. Winans, 74 A. 626, 111 Md. 434.

For other cases see Decennial Digests, Liens ⇨15; Trusts ⇨131.

Q. 27. T leaves realty and personalty to a trustee, directing that the income be paid to C for his life, "the right to the income not to be capable of being alienated by C, and not to be subject to the claims of C's creditors." A transferee of the right to the income and a creditor of C ask whether they have any rights against the trustee.

A. No; not in most states. This is a spendthrift trust, and such trusts are enforced generally. Transferees and creditors have no rights until the income is paid to C.

Wagner v. Wagner, 91 N. E. 66, 244 Ill. 101, 18 Ann. Cas. 490.

Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504.

For other cases see Decennial Digests, Trusts ⇨12; Wills ⇨674.

Q. 28. A transferred to B \$100,000 in bonds, with a direction that B hold them in trust for A, and pay the income therefrom to A for his life, free from all claims of his creditors. Later C became a judgment creditor of A, and seeks to subject the trust property in the hands of the trustee to his claim. What result?

A. C should succeed. The spendthrift trust attempted here was created by the settlor for his own benefit. The courts do not sustain such trusts, but require that the cestui be another than the settlor. This is to prevent fraud on creditors.

McColgan v. Walter Magee, Inc., 155 P. 995, 172 Cal. 182, Ann. Cas. 1917D, 1050.

Schenck v. Barnes, 50 N. E. 967, 156 N. Y. 316, 41 L. R. A. 395.

For other cases see Decennial Digests, Trusts ⇨12, 152, 153.

SECTION 6.—CHARITABLE TRUSTS

Q. 29. W died, leaving a will containing the following clause: "I bequeath \$1,000, the income from which is to be used to feed and care for my dog, Dick." The executor brings a bill to obtain the instructions of the court. What result?

A. The lack of a trustee is not fatal. Equity will supply one. But the purpose is not charitable, the beneficiary is not a person, and the trust is void, unless, as in Kentucky, the statute permits trusts for "humanitarian purposes," as well as for charitable purposes.

Willett v. Willett, 247 S. W. 739, 197 Ky. 663, 31 A. L. R. 426.

For other cases see Decennial Digests, Charities ⇨10; Trusts ⇨160(2).

Q. 30. Citizens of Indianapolis subscribed a fund to buy land for an industrial school, it being proposed that an existing corporation, the Winona School, take over the land as a part of its plant, when it had raised a certain endowment. About \$150,000 was paid in by about 1,200 persons for the industrial school fund, and it was invested in land. Later the Winona School became insolvent, and its endowment campaign failed. The trustees, holding the land bought with the \$150,000, ask instructions from equity. Many of the subscribers want their money returned. The city of Indianapolis petitions the court to order the trustees to deed the land to the city as trustee to operate an industrial school. Under its charter it has power to take such action. What decree should equity make?

A. It would be reasonable to make the decree requested by the city. The original trust purpose has failed. Under the cy pres doctrine, equity will carry out a charitable trust as nearly as possible according to the settlor's plan, if the exact plan is not practicable, due to a change in circumstances. This doctrine applies to gifts inter vivos as well as by will.

Richards v. Wilson, 112 N. E. 780, 185 Ind. 335.

For other cases see Decennial Digests, Charities ⇨37.

Q. 31. A leaves money to trustees, to provide free beds in a hospital for any applicants deemed worthy by the trustees. The next of kin of A attack the trust on the ground that the income may be used to furnish free beds to those abundantly able to supply their own beds, and that the gift is not confined to aiding the poor. What result?

A. The trust is a valid charitable trust. Charity does not consist merely in almsgiving or aiding the poor. Relief of suffering among all classes is charitable.

Little v. City of Newburyport, 96 N. E. 1032, 210 Mass. 414, Ann. Cas. 1912D, 425.

Godfrey v. Hutchins, 68 A. 317, 28 R. I. 517.

For other cases see Decennial Digests, Charities ⇨1.

Q. 32. A left money to be invested and the income to be paid by trustees to B, C, and D, during any time of sickness or special need on their part. Is this a valid charitable trust?

A. No; it is a private trust, since the beneficiaries are three definite persons. A charitable trust requires indefinite beneficiaries. There must be a class from which the trustees shall select.

Moseley v. Smiley, 55 So. 143, 171 Ala. 593.

Ripley v. Brown, 105 N. E. 637, 218 Mass. 33.

For other cases see *Decennial Digests, Charities* ⇐1, 10, 22(2).

Q. 33. T left money to trustees, to invest and pay over the income once every three years to a Jewish girl, to be selected by the trustees, upon the occasion of her marriage. Is this a valid charitable trust?

A. Such a trust has been held to be charitable, as encouraging marriage and tending to the support of a religion. The result, however, seems doubtful, since the tendency to aid either worthy cause seems very remote.

In *re Cohen*, 36 T. L. R. (Eng.) 16, 33 Harv. Law Rev. 472.

For other cases see *Decennial Digests, Charities* ⇐11, 13.

Q. 34. A testator left money to trustees, to pay the income out for the purpose of establishing tennis courts at a boys' school and giving athletic prizes there. Is this a charitable trust?

A. Yes; it encourages wholesome play, and contributes to the good health of the nation. This is a public benefit.

In *re Mariette*, 113 L. T. R. 920.

In *re Nottage*, [1895] 2 Ch. 649.

For other cases see *Decennial Digests, Charities* ⇐10, 14.

Q. 35. A testator left land to trustees, the income to be used for missionary purposes in whatever field the trustees thought best. The trust was attacked by the heirs at law as too indefinite to be enforceable as a charity. What result?

A. The contention of the heirs has been supported in a recent case. The nature of the charity must be sufficiently clear to enable the trustee to tell whether he is carrying out the settlor's intent or not. Whether the trust purpose is definite enough is often a close question of fact.

Jones v. Patterson, 195 S. W. 1004, 271 Mo. 1, L. R. A. 1917F, 660.

For other cases see *Decennial Digests, Charities* ⇐4, 22(5).

Q. 36. Money is left to trustees to pay the income to clergymen for the purpose of having masses said for the souls of the testator and his relatives. Is this a charitable trust?

A. Yes; it is treated as a trust for the furtherance of religious objects, and thus conferring benefits on all or some members of the church.

Hoeffer v. Clogan, 49 N. E. 527, 171 Ill. 462, 40 L. R. A. 730, 73 Am. St. Rep. 241.

In re Morris, 124 N. E. 724, 227 N. Y. 141.

For other cases see *Decennial Digests*, Charities ¶16.

Q. 37. Money is left to trustees to use the income for the upkeep and preservation of a private burial plot and monument for all time. Is this gift valid?

A. No; in the absence of statute. There is no public benefit. The perpetual trust is said to be opposed to the rule against perpetuities. Many states have statutes allowing such trusts as charitable.

In re Gay's Estate, 71 P. 707, 138 Cal. 552, 94 Am. St. Rep. 70.

Detwiller v. Hartman, 37 N. J. Eq. 347.

For other cases see *Decennial Digests*, Charities ¶10, 20(1); Perpetuities ¶8(7).

SECTION 7.—DUTIES AND LIABILITIES OF TRUSTEES

Q. 38. A voluntarily creates a trust for his family, providing for the distribution of income to them in certain shares, during their several lives. Later two other children are born to him. He notifies the trustee that he revokes the trust, and intends to establish another to include the two last-born children. May he do this?

A. If he did not reserve a power of revocation in the trust instrument, he has no power to change or revoke the trust. Such powers should be expressly reserved.

Lovett v. Farnham, 47 N. E. 246, 169 Mass. 1.

Fishblate v. Fishblate, 86 A. 469, 238 Pa. 450.

For other cases see *Decennial Digests*, Trusts ¶59(1).

Q. 39. A, without consulting with the trust company, makes a will by which he appoints it trustee, and dies. The character of the property is such that the company does not wish to act, and declines the trust. What is the effect?

A. The trust is valid. Equity will supply a new trustee, in whom, on appointment, title to the property will vest.

Dykeman v. Jenkins, 101 N. E. 1013, 179 Ind. 549, Ann. Cas. 1915D, 1011.

McLean v. Nelson, 46 N. C. 396.

For other cases see *Decennial Digests*, Charities ¶25, 47; Trusts ¶160(2).

Q. 40. Due to a desire to travel, a trustee tenders his resignation to the court which appointed him. The court finds his accounts

much confused, and several negotiations in process, in which the experience of the trustee will be indispensable. Will the court allow the trustee to resign?

A. While, generally, the trustee will not be held to his duties against his will, in case of danger to the trust estate, the court may refuse to release the trustee until the danger has been removed. In this case, such refusal would seem justified.

In re Olmstead, 24 App. Div. 190, 49 N. Y. S. 104.

For other cases see Decennial Digests, Trusts ⇨162.

Q. 41. A trustee has had trouble with the members of a church to which he belongs, and has been expelled on account of the unorthodox opinions he holds. One of the cestuis que trust, who is a member of this church, petitions equity to remove the trustee on this ground. What result?

A. This misconduct, if such it be, has no relation to the safety of the trust fund. While removal is in the discretion of the court, it may safely be said that no court would remove for this cause.

Haines v. Elliot, 58 A. 718, 77 Conn. 247.

For other cases see Decennial Digests, Trusts ⇨166(2).

Q. 42. C was in debt, and owned and operated a drug store. After conference with his creditors, and with their consent, he assigned the store property to K as trustee, to operate, pay the expenses and debts, and then reconvey to C. Thereafter R sold medicines to K on credit. When soliciting the order, K said to R's salesman: "You know I am only trustee here. I am running the place for C and his creditors. I have no interest in the store personally." To this the salesman said: "Oh, yes, we understand." Later R sued K individually for the debt. What result?

A. K is personally liable. Mere knowledge by the creditor that the debtor is a trustee does not constitute consent to look to the trust estate, and to relieve the trustee from liability.

Carr v. Leahy, 105 N. E. 445, 217 Mass. 438.

Rothchild Bros. v. Kennedy, 169 P. 102, 86 Or. 566.

For other cases see Decennial Digests, Principal and Agent ⇨103(12); Trusts ⇨210.

Q. 43. A trustee, who is operating a trucking business, employs a truck driver without inquiring into his experience. The driver has never driven an automobile, and drives the trust truck into another vehicle, causing damage. Can the person injured recover from the trustee individually?

A. Yes; a trustee is personally liable for torts committed by him in the course of the trust administration. Here the trustee was obviously negligent in employing the driver.

O'Malley v. Gerth, 52 A. 563, 67 N. J. Law, 610.

Thompson v. American Optical Co., 159 N. Y. S. 412, 173 App. Div. 123.

For other cases see Decennial Digests, Corporations ⚡423; Trusts ⚡235.

Q. 44. Having no trust funds on hand, a trustee pays moneys out of his own pocket to satisfy a debt contracted by him as trustee. What are the trustee's rights on his accounting?

A. He may present a claim for reimbursement on account of this expenditure, and, if the debt was reasonably and properly contracted, the trustee will be reimbursed.

Woodard v. Wright, 22 P. 1118, 82 Cal. 202.

Matter of Ungrich, 94 N. E. 999, 201 N. Y. 415.

For other cases see Decennial Digests, Trusts ⚡236, 274(3).

Q. 45. Three trustees have an offer for the lease of certain realty, which they hold. Two desire to accept the offer and prepare a lease, which they sign. The third declines to sign. Should the lessee accept this lease?

A. No; the lease will be valid only if executed by all the trustees. They hold as joint tenants, and in the case of private trusts must act as a unit.

White v. Watkins, 23 Mo. 423.

Morley v. Carson, 87 A. 713, 240 Pa. 546.

For other cases see Decennial Digests, Trusts ⚡239.

Q. 46. An Ohio trustee finds among the property in his hands a promissory note in which the maker is A, a citizen of Nevada. The note is overdue, but on account of the difficulty of collecting from the maker, who lives at a great distance from the trustee, the trustee delays for two years in suing. During this period the maker becomes bankrupt. May the cestui hold the trustee liable for the loss resulting?

A. Yes; the delay has been unreasonable. The trustee is under a duty to collect and conserve the trust assets, and unreasonable delay in doing so will subject him to liability for the result.

Purdy v. Johnson, 163 P. 893, 174 Cal. 521.

Backes v. Crane, 100 A. 900, 87 N. J. Eq. 229.

For other cases see Decennial Digests, Trusts ⚡181(1), 218(1), 219(1), 365(3).

Q. 47. A trustee invests trust funds in a mortgage on real estate, with adequate margin of security, taking the mortgage in his own name, without mention of the trust. Later, due to extraordinary

and wholly unforeseeable circumstances, the mortgage proves to be of slight value, and a loss ensues. Is the trustee liable?

A. Yes. The trustee should keep the trust investments in his name as trustee. If he places them in his name individually, he becomes an insurer of their safety. This is to insure identification of the trust property and ease of tracing. This applies to putting trust funds to the trustee's individual credit, by which he becomes responsible for the solvency of the bank.

Morris v. Wallace, 3 Pa. 319, 45 Am. Dec. 642.

Cornet v. Cornet, 190 S. W. 333, 269 Mo. 298.

For other cases see *Decennial Digests*, Trusts ⇨217(1, 3).

Q. 48. A settlor provides that the trustee may invest in automobile paper secured by chattel mortgage. The rules of equity and the statutes of the state do not allow such investments as trust investments. May the trustee safely buy automobile paper?

A. Yes; if the settlor specifically authorizes the purchase of property not legally a trust investment, the trustee is protected, if he buys property of that kind.

In re Bartol's Estate, 38 A. 527, 182 Pa. 407.

In re Reid, 156 N. Y. S. 500, 170 App. Div. 631.

For other cases see *Decennial Digests*, Trusts ⇨172, 218(1), 222.

Q. 49. The settlor states in the trust instrument that the trustee may use his discretion in making trust investments, and shall not be bound by statutory rules regarding investments. The trustee buys oil stock. Is he liable for a loss?

A. He probably will be held liable. A grant of authority to use discretion does not relieve the trustee from the duty to exercise good judgment. It merely allows him to select investments outside the prescribed kind, if the investments are reasonably sound and safe.

Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333.

In re Hart's Estate, 53 A. 364, 203 Pa. 480.

For other cases see *Decennial Digests*, Trusts ⇨217(3, 4), 218(1).

Q. 50. A trustee deposits trust income in a bank, and leaves it there for a year. The bank fails, and there is a loss. Is the trustee liable?

A. Yes. While a trustee may deposit money in a bank for a short time, when seeking a proper investment, one year is an unreasonably long time, and such delay renders the trustee liable for any damage resulting.

Woodley v. Holley, 16 S. E. 419, 111 N. C. 380.

Barney v. Saunders, 16 How. 535, 14 L. Ed. 1047.

For other cases see *Decennial Digests*, Executors and Administrators ⇨105; Trusts ⇨221.

Q. 51. A trustee lawfully holds stock in a corporation as a part of the trust estate. The trust provides for the payment of the income to A during his life, and thereafter the delivery of the corpus to B. The corporation declares a dividend in stock, delivering to each stockholder one share of new stock for every share of old stock. Should the trustee deliver the new stock to A, or hold it for B, or divide it? The corporate records show that, after the declaration of the dividend, the old stock is worth as much as it was when the trust began, and that the surplus of the corporation is larger after the stock dividend than it was when the trust began.

A. The facts show that the dividend was earned by the corporation after the trust began. It constitutes earnings, and not capital, and its form is not important. The entire lot of new stock should be delivered to A, just as a cash dividend would be paid to him.

Gilkey v. Paine, 14 A. 205, 80 Me. 319.

In re Barron's Will, 155 N. W. 1087, 163 Wis. 275.

See *Holbrook v. Holbrook*, 66 A. 124, 74 N. H. 201, 12 L. R. A. (N. S.) 768.

For other cases see *Decennial Digests*, Corporations 657; Trusts 6272(3); Wills 6684(3).

Q. 52. A trustee buys bonds which are a lawful trust investment, paying 110 therefor. He is required to pay income to A for his life, and then deliver the corpus to B. Should the trustee pay the entire amount of each bond coupon to A?

A. No; he should reserve from each coupon enough, so that he can set up a fund which will preserve the principal intact when the bond is paid off at par. If the bond is a \$1,000 bond, bought for \$1,100, the deductions from the coupons should produce \$100 when the bond matures.

Ballantine v. Young, 70 A. 668, 74 N. J. Eq. 572.

New England Trust Co. v. Eaton, 4 N. E. 69, 140 Mass. 532, 54 Am. Rep. 493; 31 Harv. Law Rev. 447.

For other cases see *Decennial Digests*, Trusts 6272(1), 274(4).

Q. 53. A and B are joint trustees. A requests B to sign an order directing a bank in which the trust securities are kept to allow A to have access to the securities, without the presence or joinder of B. This is done. A steals the securities. Is B liable to the cestuis for the loss?

A. Yes. B is charged with the duty of taking an active, equal part in the trust management. To take an active step, which gives his cotrustee exclusive control, is a breach of trust.

Barroll v. Forman, 40 A. 883, 88 Md. 188.

Bruen v. Gillet, 21 N. E. 676, 115 N. Y. 10, 4 L. R. A. 529, 12 Am. St. Rep. 764.

For other cases see *Decennial Digests*, Assignments for Benefit of Creditors 6381; Trusts 6240.

Q. 54. A trust deed provides that the trustee shall serve for \$100 a year. A trust company accepts the trust and qualifies. Later it claims that it is entitled to the full statutory commissions, and that the trust instrument cannot reduce the amount due. What result?

A. The settlor may fix a compensation different from the statutory amount, and if a trustee accepts the trust, with such amount fixed, he will be limited to the amount named in the trust deed.

In re Hanson's Estate, 114 P. 810, 159 Cal. 401.

Steinway v. Steinway, 90 N. E. 1166, 197 N. Y. 522.

For other cases see *Decennial Digests*, Trusts Ⓒ315(1, 3).

SECTION 8.—RIGHTS AND REMEDIES OF CESTUI

Q. 55. A creates a trust, whereby the income is to be paid to B in monthly installments, throughout B's life. The instrument says nothing about B's right to alienate his interest or the rights of B's creditors. A judgment creditor of B, who has exhausted his remedies at law, brings a bill in equity to collect out of the trust income. What result?

A. He should succeed. This was not a spendthrift trust. The interest of a cestui of an ordinary trust is subject to the claims of creditors.

Macfarlane v. Dorsey, 38 So. 512, 49 Fla. 341.

Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644.

For other cases see *Decennial Digests*, Execution Ⓒ41.

Q. 56. A deeds property to a trustee, B, for the benefit of A's children. The trustee declines to carry out the trust. May A proceed in equity to compel the execution of the trust?

A. No; a settlor, who is not himself a beneficiary, has no standing in court to enforce the trust. That right rests in the cestuis only.

Strong v. Doty, 32 Wis. 381.

Rodney v. Shankland, 1 Del. Ch. 35, 12 Am. Dec. 70.

For other cases see *Decennial Digests*, Charities Ⓒ49; Trusts Ⓒ345.

Q. 57. A trustee has a bank account in the A Bank, entitled "T, as Trustee for B." T owes the bank money on a note which is overdue. The bank accepts a check from T, as trustee, in payment of this note. What are the rights of the cestui against the bank?

A. He may hold the bank liable as a participator in the breach of the trust. The bank had notice that the account checked upon was a trust account. It cannot take such funds for its own benefit, in breach of the trust, without liability.

Sayre v. Weil, 10 So. 546, 94 Ala. 466, 15 L. R. A. 544.

State Bank of St. Johns v. McCabe, 98 N. W. 20, 135 Mich. 479.

For other cases see *Decennial Digests*, Banks and Banking Ⓒ129, 130(1), 134(7).

Q. 58. A trustee has a bank account, entitled "T, as trustee." He draws a check on this account to the order of B, to pay a grocery bill owed by T and contracted entirely for T's individual benefit. B presents the check at the bank and it is paid. Is the bank liable to the cestuis?

A. No; in the absence of evidence of notice of the breach of trust, aside from the form of the check. The bank is not obliged to investigate, to discover the reason for the giving of each of the trust checks.

Pennsylvania Title & Trust Co. v. Meyer, 50 A. 998, 201 Pa. 299.

Anderson v. Walker, 53 S. W. 821, 93 Tex. 119.

For other cases see *Decennial Digests, Banks and Banking* ¶130(2, 3).

Q. 59. A trustee invests trust funds in irrigation bonds, which prove to be worth only half what was paid for them. The investment is a breach of trust. The trustee is financially responsible, although probably not to the full extent of the loss. May the cestui rely on the bonds and the liability of the trustee both, in his effort to recover the loss?

A. Yes; the cestui may assert a claim against the trustee, and also a lien upon the bonds. Thus he may use the bonds and the trustee's own property as sources from which to collect.

Citizens' Bank of Paso Robles v. Rucker, 72 P. 46, 138 Cal. 606.

Newis v. Topfer, 96 N. W. 905, 121 Iowa, 433.

For other cases see *Decennial Digests, Trusts* ¶350, 374.

Q. 60. A bought property from a trustee without knowledge of the trust, and received a deed therefor. Before he had paid the price to the trustee, A was informed by the cestui that the sale was in breach of a trust. Can A hold the land as a bona fide purchaser, free from the trust?

A. No; to be a bona fide purchaser, he must have obtained legal title and paid value before notice of the trust. Here he has merely obtained legal title.

Burgett v. Paxton, 99 Ill. 288.

Dean v. Anderson, 34 N. J. Eq. 496.

For other cases see *Decennial Digests, Lis Pendens* ¶3(1); *Vendor and Purchaser* ¶240.

Q. 61. A is trustee for the B trust and the C trust, and has a single bank account, in which he has for a year made deposits and withdrawals of B trust money and C trust money, some of the withdrawals being for A's individual benefit and in breach of the trusts. The sum now remaining on deposit is insufficient to pay all that is due to both trusts. How should the sum be divided?

A. The presumption that the sums first deposited are first withdrawn will be applied, as far as breaches of trust are concerned. The withdrawals known to be for the benefit of the B trust will be charged to that trust, and a similar result will occur as to the withdrawals which benefited the C trust.

Hewitt v. Hayes, 91 N. E. 332, 205 Mass. 356, 137 Am. St. Rep. 448.

In re Bolognesi & Co., 254 F. 770, 166 C. C. A. 216.

For other cases see *Decennial Digests*, *Bankruptcy* ⇨140(3); *Trusts* ⇨282, 358(2).

Q. 62. A trustee has a bank account, in which are mixed his own funds and those of the trust. He makes withdrawals for his own benefit beyond the amount of his private funds which had gone into the fund, and then becomes bankrupt. To whom will the balance be allotted, the trustee in bankruptcy or the trust estate?

A. The trust estate will take the whole balance. It is presumed that the trustee withdrew his own funds for his private purposes, and did not take trust funds for his private purposes until all his private funds were gone.

Covey v. Cannon, 149 S. W. 514, 104 Ark. 550.

Waddell v. Waddell, 104 P. 743, 36 Utah, 435.

For other cases see *Decennial Digests*, *Banks and Banking* ⇨80(7), 130 (1); *Trusts* ⇨358(2).

SECTION 9.—TERMINATION OF TRUSTS

Q. 63. A is trustee for himself and for B, his duty being to pay to each one-half the income of the trust fund until one of them dies, and then deliver the principal fund to the survivor. B offers to sell his interest in the trust for \$20,000, A accepts, and a written transfer occurs. What happens to the trust?

A. It is destroyed by a merger of the equitable and legal interests in A. He now has all the legal interest as trustee, and all the equitable interest as cestui and transferee of B. The trust cannot continue without separate parties as trustee and cestui, and there is no object in continuing it by appointing a new trustee.

Healey v. Alston, 25 Miss. 190.

Cunningham v. Bright, 117 N. E. 909, 228 Mass. 385.

For other cases see *Decennial Digests*, *Trusts* ⇨60, 154.

Q. 64. A creates a trust for the benefit of his crippled son, the income to be paid to him for life and the principal to be disposed of as the son shall by his will direct. The trust instrument clearly shows that the sole reason for the trust is the crippled condition of the son and his consequent inability to manage his affairs. Later the son is

restored to good health, and petitions equity to end the trust and turn over the principal to him. What will equity do?

A. Equity will ordinarily terminate the trust, and order the property delivered to the son. The sole object of the trust is accomplished, and no one is interested in the trust or the trust property, except the son.

Sands v. Old Colony Trust Co., 81 N. E. 300, 195 Mass. 575, 12 Ann. Cas. 837, *Donaldson v. Allen*, 81 S. W. 1151, 182 Mo. 626.

For other cases see *Decennial Digests, Trusts* ☞ 61(1).

SECTION 10.—PURCHASE FOR VALUE WITHOUT NOTICE

Q. 65. A was the payee of a nonnegotiable promissory note, which he held in trust for B. The note ran to A, and did not show the trust on its face. A wrongfully deposited this note with the C Bank as collateral security for a debt owed by A individually to the bank, to replace other collateral withdrawn at that time. The C Bank had no knowledge that A held the note in trust for anyone. Later the C Bank allowed A to take possession of the note for the purpose of collecting it for the bank, though nothing to this effect appeared on the note. Later A handed the note to B in payment of moneys due B under the trust, and B accepted in it satisfaction of such claim; B being ignorant of any claim to the note by the C Bank. In a contest between the C Bank and B over the note, who should prevail?

A. The C Bank. The assignment of a nonnegotiable promissory note passes legal title. The bank was a bona fide purchaser of the trust property, and gave value in surrendering other collateral in exchange for the note. The bank did not lose its rights by allowing A to take possession of the note, or by the delivery of it to B. A was not a purchaser of the note for value when he took it back from the bank. He was a mere bailee for the bank. B's equitable claim to the note is prior in time to that of the C Bank, but it is cut off because of the transfer of the legal title to the bank. B could not acquire any legal interest in the note when it was finally delivered to him, because the legal title had vested in the C Bank by virtue of the previous transfer to it.

Voss v. Chamberlain, 117 N. W. 269, 139 Iowa, 569, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331.

Moore v. Moore, 13 N. E. 673, 112 Ind. 149, 2 Am. St. Rep. 170.

For other cases see *Decennial Digests, Bills and Notes* ☞ 315, 358.

Q. 66. A was the owner in fee simple of land. He contracted in writing to convey to B. Thereafter A received from C a higher offer for the land, and gave C an option on the property for 30 days, for which C paid A \$500. C knew nothing of the previous contract with B, at the time he (C) took his option and paid his money. Lat-

er C notified A that he elected to exercise his option and demanded a deed, but before he could get the deed B learned of the dealings between A and C, and notified C of his (B's) claim. A then gave C a deed, and C paid A the full purchase price of the land. What are the rights of B and C?

A. B's contract gave him an equitable interest in the land, which was prior in point of time to C's equitable interest, acquired by getting the option. The bona fide purchaser rule does not apply to equitable interests. Therefore the fact that C paid value for his option in good faith is immaterial. The legal title acquired by C after knowledge of B's equity is of no avail to C.

Henry v. Black, 63 A. 250, 213 Pa. 620.

Wenz v. Pastene, 95 N. E. 793, 209 Mass. 359.

Ballantine, Purchase for Value and Estoppel, 6 Minn. Law Rev. 87, 108.

For other cases see Decennial Digests, Landlord and Tenant ¶26; Mortgages ¶372(2); Vendor and Purchaser ¶220.

Q. 67. A is trustee for B under the will of X, and also executor of the will of C. A steals money of the C estate and uses it for his own purposes. Later he takes money of the B trust, and with it replaces the money stolen from the C estate, and pays it out to the legatees of C, who take it in good faith and without knowledge of A's misconduct as trustee and executor. Y and Z are bondsmen on A's bond as executor of the C estate. B discovers the misappropriation of the trust funds by A, and asks whether he has any rights against the legatees under C's will, or against Y and Z, the bondsmen? What answer and why?

A. B has no rights against the legatees, because they were bona fide takers of the trust money for value. They surrendered claims against A, as executor, in return for the proceeds of the embezzlement from the B trust. However, B has a remedy against Y and Z. They were liable on A's bond, because of A's misappropriation of the C estate money, and if the funds of the B trust had not been used to make up the deficiency of A, as executor, Y and Z would, assuming A's insolvency, have been liable to the legatees under the will of C. The B trust money has relieved Y and Z of this liability, and B should be subrogated to the rights of the legatees against Y and Z. They will be liable to B for the trust moneys paid to the legatees in an amount not exceeding the amount for which Y and Z would have been liable on their official bonds, if the embezzlement of A from the C estate had not been made good.

First Taxing District v. Gregory, 118 A. 96, 97 Conn. 639, 26 A. L. R. 297.

Pittsburgh-Westmoreland Coal Co. v. Kerr, 115 N. E. 465, 220 N. Y. 137.

For other cases see Decennial Digests, Subrogation ¶25.

WILLS AND ADMINISTRATION

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Section

1. Testamentary Capacity.
2. Nature of Instrument.
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27. Recovery in Action for Wrongfully Causing Death.
28. Abatement of Legacies.
29. Gifts Causa Mortis.

SECTION 1.—TESTAMENTARY CAPACITY

Q. 1. On the contest of T's will, based upon T's alleged incapacity at the time the will was executed, the court charged, over propo-
nent's objection, that in order to have testamentary capacity a tes-
tator must have ability to transact ordinary business. Was the
charge correct?

A. No. A lower degree of capacity is required for the execution
of a will than for the transaction of business, where there is an op-
posing mind to meet. All that a testator of full age requires is an
understanding in a general way of the act which he is doing, the
nature and extent of his property, the natural objects of his boun-
ty, and the disposition which he wishes to make of his property.

Rowcliffe v. Belson, 104 N. E. 268, 261 Ill. 566, Ann. Cas. 1915A, 359.

Maddox v. Maddox, 21 S. W. 499, 114 Mo. 35, 35 Am. St. Rep. 734.

For other cases see Decennial Digests, Wills $\S$ 31, 50.

Q. 2. One week after the execution of T's will, he was adjudicated to be of unsound mind, and a guardian was appointed for him. When T's will was offered for probate, the court refused to admit evidence of the adjudication and appointment of a guardian. Did the court rule correctly?

A. Probably not, although the cases are in conflict. The question is one of relevancy, and it seems that evidence of a guardianship should be admitted to prove a reasonably contemporaneous lack of capacity to make a will. Where the adjudication precedes the execution of the will, the courts are more inclined to admit the evidence, although the appointment of a guardian for an alleged insane person is not conclusive of the lack of testamentary capacity.

Kelley v. Stanton, 118 A. 863, 141 Md. 380.

In re American Board for Foreign Missions, 66 A. 215, 102 Me. 72.

For other cases see Decennial Digests, Wills ⚡35, 53(3), 55(1).

Q. 3. T, while married to A, lived with B as his mistress. T's will bequeathed all of his property to B, although T left several children. While living with T, B made a number of appeals to T, asking him to have pity for her future destitution, if he made no provision for her in his will. Do these facts establish undue influence?

A. Not if the will expresses testator's desire. Illicit relations between testator and beneficiary do not, of themselves, constitute undue influence. Undue influence must amount to coercion, and appeals to affection, gratitude, and pity are legitimate, if testator acts of his own volition.

Monroe v. Barclay, 17 Ohio St. 302, 93 Am. Dec. 620.

Maynard v. Vinton, 26 N. W. 401, 59 Mich. 139, 60 Am. Rep. 276.

For other cases see Decennial Digests, Wills ⚡155(1), 163(3).

SECTION 2.—NATURE OF INSTRUMENT

Q. 4. T made and executed, before two witnesses, an ordinary warranty deed conveying his farm to one of his children. The deed, which was not delivered, but was among T's papers at his decease, contained the following paragraph: "It is understood that this instrument is made for the purpose of creating an estate limited to take effect in possession at a future date, and grantor reserves the full use and occupancy of the land herein conveyed during his life." Is this document entitled to probate as a will?

A. No. Such an instrument, creating a present interest, is a deed, though the enjoyment of the interest created is postponed until the grantor's death.

McIntyre's Estate, 120 N. W. 587, 156 Mich. 240.

Dexter v. Witte, 119 N. W. 891, 138 Wis. 74.

For other cases see Decennial Digests, Wills ⚡88(2, 3), 91.

Q. 5. T orally agreed with B, his only son and heir, if B would work for him in T's store during T's life, that he either would make a will devising his home farm to B, or would make no will, and thus permit B to inherit the farm. T died, leaving a will devising this farm to his brother. May B recover for breach of contract?

A. Contracts to make or not to make wills are valid, if they have all the essentials of a contract. Such contracts may be performed within the year, and accordingly do not come within the statute of frauds in that respect; but, if an oral contract is to devise or not to devise land, as in the problem stated, it is usually held to be unenforceable under the statute of frauds.

Dicken v. McKinley, 45 N. E. 134, 163 Ill. 318, 54 Am. St. Rep. 471.

Wellington v. Apthorp, 13 N. E. 10, 145 Mass. 69.

For other cases see Decennial Digests, Frauds, Statute of §130(2); Wills §58(1).

Q. 6. T made a duly executed document, in which he nominated B as executor, but made no disposition of any of his property, and gave no further directions whatever. This document was filed for probate. Should it be probated as a will?

A. Yes; although a will is often defined as "a disposition of property to take effect at death, in the meantime being revocable," it may be probated, although it merely nominates an executor.

Hickman's Estate, 36 P. 118, 101 Cal. 609.

Mulholland v. Gillan, 54 A. 928, 25 R. I. 87, 1 Ann. Cas. 366.

For other cases see Decennial Digests, Wills §76, 83.

Q. 7. T, a bachelor, labored under the impression that his favorite brother, B, was deceased, since B had not been heard from for a number of years. T made a will, giving all of his large estate to his only other brother, C, stating to his attorney, however, that he would have given B one-half, had B been living. B returned shortly after T's death. Is he entitled to share in T's estate?

A. No; a will cannot be reformed by the addition of words thereto, even when the evidence proves testator made an omission by reason of mistake.

Gifford v. Dyer, 2 R. I. 99, 57 Am. Dec. 708.

2 Ill. Law Bull. 175, 286, 293.

For other cases see Decennial Digests, Wills §489(1).

SECTION 3.—EXECUTION

Q. 8. T wrote her will, beginning: "I, T, of Boston, being of sound mind," etc. She failed otherwise to sign the will, but it was properly attested in her presence. Is the will entitled to probate?

A. Yes; in those states where the rule is substantially as under the statute of frauds, and no position for the signature is specified by statute. It must be made to appear, however, that the name at the beginning was written with the intention that such act constitute a signing thereof.

Meads v. Earle, 91 N. E. 916, 205 Mass. 553, 29 L. R. A. (N. S.) 63.

In re Phelan's Estate, 87 A. 625, 82 N. J. Eq. 316.

For other cases see Decennial Digests, Wills $\Leftrightarrow$ 111(2).

Q. 9. T, domiciled in a state requiring that a will be signed at the end thereof, placed his signature where it preceded a clause appointing an executor. The will contained ten dispositive items, which preceded T's signature. Is the will, or any part thereof, entitled to probate?

A. No; the prevailing view, where statute requires signature at end, is that entire will fails, if a testamentary provision follows the signature.

Wineland's Appeal, 12 A. 301, 118 Pa. 37, 4 Am. St. Rep. 571.

In re Conway, 26 N. E. 1028, 124 N. Y. 455, 11 L. R. A. 796.

For other cases see Decennial Digests, Wills $\Leftrightarrow$ 111(2).

Q. 10. T wrote her own will on a sheet of writing paper folded in the middle, so as to make four pages of equal size. The writing proceeded in logical order from the first to the third page, and then back to the second, so that her signature was upon the second, rather than the third, page. The will was properly attested. Was this will entitled to probate in a jurisdiction requiring signing at the end thereof?

A. Probably yes. The construction usually made is one which requires a signing at the grammatical or logical end, rather than the physical end.

Stinson's Estate, 77 A. 807, 228 Pa. 475, 30 L. R. A. (N. S.) 1173, 139 Am. St. Rep. 1014.

Compare Matter of Andrews, 56 N. E. 529, 162 N. Y. 1, 48 L. R. A. 662, 76 Am. St. Rep. 294.

For other cases see Decennial Digests, Wills $\Leftrightarrow$ 111(2).

Q. 11. T properly signed his will at the end thereof, and had it attested. Later T thought of an item which he had omitted, and wrote after his signature: "I give by river farm to my nephew, John." Is this will entitled to probate in a state requiring signature at the end of will?

A. Yes; a will, once properly signed at the end and attested, is not affected by the subsequent addition of a dispositive clause after the signature.

Saunders v. Samarreg Co., 55 A. 763, 205 Pa. 632.

For other cases see Decennial Digests, Wills $\Leftrightarrow$ 111(2).

Q. 12. One item of T's will, which was properly executed, read: "I give \$5,000 to each person whose name I shall write on a card and place in my safety deposit box." At T's death, a card was found in T's safety deposit box, bearing the names of B, C, and D. The card bore the words: "This is the card mentioned in my will." Are the three persons entitled to receive legacies of \$5,000 each?

A. No; in order to incorporate by reference, the document to be incorporated must be in existence when the will is executed, and must be referred to in such a way as to show an intention to incorporate, and reasonably to identify the document to be incorporated.

Keeler v. Merchants Loan & Trust Co., 97 N. E. 1061, 253 Ill. 528.

Appeal of Bryan, 58 A. 748, 77 Conn. 240, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393.

Magnus v. Magnus, 84 A. 705, 80 N. J. Eq. 346.

For other cases see Decennial Digests, Wills ¶98.

Q. 13. T made a will, in which he gave each of his nephews \$25,000, but provided that all advances to any nephew, evidenced by certain papers subsequently to be made, should be deducted from that nephew's legacy. Is this provision a valid one, if T makes advances and enters them against beneficiaries as contemplated in will? . .

A. Yes; this is not an attempt to alter or complete the will by a document not formally executed. The making of the advances is not an act of testamentary character, which alters or completes an unfinished will.

Appeal of Moore, 47 A. 731, 61 N. J. Eq. 616.

For other cases see Decennial Digests, Wills ¶761.

Q. 14. T properly signed his will, and, since the statute required subscription by two witnesses, it was attested by two witnesses, one of whom was given a legacy of \$5,000 by the will. Is the will entitled to probate?

A. Yes; in the majority of jurisdictions. Although under the statute of frauds a beneficiary was incompetent by reason of interest, in most of the states statutes have been enacted which render a beneficiary a competent witness in support of the will. Usually the beneficiary witness, while not permitted to take under the will, if the will would not be duly executed without him, is permitted to take what he would have taken, had testator died intestate, not to exceed the provision made for him in the will.

Holfast v. Dowsing, 2 Str. 1253.

Bruce v. Shuler, 62 S. E. 973, 108 Va. 670, 35 L. R. A. (N. S.) 686, 15 Ann. Cas. 887.

For other cases see Decennial Digests, Wills ¶116.

Q. 15. T named A and B as executors of his will, and A and B were the only attesting witnesses. The statute requiring two or more competent witnesses, is this will properly executed?

A. Yes; by the prevailing view, one named as executor is a competent witness in support of a will, even though he is entitled to compensation for his services.

Geraghty v. Kilroy, 114 N. W. 838, 103 Minn. 286.

Children's Aid Society v. Loveridge, 70 N. Y. 387.

For other cases see *Decennial Digests*, Wills ¶116.

Q. 16. A, the attorney who drew T's will, signed as one of the attesting witnesses. The statute disqualified any attorney from testifying concerning any communication made to him in that relation, except by the express consent of the client. In proceeding to probate T's will, may A be questioned, over objection, as to T's capacity and the circumstances surrounding execution?

A. Yes. T, by permitting A to become a witness to his will, thereby consented that A might be examined as a witness to execution of will, capacity of testator, or any other fact affecting will's validity.

Knepper v. Knepper, 134 N. E. 476, 103 Ohio St. 529.

Brown v. Brown, 108 N. W. 180, 77 Neb. 125.

For other cases see *Decennial Digests*, Wills, ¶219(3).

Q. 17. T made a will devising a large tract of land to A. The statute requiring two witnesses, the will was duly attested by B and C. B was A's son. At the time the will was offered for probate, A had died, and, if the will is probated, B will receive the estate devised to A. May B testify in support of the will, and thus share thereunder?

A. Yes; attesting witnesses to a will must be such as are competent at the date of attestation, and, if then competent, their subsequent incompetency, from whatever cause, will not prevent the probate of the will.

Maxwell v. Hill, 15 S. W. 253, 89 Tenn. 584.

In re Holt, 57 N. W. 219, 56 Minn. 33, 22 L. R. A. 481, 45 Am. St. Rep. 434.

For other cases see *Decennial Digests*, Wills ¶116.

Q. 18. T, wishing to execute his will, which had been prepared by his attorney, properly signed the will at the end thereof. T then called in A and B, and told them that he would like to have them sign his will as witnesses. The will was so folded that T's signature was concealed, but a place was available where A and B signed. A and B testify that they did not see T's signature. T's heir

insists that the will is not entitled to probate. How should the court rule?

A. Against probate, where signature must be attested. While testator generally may acknowledge his signature, and witnesses need not actually see such signature, it is essential to the valid acknowledgment of a signature by testator that the witnesses have an opportunity of seeing such signature.

Nunn v. Ehlert, 106 N. E. 163, 218 Mass. 471, L. R. A. 1915B, 87.

Compare *Gould v. Chicago Theological Seminary*, 59 N. E. 538, 189 Ill. 282 (where witnesses required to attest will).

For other cases see *Decennial Digests*, Wills ☞ 118, 119, 303(3).

Q. 19. T signed his will in the presence of two witnesses. A and B then signed as witnesses at T's request. The witnesses did not know the contents of the document; neither were they aware of the fact that they were attesting the signature to a will. Was the will properly executed?

A. Generally, yes. The witnesses need not know the contents of the will, and, except when the statute requires that a will be published and declared by the testator to be his will, it is not essential that the witnesses know that they are attesting the signature to a will.

Lunn v. Mickler, 179 S. W. 477, 133 Tenn. 51.

Claffin's Will, 52 A. 1053, 75 Vt. 19, 58 L. R. A. 261.

For other cases see *Decennial Digests*, Wills ☞ 119.

Q. 20. A, an attorney, prepared a will for his client, T. A read the will to T, who said that it was satisfactory, and that he wished it immediately executed. A said that he would sign as one witness, which he did in T's presence. T then signed, and B, A's stenographer, who had been present when A and T signed, immediately added her signature as a witness. Is this will entitled to probate?

A. The American authorities are fairly evenly divided on the question as to whether or not the fact that one or more of the subscribing witnesses signed before the testator invalidates a will. Under the English rule, the will would not be deemed properly executed. Where, as here, the whole execution of the will was part of one transaction, and testator and witnesses all signed in the presence of each other, it seems that the will might well be admitted to probate.

In re Horn's Estate, 125 N. W. 696, 161 Mich. 20, 26 L. R. A. (N. S.) 1126, 20 Ann. Cas. 1364 (holding will good).

Lacey v. Dobbs, 50 A. 497, 63 N. J. Eq. 325, 55 L. R. A. 580, 92 Am. St. Rep. 667 (contra).

For other cases see *Decennial Digests*, Wills ☞ 123(4).

Q. 21. T went to the office of A, his attorney, and had a will drawn, which T properly signed. A sent his office boy to secure two witnesses, B and C. When B and C arrived, A told them that T had signed his will, and wanted them to subscribe as witnesses. T said nothing. B and C saw T's signature, and signed as witnesses. Was this will properly executed?

A. Yes; an implied acknowledgment is sufficient. It is not essential that the testator expressly acknowledge the signature or the writing.

Hull's Will, 89 N. W. 979, 117 Iowa, 738.

Matter of Nelson, 36 N. E. 3, 141 N. Y. 152.

For other cases see Decennial Digests, Wills ⚡120, 303(3).

Q. 22. T's will was drawn for him by a justice of the peace and contained no attestation clause. T signed his will in the presence of A, who signed as a witness, and B signed an hour later in T's presence, the latter having acknowledged his signature. A was not present when B signed. Was the will properly executed?

A. Yes; unless the statute expressly requires that witnesses sign in the presence of each other. No attestation clause is necessary, although it is always wise to have an attestation clause, indicating that witnesses have signed as prescribed by statute.

Smith's Will, 8 N. W. 616, 9 N. W. 665, 52 Wis. 543, 38 Am. Rep. 756.

Ferris v. Neville, 86 N. W. 960, 127 Mich. 444, 54 L. R. A. 464, 89 Am. St. Rep. 480.

For other cases see Decennial Digests, Wills ⚡89, 123(5).

Q. 22a. T's will contained no attestation clause. It purported to be signed by T, and by A and B as witnesses. In the proceedings to probate the will after T's death, both A and B testified that they had no recollection whatever as to the execution of the instrument, but were able to identify their signatures and that of testator. No other evidence was available to show that the formal requisites to the execution of the will had been observed. Is the will entitled to probate?

A. Yes; by prevailing rule. A will need have no attestation clause. Upon proof of the genuineness of signatures, the courts usually presume the regularity of execution, and this presumption supplies the want of direct or circumstantial evidence.

Mead v. Trustees of Presbyterian Church, 82 N. E. 371, 229 Ill. 526, 14 L. R. A. (N. S.) 255, 11 Ann. Cas. 426.

Leatherbee v. Leatherbee, 141 N. E. 669, 247 Mass. 138.

For other cases see Decennial Digests, Wills ⚡289, 303(5), 304.

Q. 23. T properly signed his will at the end thereof in the presence of B and C, who signed as witnesses on a table two feet from where testator was lying. T asked B and C to sign, but lapsed into unconsciousness before C had completed his signature. Was the will properly executed?

A. No; physical presence alone is not sufficient. Testator must also be mentally present, and actually know what is being done.

Right v. Price, 1 Doug. 241.

Tucker v. Sandidge, 8 S. E. 650, 85 Va. 546.

For other cases see Decennial Digests, Wills ⚡55(10), 111(3).

Q. 24. T signed his will in the presence of B and C. Since there was no table on which to write in T's room, B and C took the will into an adjoining room and there signed. T could not see B and C sign, but after signing they brought the will back to T and showed him their signatures. T thanked the witnesses and ordered the document placed in his safe. Is this document entitled to probate?

A. No; by prevailing rule. Most jurisdictions, in determining physical presence, apply a vision test, and require a present ability on the part of testator to see witnesses sign without materially changing his position. Although testator may acknowledge his signature, witnesses are not permitted thus to acknowledge.

Mendell v. Dunbar, 47 N. E. 402, 169 Mass. 74, 61 Am. St. Rep. 277.

Shires v. Glascock, 2 Salk. 688.

For other cases see Decennial Digests, Wills ⚡123(5).

Q. 25. T signed his will, and asked B and C to witness it. They signed at a table in the same room. The bodies of the witnesses shut off the view of the testator, who was propped up in bed, so that he did not see the pen, the letters traced by it, nor probably the hand that held the pen. Was this will properly executed?

A. Probably yes. When the will is attested in the room occupied by testator, it is prima facie in his presence, and there is a presumption that testator saw or might have seen the attestation. There is no such presumption when witnesses sign in another room.

In re Tobin, 63 N. E. 1021, 196 Ill. 484.

Stewart v. Stewart, 40 A. 438, 56 N. J. Eq. 761.

For other cases see Decennial Digests, Wills ⚡123(5), 289.

Q. 26. T, who was totally blind, signed his will by mark, and it was then attested by B and C, who signed in the same room where testator was lying. Was this will properly executed?

A. Yes; the courts usually apply the same rule with reference to what is presence in the case of a blind person that is applied in the case of a testator of normal vision.

Goods of Piercy, 1 Rob. Ecc. 278.

Arneson's Will, 107 N. W. 21, 128 Wis. 112.

For other cases see *Decennial Digests*, Wills ¶123(5).

Q. 27. T, whose sight was unimpaired, signed his will. By reason of an injury, T was compelled to lie on his bed looking upward, without turning his head. B and C signed T's will at his request on a table a few feet from T's bed. Is this will entitled to probate?

A. Probably yes. While witnesses could have contrived to sign where testator might have seen them, to allow probate is in keeping with the decision in the case of blind testators.

Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464.

Cook v. Winchester, 46 N. W. 106, 81 Mich. 581, 8 L. R. A. 822.

For other cases see *Decennial Digests*, Wills ¶123(5).

SECTION 4.—CONDITIONAL WILLS

Q. 28. T's duly executed and attested will read in part: "I am going to town with my drill, and I ain't feeling good, and in case I shouldn't get back, I want my property to go as follows." T then disposed of his property by the document. T returned home, and died shortly thereafter. Is this document entitled to probate?

A. A will may be conditional in form, so that its operation may be dependent upon the happening of a condition precedent. The question is one of testator's intention, to be determined by the court. The cases cannot be reconciled, but there is a decided tendency to construe a will as unconditional, and the statement merely as inducement for making the will, if there is any room for doubt as to testator's intention. In the case stated above, however, the court in Pennsylvania held the will conditional, and denied probate.

Morrow's Appeal, 9 A. 660, 116 Pa. 440, 2 Am. St. Rep. 616 (conditional or contingent will).

Damon v. Damon, 8 Allen (Mass.) 192.

For other cases see *Decennial Digests*, Wills ¶80.

SECTION 5.—REVOCATION

Q. 29. T, a blind testator, told A to bring him his will, and A handed it to T in an envelope with three seals. T felt the seals, and handed it to A with seals unbroken, directing him to throw it into the fire and burn it. A pretended to do so, but in fact put the will into his pocket, and threw another paper into the fire, calling upon testator to hear it burn. T smelled the paper burning, and

died in the belief that his will had been destroyed. After T's death the will was offered for probate. Should it be admitted?

A. Yes; intention to revoke alone is generally not sufficient. There was no sign of any tearing, canceling, obliterating, or destroying as usually required by statute.

Kent v. Mahaffey, 10 Ohio St. 204.

Bohleber v. Rebstock, 99 N. E. 75, 255 Ill. 53, 41 L. R. A. (N. S.) 105, Ann. Cas. 1913D, 307 (attempted or intended revocation prevented by fraud).

For other cases see Decennial Digests, Wills ⚡170, 177, 187.

Q. 30. T duly executed his will, bequeathing a large estate to B. Some time later B murdered T. Is B entitled to take under T's will?

A. Since murder of a testator does not revoke a will, in the absence of a statutory provision, B generally takes the legal title to the property bequeathed to him. It seems that in equity B should be held a trustee for the heirs of T. Some courts, however, allow B to take beneficially, and others on grounds of policy refuse to permit B to take at all.

Ellerson v. Westcott, 42 N. E. 540, 148 N. Y. 149.

Shellenberger v. Ransom, 59 N. W. 935, 41 Neb. 631, 25 L. R. A. 564.

Wall v. Pfanschmidt, 106 N. E. 785, 265 Ill. 180, L. R. A. 1915C, 328, Ann. Cas. 1916A, 674.

For other cases see Decennial Digests, Descent and Distribution ⚡51; Wills ⚡711.

Q. 31. T duly executed a will. A year later T executed a second will. At T's death the first will was found in T's safety deposit box. The second will could not be found, and there was no evidence as to its contents. The witnesses to the second will testified as to its due execution. Is the first will entitled to probate?

A. Yes; the burden of proof is on those opposing probate to show that a lost will subsequently made was inconsistent with or expressly revoked a prior will.

Dunahugh's Will, 107 N. W. 925, 130 Iowa, 692.

Cheever v. North, 64 N. W. 455, 106 Mich. 390, 37 L. R. A. 561, 58 Am. St. Rep. 499.

For other cases see Decennial Digests, Wills ⚡179, 290.

Q. 32. T, a bachelor, made a will giving all of his property to his brother, B. Later T married C. T died, leaving C, his wife, and D, his only child. T's will was found among his papers at his decease. Is this will entitled to probate?

A. No; as a general rule, the facts above stated constitute a revocation by circumstances. Marriage and birth of issue revoked

the will of a male in England, unless widow and issue were provided for in will. Marriage alone revoked the will of a female. Statutes in America frequently prescribe the effect upon a will of marriage or birth of issue.

Durfee v. Risch, 105 N. W. 1114, 142 Mich. 504, 5 L. R. A. (N. S.) 1084, 7 Ann. Cas. 785.

Marston v. Roe d. Fox, 8 A. & E. 14.

For other cases see *Decennial Digests*, Wills ☞ 191.

Q. 33. T duly executed his will. A year later he decided to revoke it. T therefore wrote along the margin of the will, though not upon any portion of the words in the will: "This will is canceled, revoked, and null and void. T." The document was found at T's death among certain waste paper in the basement of T's house. Is it entitled to probate?

A. Yes; on principle and by weight of authority. This is not a revocation by cancellation, and simply amounts to an unattested instrument of revocation, which is inoperative in most jurisdictions.

Will of Ladd, 18 N. W. 734, 60 Wis. 187, 50 Am. Rep. 355.

Howard v. Hunter, 41 S. E. 638, 115 Ga. 357, 90 Am. St. Rep. 121 (Indorsement on will).

For other cases see *Decennial Digests*, Wills ☞ 185.

Q. 34. T made a will, giving a certain portion of his property to his wife, B. Later T obtained a divorce from B. Ten years after obtaining the divorce, T died and the will was found among T's papers. Is B entitled to take under this will?

A. Probably yes. However, when the divorce is accompanied by a settlement of property rights between husband and wife, there is substantial authority for the position that the change is sufficient to cause an implied revocation by circumstances.

Jones' Estate, 60 A. 915, 211 Pa. 364, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221.

Hall's Estate, 119 N. W. 219, 106 Minn. 502, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cas. 541.

Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307.

For other cases see *Decennial Digests*, Wills ☞ 193, 194.

Q. 35. One item in T's will, which was duly signed and attested, made a bequest of \$5,000 to B. Some months later, T ran his pen twice through the name of B and substituted therefore the name of C. T did nothing in the way of re-executing his will. In what form, if at all, should T's will be probated?

A. The will should be probated as originally executed, since there was no intent to revoke the whole will. In most jurisdictions, the new disposition in favor of C would fail, when will was not re-exe-

cuted. The courts usually treat the validity of the cancellation as conditional upon the operation of the substitution. By virtue of what is often called the doctrine of "dependent relative revocation," or by express statutory provision, B would receive his legacy.

Thomas v. Thomas, 79 N. W. 104, 76 Minn. 237, 77 Am. St. Rep. 639.

Knapen's Will, 53 A. 1003, 75 Vt. 146, 98 Am. St. Rep. 808.

For other cases see Decennial Digests, Wills $\S$ 189, 290.

SECTION 6.—REPUBLICATION AND REVIVAL

Q. 36. In 1920 T made a will, bequeathing \$25,000 to each of his three children, A, B, and C. In 1922 A needed money badly, and T paid him the \$25,000 which he was to receive by T's will. In 1923 T executed a codicil to his will, in which he made a small bequest, and confirmed and republished his will of 1920. T is now deceased, and A insists that he is entitled to \$25,000 by virtue of the republication of the will. Is he so entitled?

A. No; the codicil of 1923 operated as a republication of the former will, but such a republication does not revive a legacy which has once been satisfied.

Tanton v. Keller, 47 N. E. 376, 167 Ill. 129.

Izard v. Hurst, Freeman, C. C. 224.

For other cases see Decennial Digests, Wills $\S$ 769.

Q. 37. T made a will in 1910. In 1920 T made a second will, which revoked the earlier one. In 1925 T revoked his second will by burning. At T's death the will of 1910, which remained intact, was offered for probate. Those opposed to probate proved the execution and contents of the later will. How should the court rule?

A. The courts have taken different views of this problem. Sometimes the second will is treated as a final revocation. In other jurisdictions, the clause of revocation is treated as testamentary in its nature, and not effective if the second will is itself revoked. Statutes in a number of states provide that the revocation of a second will shall not revive the first, unless it appears "by the terms of the revocation" that such was testator's intention.

Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322.

Cheever v. North, 64 N. W. 455, 106 Mich. 390, 37 L. R. A. 561, 58 Am. St. Rep. 499 (revival of revoked will by revocation of revoking instrument).

For other cases see Decennial Digests, Wills $\S$ 198.

Q. 38. T made a valid will. Later he made a second will, revoking the first. Still later he tore up his second will, orally stating as he did so: "I revoke this will, intending to revive my first will." The statute in the state of T's domicile provided that the revoca-

tion of the second will should not revive an earlier will revoked by it, except when it appeared "by the terms of such revocation" that it was testator's intention to revive the earlier will. The first will, which testator had kept in his safe, is now offered for probate. Should it be admitted?

A. No; the statute contemplated only a republication in writing. This writing, in most jurisdictions, must be executed with the same formalities as a will; i. e., in the presence of attesting witnesses.

Matter of Stickney, 55 N. E. 396, 161 N. Y. 42, 76 Am. St. Rep. 246.

Kern v. Kern, 55 N. E. 1004, 154 Ind. 29 (oral revival or republication).

For other cases see *Decennial Digests*, Wills ⚡ 180, 200.

Q. 39. T, who left three children, A, B, and C, made a will, one item of which read: "I give my son A \$5,000, which is all he is to receive from my estate." T specifically disposed of his remaining property, except a farm, to B and C. The will contained no residuary clause, and no disposition, therefore, of the farm was made by the will. A claims that he is entitled to inherit one-third of the farm. Is his claim well founded?

A. Yes; a clause excluding an heir from inheriting the estate of a testator is inoperative, unless some valid disposition is made of testator's property.

Zimmerman v. Hafer, 32 A. 316, 81 Md. 347.

Crane v. Doty, 1 Ohio St. 279.

For other cases see *Decennial Digests*, Wills ⚡ 535.

Q. 40. T properly executed his will. Some months later T added a codicil to his will, making a bequest of \$5,000 to A. T, however, failed to have his signature to the codicil attested as required by the statute, and it was therefore of no effect. Still later T made a codicil which was duly executed, and which expressly confirmed the will, but made no mention of the first codicil. Is A entitled to the legacy of \$5,000.

A. No; the due execution of the codicil, mentioning the will, republished the will, as modified by properly executed codicils. The first codicil was in fact no part of the will, and was therefore not republished, and could not be deemed incorporated, since not referred to in the second codicil.

Burton v. Newbery, 1 Ch. D. 234.

Manship v. Stewart, 104 N. E. 505, 181 Ind. 299.

For other cases see *Decennial Digests*, Wills ⚡ 199.

Q. 41. T made a will on January 2, 1925, devising a large parcel of realty for a charitable use. The statute of T's state required that

a disposition in favor of a charity should be void, if made within 30 days of a testator's death. On March 5, 1925, T made a codicil to his will, in which he gave a legacy to a friend, and expressly confirmed his will. T died March 15, 1925. Is the charitable gift good?

A. Yes; while for some purposes the will, being republished by the codicil, is made to speak from the date of the codicil, this is true only so far as the codicil requires that it should so speak. In construing such a statute, the charitable bequest stands as made of the date of the will.

Matter of McCauley, 71 P. 512, 138 Cal. 432.

Morrow's Estate, 54 A. 342, 204 Pa. 484.

For other cases see Decennial Digests, Wills ☞ 16.

SECTION 7.—NUNCUPATIVE OR ORAL WILLS

Q. 42. T, who had made no will, met with a serious railway accident. Knowing that he probably would not live, T called upon a number of persons present to witness that he wished A, one of his sons, to have \$5,000, and that he wished his other son, B, to have his farm and everything else belonging to him. A died shortly thereafter, and the next day the will was reduced to writing by witnesses who heard T's words. Did T die testate?

A. The various state statutes differ materially with reference to the making of *nuncupative* or oral wills. Under the English Wills Act, nuncupative wills were declared invalid, except that a soldier in actual military service or a seaman being at sea might dispose of his personalty by an oral will. Some American statutes follow rather closely the English statute, and in nearly all jurisdictions an oral will may not dispose of real estate. Many states limit the value of the personal estate which may be thus bequeathed.

Maurer v. Reifschneider, 132 N. W. 197, 89 Neb. 673, Ann. Cas. 1912C, 643.

See Gardner on Wills (2d Ed.) pp. 44 to 57.

For other cases see Decennial Digests, Wills ☞ 138.

Q. 43. T died domiciled in a state which permitted a testator by a nuncupative will to dispose of his personalty, if such will was made in the last sickness and in the presence of two disinterested witnesses. T had made a written will disposing of all his property to B. Later, when in his last sickness, T made an oral will bequeathing all of his personalty to C. The oral will conformed to the statutory requirements as to such wills. Is C entitled to T's personalty?

A. No; since all of T's property had been disposed of by the written will, to give effect to the oral will would be to permit an

oral revocation of the written will. A nuncupative will cannot be given effect as a disposition of property already covered by an earlier written will.

McCune's Devisees v. House, 8 Ohio, 144, 31 Am. Dec. 433.

Brook v. Chappell, 34 Wis. 405.

For other cases see *Decennial Digests*, Wills $\S$ 187, 222.

SECTION 8.—HOLOGRAPHIC WILLS

Q. 44. T, who had formerly practiced law, wrote a document purporting to dispose of all of his property at his death. T signed the document at the end thereof, and placed it in his safety deposit box, where it was found at his death. The document was not attested. Is it entitled to probate?

A. Not in most jurisdictions. Such a will is called a holographic will, and in some jurisdictions a document, if written, dated, and signed by the testator's own hand, is a good will, although not attested.

Lakemeyer's Estate, 66 P. 961, 135 Cal. 28, 87 Am. St. Rep. 96.

Noyes' Estate, 105 P. 1017, 40 Mont. 190, 26 L. R. A. (N. S.) 1145, 20 Ann. Cas. 366.

Succession of Del Escobal, 8 So. 268, 42 La. Ann. 1086, 9 L. R. A. 829.

For other cases see *Decennial Digests*, Wills $\S$ 130, 132, 148.

Q. 45. T died domiciled in a state which did not require a will to be witnessed, if written entirely by the hand of the testator. T wrote a document in the form of a letter, which stated the disposition which T wished to have made of his personal property. The document was simply signed "Father." This document was offered for probate as a duly signed holographic will. Is it entitled to probate?

A. Probably yes. A testator may sign by mark or by initials, if he intends such mark or initials to stand as his completed signature. The word "Father" seems to have been intended by the testator as his signature, and, if so, should be deemed legally sufficient.

Kimmel's Estate, 123 A. 405, 278 Pa. 435, 31 A. L. R. 678.

Wise v. Short, 107 S. E. 134, 181 N. C. 320.

For other cases see *Decennial Digests*, Wills $\S$ 130, 133.

SECTION 9.—BURDEN OF PROOF

Q. 46. T's will, which purported to be properly executed, was offered for probate. Those opposed to probate insisted that T lacked testamentary capacity when he signed will. Proponent insists that, since there is a presumption of sanity, the burden of

proof to show lack of capacity is upon contestant. On whom is the burden of proof?

A. On proponent, by better view. Since proponent is asking the court to act, the risk of nonpersuasion should be upon him. After due execution proved, the presumption of sanity makes a prima facie case for proponent; but, when this is met by evidence indicating a lack of capacity, the final burden of proof should not be shifted to contestant. Because of the presumption of sanity, many courts do thus shift the burden of proof to contestant, although properly the effect of this presumption should be merely to shift the duty of going forward with evidence, or, in other words, to raise the "burden of rebuttal."

Prentis v. Bates, 53 N. W. 153, 93 Mich. 234, 17 L. R. A. 494.

Richardson v. Bly, 63 N. E. 3, 181 Mass. 97.

For other cases see Decennial Digests, Wills $\S$ 52(1).

SECTION 10.—RULE AGAINST PERPETUITIES

Q. 47. T at his death had three grandchildren, all under 5 years of age. In his will T bequeathed \$25,000 to each of his grandchildren who should reach 30 years of age. Are the bequests to the grandchildren good, in the event that each grandchild reaches 30 years of age?

A. Not in most jurisdictions. The common-law rule against perpetuities is usually applied in wills both to devises and bequests. This rule in wills requires that an interest must vest within 21 years after the termination of lives in being at testator's death.

Andrews v. Lincoln, 50 A. 898, 95 Me. 541, 56 L. R. A. 103.

Johnson v. Preston, 80 N. E. 1001, 226 Ill. 447, 10 L. R. A. (N. S.) 564.

For other cases see Decennial Digests, Perpetuities $\S$ 4(2), 6(14), 9(3).

SECTION 11.—CONFLICT OF LAWS

Q. 48. T died, leaving a will properly executed according to the law of his domicile at death, which required two witnesses. One item of T's will devised to B a farm, and bequeathed to him 100 cattle, both farm and cattle being in an adjoining state. This state required three witnesses to a will. Is B entitled to the provision made for him?

A. The general rule of conflict of laws as to wills, is that, as affects realty, the formalities of execution are governed by the law of the state where the realty is situated, while, as affects personalty, such formalities are governed by testator's domicile. In the absence of an express statutory change of this rule, therefore,

B would receive the cattle, but not the farm. Statutes rather generally now provide for the admission to record of wills made in accord with the law of testator's domicile at death, and permit such wills to pass both realty and personalty, even when not executed in accord with the law of the state where property is situated.

Knight v. Wheedon, 30 S. E. 794, 104 Ga. 309.

Ford v. Ford, 33 N. W. 188, 70 Wis. 19, 5 Am. St. Rep. 117.

For other cases see *Decennial Digests*, Wills ⇨70.

Q. 49. T signed his will, and it was duly attested by two witnesses, as required by the law of the state in which T was then domiciled. Later T established his domicile in a state which required a will to be attested by three witnesses. T died domiciled in the latter state, never having changed his will, since he knew nothing of the difference in requirements. The will with two witnesses is offered for probate. Should it be admitted?

A. No. In the absence of a statute changing the general rule, the formalities determining the validity of a will depend upon the law of testator's domicile at the time of his death.

Moultrie v. Hunt, 23 N. Y. 394.

Shute v. Sargent, 36 A. 282, 67 N. H. 305.

For other cases see *Decennial Digests*, Wills ⇨22, 70.

SECTION 12.—ELECTION BY BENEFICIARY

Q. 50. T made a valid will, in one item of which he devised Blackacre to B and his heirs. In another item of his will, T devised Whiteacre to C and his heirs. At testator's death, the title to the fee in Whiteacre was vested in B. Is B entitled to both Blackacre and Whiteacre?

A. No. B is put to his election, and cannot take the gift and retain his own property. He must elect to claim either under or against the will. B, therefore, has the choice of taking Blackacre and permitting C to have Whiteacre, or of refusing to take Blackacre and keeping Whiteacre.

Drake v. Wild, 39 A. 248, 70 Vt. 52.

Waggoner v. Waggoner, 68 S. E. 990, 111 Va. 325, 30 L. R. A. (N. S.) 644.

For other cases see *Decennial Digests*, Wills ⇨717, 781, 782(12), 794.

Q. 51. T devised Blackacre to B and his heirs, and Whiteacre to C and his heirs. B in fact owned Whiteacre. Since Whiteacre was the more valuable tract, B elected against the will and kept Whiteacre. What if any rights has C?

A. C is entitled to be compensated out of Blackacre, the property devised to the electing beneficiary, to the extent that he has been

injured by the fact that B declines to take under the will. The whole doctrine is an equitable one, and C's demand for compensation out of Blackacre is more equitable than is the demand of T's heir at law or his residuary legatee.

Brown v. Brown, 44 N. W. 250, 42 Minn. 270.

Appeal of Sandoe, 65 Pa. 314.

For other cases see *Decennial Digests*, Wills $\S$ 802(5).

SECTION 13.—GIFTS TO A CLASS

Q. 52. One item of T's will read: "I give my home farm of 200 acres to my grandchildren." T then had three grandchildren, A, B, and C, but two more grandchildren, D and E, were born before T's death. Two years after T's death, and before any distribution of his estate had been made, a sixth grandchild, F, was born. Who are entitled to share under the above-mentioned item?

A. All of the grandchildren, except F. In the absence of an expression of testator's intention to the contrary, an immediate gift to a class generally is held to vest in those in existence at the time of testator's death.

In re Nicholson's Will, 88 N. W. 1064, 115 Iowa, 493.

Clark v. Mack, 126 N. W. 632, 161 Mich. 545, 28 L. R. A. (N. S.) 479.

For other cases see *Decennial Digests*, Wills $\S$ 524(2).

Q. 53. One item of T's will read: "I devise my home farm to my children." T then had three children, A, B, and C. D, a fourth son was born before T's death. C died before T, leaving a son, E. The statute provided that, in the event of a gift to a child or other relative of a testator, who died before testator, the issue of the child or relative should take the interest which his ancestor would have taken, had he survived the testator. Who is entitled to share in the farm?

A. A, B, D, and E. Although a class is ordinarily determined as of testator's death, statutes preventing lapse are usually construed as applying to gifts to a class. In some states, however, E would not be permitted to take, on the ground that C was not in the class, and that there was accordingly no lapse.

Rudolph v. Rudolph, 69 N. E. 834, 207 Ill. 266, 99 Am. St. Rep. 211.

In re Stockbridge, 14 N. E. 928, 145 Mass. 517.

Trenton Trust & Safe Deposit Co. v. Sibbits, 49 A. 530, 62 N. J. Eq. 131.

For other cases see *Decennial Digests*, Wills $\S$ 523, 552(5).

SECTION 14.—LAPSED DEVISES

Q. 54. T made a will, devising one farm to A, a second to B, and all the rest and residue of his estate to C. A died leaving no issue,

and the devise to him lapsed. The devise to A is claimed by C, as residuary legatee, and by H, who is T's heir at law. Who is entitled thereto?

A. At common law, the farm devised to A passed to the heir at law as intestate property. A particular devise was treated as an exception from the residuary gift. The will was treated as a present conveyance, and therefore did not pass a lapsed devise, which was deemed after-acquired property. Statutes now generally permit a will to dispose of property acquired after its execution, and under such statutes a lapsed devise is usually held to pass to a general residuary legatee.

Molineaux v. Raynolds, 36 A. 276, 55 N. J. Eq. 187.

Johnson v. Holifield, 2 So. 753, 82 Ala. 123.

For other cases see *Decennial Digests*, Wills ¶858(1-3).

SECTION 15.—LEGACIES

Q. 55. T's will directed his executor to collect his life insurance policies payable to his estate, and that he "pay to B out of the proceeds thereof the sum of \$5,000." The amount collected on policies amounted to \$3,000. B insists that he receive \$2,000 from T's general estate, which would otherwise pass to T's residuary legatee. Is B entitled to the additional sum?

A. Yes; such a legacy is usually deemed demonstrative, and not specific. Although a demonstrative legacy designates the fund out of which it is to be taken, recourse for its payment may be made to the general estate, in case the designated fund fails.

White v. White, 53 S. E. 371, 73 S. C. 261.

Gardner v. McNeal, 82 A. 988, 117 Md. 27, 40 L. R. A. (N. S.) 553, Ann. Cas. 1914A, 119.

For other cases see *Decennial Digests*, Wills ¶755.

Q. 56. One item of T's will read: "I give to my nephew, B, the note which I now hold in the sum of \$5,000, payable to my order and signed by C." Before T's death, C's note fell due, and he voluntarily paid it to T, who deposited the money in his bank. To what is B entitled under this item?

A. Nothing. The bequest to B was specific, and was adeemed. The question is one of identity, rather than of intention. Since the thing bequeathed is no longer in existence, it cannot pass.

Wyckoff v. Executors of Perrine, 37 N. J. Eq. 118.

Tolman v. Tolman, 27 A. 184, 85 Me. 317.

For other cases see *Decennial Digests*, Wills ¶715, 767.

Q. 57. T gave a legacy of \$25,000 to each of his children, A, B, and C. During his lifetime T made a gift of \$10,000 to C. No evidence is available as to whether or not T intended the gift to be applied toward the legacy. To what sum is C entitled?

A. \$15,000. Where a legacy is given by one in loco parentis, and the testator later makes a gift of similar property to the same beneficiary, the presumption arises that the gift was intended in satisfaction of the prior legacy, and unless this presumption is rebutted an ademption pro tanto takes place. This doctrine arose because of the court's hostility to double portions for those to whom testator owed the duties of a parent, and there is no such presumption when testator does not stand in that relation.

Richardson v. Eveland, 18 N. E. 308, 126 Ill. 37, 1 L. R. A. 203.

Youngerman v. Youngerman, 114 N. W. 7, 136 Iowa, 488, 15 Ann. Cas. 245.

For other cases see *Decennial Digests*, Wills §766, 772.

Q. 58. Among the legacies in T's will were legacies of \$5,000 each to A, B, and C, three friends of T. T's will gave his residuary estate to five friends, A, B, C, D, and E. A, B, and C died without issue before T. What disposition should be made of the provision made for the three last named legatees?

A. By the rule prevailing in most jurisdictions, the three legacies of \$5,000 each would lapse and fall into the residuum. The legacies to A, B, and C, as residuary legatees, also lapse, and, since they do not fall into the residue, because themselves a part of the residue, three-fifths of the augmented residue would pass as intestate property.

Worcester Trust Co. v. Turner, 96 N. E. 132, 210 Mass. 115.

Matter of Hoffman, 94 N. E. 990, 201 N. Y. 247.

For other cases see *Decennial Digests*, Wills §587(6), 775, 858(4), 862, 863.

SECTION 16.—PROVISIONS AGAINST CONTEST

Q. 59. T's will contained a provision to the effect that, if any legatee named as a beneficiary contested the same, such legatee should forfeit thereby his right to any portion of the estate, and that the legacy given to such legatee should pass to the residuary legatee named. B, who was given a legacy of \$2,500, unsuccessfully, but in good faith, contested the will. Is he entitled to the legacy?

A. Not by the prevailing rule. The beneficiary takes by the grace of the testator, and the condition attached is valid by the weight of authority. Such a condition is in some jurisdictions very proper-

ly held contrary to public policy, and inoperative, if contest is made in good faith.

Moran v. Moran, 123 N. W. 202, 144 Iowa, 451, 30 L. R. A. (N. S.) 898.

In re Kitchen, 220 P. 301, 192 Cal. 384, 30 A. L. R. 1008.

For other cases see *Decennial Digests*, Wills $\S$ 651.

SECTION 17.—ELECTION BY WIDOW

Q. 60. T, who was survived by a wife, W, and two sons, A and B, left a will, the first item of which read: "I give to my wife, W, in lieu of dower and all other claims upon my estate, \$50,000 in cash." T's will contained no residuary clause, and he died intestate as to a large farm, worth \$60,000. W elected to take under T's will, but also insists that dower be assigned to her in the intestate realty. Is she entitled thereto?

A. Yes; where testator makes a provision for his wife, and expressly or by clear implication indicates that such provision is in lieu of dower and distributive share, the wife is put to her election, and cannot claim both the testamentary provision and dower. However, as to intestate property she is entitled to dower, although she has elected to take under a will declaring she is to have only provision therein made.

Bennett v. Packer, 39 A. 739, 70 Conn. 357, 66 Am. St. Rep. 112.

Skellenger v. Skellenger, 32 N. J. Eq. 659.

For other cases see *Decennial Digests*, Wills $\S$ 782(2), 865(4).

SECTION 18.—GIFTS BY IMPLICATION

Q. 61. One item of T's will read: "I give my 100-acre river farm to my heirs after the death of B." The will contained no other mention of B, who claims a life estate in the farm after T's death. Is he entitled to such an estate?

A. Yes; this is a gift by implication. Such a gift may be made without any express words of gift, if an intention to give clearly appears from the will as a whole.

Connor v. Gardner, 82 N. E. 640, 230 Ill. 258, 15 L. R. A. (N. S.) 73.

Masterson v. Townshend, 25 N. E. 928, 123 N. Y. 458, 10 L. R. A. 816.

For other cases see *Decennial Digests*, Wills $\S$ 102, 478.

SECTION 19.—PROVISIONS IN RESTRAINT OF MARRIAGE

Q. 62. T's will contained a bequest of an annuity of \$5,000 to his wife, W, to be paid to her "during widowhood." A few years after T's death, W remarried, and now demands her annuity on the ground that the provision terminating her annuity upon

marriage was void as in restraint of marriage. Is W entitled to further payments?

A. No; a general condition in restraint of marriage is usually deemed contrary to public policy and inoperative, since it commonly is in the form of a condition subsequent. However, a valid condition against remarriage may be imposed by any testator who has a natural interest in the beneficiary.

Knight v. Mahoney, 25 N. E. 971, 152 Mass. 523, 9 L. R. A. 573.

Overton v. Lea, 68 S. W. 250, 108 Tenn. 505.

For other cases see Decennial Digests, Wills $\S$ 647.

SECTION 20.—DESCENT OF INTESTATE PROPERTY

Q. 63. T, a widower, died intestate, leaving H, his only son and heir. A was appointed administrator of T's estate. T was badly involved, and at his death left no assets except a building worth \$100,000, leased at \$6,000 a year, payable in quarterly installments. At his death, T owed \$200,000 in unsecured claims. A began proceedings under the statute to sell T's realty to pay debts, but, before he secured an order of sale \$6,000 in rent accrued. Who is entitled thereto?

A. H, by prevailing view. The land of intestate descends at once to his heir, who as owner of the reversion has the right to collect all rents accruing between death of intestate and sale of intestate's land by administrator for the purpose of paying debts. This rule is usually applied, even against creditors of an insolvent estate.

Overturf v. Dugan, 29 Ohio St. 230.

Towle v. Swasey, 106 Mass. 100.

Brown v. Fassenden, 17 A. 709, 81 Me. 522.

For other cases see Decennial Digests, Executors and Administrators $\S$ 41, 413.

Q. 64. I died intestate. He was a widower, and survived by H, his only son and heir. H paid all the debts of I. Among the assets of I's estate, after payment of all debts, taxes, and demands, was a note of \$1,000, payable to I's order. There was no administrator appointed of I's estate, since H had in his possession sufficient money of decedent to meet all obligations. H, as sole distributee, now sues at law the maker of the note, which is due and unpaid. Is he entitled to recover?

A. No; by general rule. The personal property of a decedent does not vest in the heir, but title is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death. The sole heir in possession of a note payable to

intestate's order has no right to sue at law in his own name, but his rights should be enforced through administration and distribution.

McBride v. Vance, 76 N. E. 938, 73 Ohio St. 258, 112 Am. St. Rep. 723, 4 Ann. Cas. 191.

Pritchard v. Norwood, 30 N. E. 80, 155 Mass. 539.

For other cases see Decennial Digests, Descent and Distribution ¶87, 91 (1); Executors and Administrators ¶3(1).

Q. 65. After T's death, a will, purporting to be signed by T and attested, was duly probated. E, named as executor in this document, was appointed by the probate court. D, a debtor of the estate, paid E \$5,000 which he owed to T's estate. Later it was discovered that T's signature had been forged, and the probate of the will was set aside. A, having been appointed administrator of T's estate, now sues D to secure payment of the \$5,000 indebtedness. Has D a defense?

A. Yes; the probate court had jurisdiction, and D simply recognized the court's act within that jurisdiction. The decision of the probate court admitting the will to probate could not have been collaterally attacked by D, and he should therefore be protected in making payment under the sanction of a court having competent jurisdiction.

Allen v. Dundas, 3 T. R. 125.

Poplin v. Hawke, 8 N. H. 124.

For other cases see Decennial Digests, Wills ¶432.

SECTION 21.—DEFINITIONS

Q. 66. Define the terms—

- (a) Executor.
- (b) Administrator cum testamento annexo.
- (c) Administrator de bonis non.

A. (a) An executor is one to whom another man commits by his last will the execution of that will and testament. 2 Bl. Com. 503.

(b) An administrator cum testamento annexo (with will annexed) is one appointed to administer where there is a will, but where no executor has been named in such will, or, if named, does not act as such executor. 2 Bl. Com. 504.

(c) An administrator de bonis non (of goods not administered) is one appointed to administer when the first executor or administrator dies, or is otherwise removed, before completing the work of administration. 2 Bl. Com. 506.

For cases see Decennial Digests, Executors and Administrators ¶14, 21, 23, 37.

Q. 67. T's will named E as executor. E owed T at the latter's death the sum of \$5,000 for money loaned. E accepted the trust, was appointed, and gave bond. What was the effect of E's appointment upon his debt?

A. At common law the appointment of one's debtor as executor was held to extinguish the debt. Under the doctrine prevailing in nearly all American jurisdictions, the appointment of a debtor as executor or administrator merely serves to make the personal representative liable for his debt to the estate as for so much money in his hands. This rule is sometimes applied to the sureties of an executor, who is insolvent, and therefore unable to account for his debt as money in his hands. They are liable for his failure to administer and distribute the money, by the minority rule.

Wachsmuth v. Penn Mutual L. Ins. Co., 89 N. E. 787, 241 Ill. 409, 26 L. R. A. (N. S.) 411, 132 Am. St. Rep. 226.

McGaughey v. Jacoby, 44 N. E. 231, 54 Ohio St. 487.

State, to Use of Farmer, v. Citizens' Trust & Guaranty Co., 100 S. E. 685, 84 W. Va. 729, 8 A. L. R. 79.

For other cases see *Decennial Digests, Executors and Administrators* 50, 528(5).

Q. 68. T's will bequeathed to B a legacy of \$5,000. B, a friend of T, owed T \$2,500 on a note, which he had given T in return for a loan of that sum. The note, however, was barred by the statute of limitations at the time of T's death. B demands payment of the entire legacy, while T's executor insists upon his right to set off the unpaid note. Is he entitled so to set off?

A. No; by the prevailing rule. T's right to recover having become barred by the statute of limitations, his personal representative could not recover on the note. Since the will made no directions as to deductions, B is entitled to receive his full legacy, without set-off.

Holt v. Libby, 14 A. 201, 80 Me. 329.

Allen v. Edwards, 136 Mass. 138.

For other cases see *Decennial Digests, Executors and Administrators* 294.

Q. 69. What is meant by "widow's quarantine"?

A. By "widow's quarantine" was meant the period of 40 days from the death of a man seized of land, during which the widow might remain in his chief mansion without paying rent, and during which her dower was to be assigned. 2 Bl. Com. 135.

For cases see *Decennial Digests, Executors and Administrators* 175.

Q. 70. What is the widow's "allowance"?

A. Statutory provisions generally give power to the probate court to make allowance for the support of the widow and children out of the estate during administration, and the rights of testamentary disposition and of beneficiaries to take under a will are subordinate to this power of the court. A widow's claim to a family allowance is strongly favored. It is additional to dower or other interest.

In re Whitney's Estate, 154 P. 855, 171 Cal. 750.

For other cases see *Decennial Digests, Executors and Administrators* ⇨ 174, 176.

SECTION 22.—POWERS OF EXECUTOR

Q. 71. E was appointed in Texas as executor of the last will of T, who died domiciled in Texas. P, who lived in New York state, had a cause of action against T. While E was sojourning in New York, P brought suit against E as executor, and had him served personally with process. The statute of New York permitted any foreign executor to sue or be sued in New York. E moved to quash the service. Should his motion be sustained?

A. Probably yes. A foreign executor or administrator cannot sue or be sued in a foreign state, except as aided by statute. The New York statute probably could not permit a judgment upon service in that state, binding upon the property in Texas, without the consent of the latter state.

Thorburn v. Gates (D. C.) 225 F. 613.

Craig v. Toledo R. Co., 3 Ohio Dec. 146.

For other cases see *Decennial Digests, Executors and Administrators* ⇨ 525.

Q. 72. T died, leaving a will in which E was named as executor. E qualified, but had only partially administered T's estate, when he died, leaving a will in which he nominated F as his executor. F qualified as executor of E's will. What position towards T's estate is held by F?

A. F does not become executor of the will of T. The rule prevailing in American jurisdictions is that the duties and liabilities of an executor, upon his decease, devolve, not upon the executor of the executor, but upon an administrator de bonis non with the will annexed of the estate of the original testator.

Prescott v. Morse, 64 Me. 422.

Farwell v. Jacobs, 4 Mass. 634.

For other cases see *Decennial Digests, Executors and Administrators* ⇨ 121(1), 128.

Q. 73. T's will named E as executor. T's will contained no residuary clause, and by virtue of changes which took place in T's estate before his death T died intestate as to a large share of his estate. E is willing to qualify. How should the estate be administered?

A. The entire estate should be administered by E. Where a portion of an estate is intestate property, an executor has the right and duty of administering the entire estate under his letters testamentary, without taking out letters of administration.

McGreevy v. McGrath, 25 N. E. 29, 152 Mass. 24.

Venable v. Mitchell, 29 Ga. 566.

For other cases see Decennial Digests, Executors and Administrators 3(1), 121(1).

Q. 74. What is an executor de son tort?

A. "An executor de son tort—i. e., executor of his own wrong—is a person who, without any authority, intermeddles with the estate of a decedent, and does such acts as properly belong to the office of an executor or administrator, and thereby becomes a sort of quasi executor, although only for the purpose of being sued or made liable for the assets with which he has intermeddled."

Grace v. Seibert, 85 N. E. 308, 235 Ill. 190, 22 L. R. A. (N. S.) 301.

For other cases see Decennial Digests, Executors and Administrators 538.

Q. 75. Before his death, I, who died intestate, told E what he would like to have done with his property at his decease. Upon I's death, E took possession of I's estate and began to administer it in accordance with I's express instructions. C, a creditor, brought suit against E as an executor de son tort. Is the action properly brought?

A. Yes; in those jurisdictions which recognize such a representative as an executor de son tort. E has intermeddled with the assets of the estate, and has intruded into the office of executor.

Rohn v. Rohn, 68 N. E. 369, 204 Ill. 184, 98 Am. St. Rep. 185.

Bennett v. Ives, 30 Conn. 329.

For other cases see Decennial Digests, Executors and Administrators 538, 541.

Q. 76. A and B agreed to marry. Later A broke this contract, and B brought suit against him for breach of contract to marry. While the suit was pending, B died, and C was appointed her administrator. May C have the suit revived and continued in his name as administrator?

A. No. While, as a rule, causes of action in contract survive to the personal representative, the action for breach of contract of marriage is usually treated more as one sounding in tort, and does not survive, in the absence of proof of special damage.

Hovey v. Page, 55 Me. 142.

Chamberlain v. Williamson, 2 M. & S. 408.

For other cases see Decennial Digests, Abatement and Revival ¶52.

SECTION 23.—SURVIVORSHIP OF CAUSES OF ACTION

Q. 77. A was injured by the negligence of the B Railway, and brought suit to recover for such injury. While the suit was pending, A died from the injury, and C was appointed administratrix of his estate. Upon her appointment, C, on motion, had the action brought by A revived, so that she might continue it as administratrix. C, as administratrix, also brought suit in behalf of A's next of kin against the B Railway for wrongfully causing the death of her intestate. The statute named the personal representative as the one to sue in such a case, but defendant insists that plaintiff must elect. May plaintiff prosecute both actions?

A. Yes; in most jurisdictions. The tort action for injury to A usually survives by reason of statutory provisions. The two actions are not prosecuted in the same right; one being for injury to decedent, and the other for the injury to next of kin.

Mahoning Valley Ry. Co. v. Van Alstine, 83 N. E. 601, 77 Ohio St. 395, 14 L. R. A. (N. S.) 893.

Spradlin v. Georgia R. & E. Co., 77 S. E. 799, 139 Ga. 575.

For other cases see Decennial Digests, Abatement and Revival ¶54; Judgment ¶688.

Q. 78. T died intestate, and named E as his executor. After E's appointment, D negligently broke certain glass belonging to T's estate. E brought suit as executor for the loss caused by D's negligence. D in a proper manner raised the objection that the suit should have been brought by E individually. Is his objection well taken?

A. No; a personal representative may sue in his individual capacity for causes of action accruing after his decedent's death. In most jurisdictions, however, in such a case he may declare either in his representative or his individual capacity.

Leavitt v. Jas. F. Scholes Co., 103 N. E. 965, 210 N. Y. 107.

Myers v. Weger, 42 A. 280, 62 N. J. Law, 432.

For other cases see Decennial Digests, Executors and Administrators ¶427.

Q. 79. D in his lifetime conveyed to G certain real estate for the purpose of defrauding creditors. D died shortly thereafter, and A was appointed administrator of D's estate. May A successfully prosecute a suit to set aside the conveyance to G?

A. An administrator may impeach a fraudulent conveyance of realty by his intestate only when authorized by statute. Statutes usually permit such an action by an administrator only for the benefit of creditors, and require, therefore, that administrator establish that property fraudulently conveyed is actually required for the payment of debts.

Chapoton v. Prentis, 107 N. W. 879, 144 Mich. 283.

McCall v. Pixley, 27 N. E. 887, 48 Ohio St. 379.

For other cases see Decennial Digests, Executors and Administrators 329(1), 431(1), 453(2).

SECTION 24.—EXONERATION

Q. 80. T in his will devised his home farm to his son, A, and the residue of his estate to his daughter, B. T's farm was incumbered by a mortgage given to secure T's note for \$10,000. T left nothing at his death, after payment of unsecured debts, except the farm, worth \$25,000, and \$15,000 in cash. A insists that the administrator pay off the mortgage indebtedness. Should the administrator do so?

A. Yes; the devisee of land incumbered by the testator is entitled to have his land exonerated out of the general personal assets. Such devisee is, however, not entitled to exoneration out of personalty specifically bequeathed.

Brown v. Baron, 37 N. E. 772, 162 Mass. 56, 44 Am. St. Rep. 331.

Turner v. Laird, 35 A. 1124, 68 Conn. 198.

For other cases see Decennial Digests, Executors and Administrators 133; Wills 840.

Q. 81. T in his lifetime acquired a farm, which was then subject to a mortgage for \$10,000. T devised the farm to B, and the residue of his estate to C. Is B entitled to have the mortgage paid out of the residuary estate?

A. No. B takes the farm with the burden of the incumbrance. The devisee is entitled to exoneration only when the debt is testator's own debt, on which he is personally liable to mortgagee.

Petition of Hunt, 32 A. 204, 19 R. I. 139, 61 Am. St. Rep. 743.

Hetzel v. Hetzel, 71 A. 755, 74 N. J. Eq. 770.

For other cases see Decennial Digests, Executors and Administrators 209; Wills 840.

SECTION 25.—INTEREST ON LEGACIES

Q. 82. T's will gave a legacy of \$5,000 to B. T's estate was all invested in stocks, which paid 3 per cent. dividends each quarter until disposed of, 18 months after T's death. Two years after T's death, E, the executor, tendered B \$5,000, but B insisted that he be paid two years' interest. Is he entitled to such payment?

A. No; unless otherwise fixed by statute, or by direction of testator, a general legacy is payable at the expiration of one year from the testator's death. B's legacy, therefore, does not begin to draw interest until one year after T's death.

Lyford v. McFetridge, 117 N. E. 589, 228 Mass. 285.

Lowman v. Lowman, 48 S. E. 536, 69 S. C. 543.

For other cases see *Decennial Digests, Executors and Administrators* 313.

Q. 83. T's will made a bequest of 100 shares of United States Steel preferred to B. T mentioned in his will that he then owned these shares, and that he wished his executor to make a transfer thereof to B within one year after T's death. Six months after T's death a dividend was declared on these shares. Is B entitled thereto?

A. Yes. A specific bequest is considered as severed from the estate, and the beneficiary is entitled to whatever income or interest the property bequeathed may produce from the time of testator's death.

Loring v. Woodward, 41 N. H. 391.

Thayer v. Paulding, 85 N. E. 868, 200 Mass. 98.

For other cases see *Decennial Digests, Wills* 728, 734(2, 5), 735.

Q. 84. T's will contained a legacy of \$10,000 for B, a minor child. The assets of T's estate were not productive, and E, T's executor, was not in a position to pay legacies until two years after T's death. G, B's guardian, insists that E pay interest on B's legacy from T's death. Is G entitled to such payment?

A. Yes. When no other provision was made for a minor child of testator, or for one to whom testator stood in loco parentis, a legacy is deemed a provision for maintenance, and bears interest from the death of testator.

Keech's Estate, 87 A. 623, 240 Pa. 491.

Webb v. Webb, 48 A. 95, 92 Md. 101, 84 Am. St. Rep. 499.

For other cases see *Decennial Digests, Wills* 734(5).

Q. 85. T's will made a provision of \$50,000 for his wife, W, and specifically stated that such provision was in lieu of dower. The statute in T's state provided a year's allowance for the maintenance of a decedent's widow. W elected to take under T's will. Is she entitled also to claim the year's allowance?

A. Yes; by prevailing rule. The statute granting a temporary allowance for the support of a widow is usually given a liberal construction. While the cases cannot be reconciled, the widow is generally held entitled to receive both the statutory allowance and the provision made for her by the will, unless testator indicates an intention to the contrary.

Collier v. Collier's Ex'rs, 3 Ohio St. 369.

Moore v. Moore, 12 N. W. 180, 48 Mich. 271.

For other cases see Decennial Digests, Executors and Administrators 179; Wills 782(1).

SECTION 26.—INHERITANCE TAXATION

Q. 86. D at his death had \$50,000 on deposit with the Dollar Trust Company in New York City. D died domiciled in Chicago. Illinois levied an inheritance tax on this deposit, on the theory that it was merely a chose in action, the situs of which was at D's domicile, and not in New York. May New York also assess an inheritance tax on this deposit?

A. Yes; such a double inheritance tax infringes no rule of constitutional law. The transfer is subject to the power of the state of New York, and that state may therefore assess an inheritance tax. The state of decedent's domicile may at the same time insist that intangibles follow the person, and that domicile governs the whole.

Blackstone v. Miller, 23 S. Ct. 277, 188 U. S. 189, 47 L. Ed. 439.

Matter of Clinch, 73 N. E. 35, 180 N. Y. 300.

For other cases see Decennial Digests, Taxation 867(4), 869.

Q. 87. T died domiciled in Massachusetts. His will directed the sale of certain land in New York for the payment of various legacies. Is the New York real estate subject to an inheritance tax in Massachusetts?

A. No; by the general rule. Real estate of a resident decedent located in a foreign jurisdiction is not subject to taxation at residence. The doctrine of equitable conversion is generally held not to be applicable in the law of inheritance taxation, on the ground

that the doctrine is a fiction which should not be used to produce double taxation.

Connell v. Crosby, 71 N. E. 350, 210 Ill. 380.

McCurdy v. McCurdy, 83 N. E. 881, 197 Mass. 248, 16 L. R. A. (N. S.) 329, 14 Ann. Cas. 859.

Rambo's Estate, 109 A. 671, 266 Pa. 520, contra.

See 9 Minn. Law Rev. 581.

For other cases see Decennial Digests, Conversion ; Taxation 
865, 867(1), 868(1).

Q. 88. T's will disinherited his son, A, and named B and C as residuary legatees. A threatened to contest the will, and B and C paid him \$30,000 by way of compromise of the threatened litigation. B and C insist that the sum named be deducted before determining the residuary estate on which they must bear inheritance tax. Should this deduction be made?

A. No; by prevailing rule. A took by contract, and not under T's will. The whole of T's residuary estate vested in the residuary legatees at the death of T, and the inheritance tax was then due and payable.

Estate of Graves, 89 N. E. 978, 242 Ill. 212.

Matter of Cook, 79 N. E. 991, 187 N. Y. 253.

For other cases see Decennial Digests, Taxation 864, 886½.

Q. 89. In his lifetime T transferred securities worth \$1,000,000 to the Security Trust Company. The trust agreement, which was irrevocable, directed that the company pay the income on the trust property to T for life, and at his death distribute the fund among T's children. The statute in the state of T's domicile assessed a tax upon all transfers to take effect at or after the maker's death. Is this property subject to a tax upon T's death?

A. Yes. Where a whole or a part of the income is reserved, to the extent of the reservation the transfer is properly taxable. So much of the estate conveyed as is necessary to produce the income reserved is subject to the inheritance tax.

People v. Kelley, 75 N. E. 1038, 218 Ill. 509.

Matter of Green, 47 N. E. 292, 153 N. Y. 223.

For other cases see Decennial Digests, Taxation 879(1), 885.

Q. 90. T's will gave B a legacy of \$5,000. B was indebted to C in the sum of \$3,000. E was appointed executor of T's will, and a few days thereafter C brought an action against B, and served garnishee process upon E. Was the garnishment proper?

A. No. In the absence of express statute, it is usually held that money or property held by an executor or administrator in his rep-

representative capacity cannot be reached by attachment or garnishee process in an action against an heir or legatee before an order of distribution has been made.

Orlopp v. Schueller, 73 N. E. 1012, 72 Ohio St. 41, 106 Am. St. Rep. 583, 2 Ann. Cas. 919.

J. I. Case Threshing Mach. Co. v. Miracle, 11 N. W. 580, 54 Wis. 295.

For other cases see *Decennial Digests*, Garnishment $\S$ 35, 36, 61.

SECTION 27.—RECOVERY IN ACTION FOR WRONGFULLY CAUSING DEATH

Q. 91. D was killed by the negligence of C. A was appointed administrator of the estate of D, who was survived by three minor children. The statute of the state of D's domicile authorized an administrator to prosecute an action against one who wrongfully caused the death of his decedent, such action to be for the benefit of decedent's next of kin. A recovered \$10,000 damages in a wrongful death suit. A has, however, no funds other than this sum to pay the funeral expenses and other debts of D. Would you advise him to apply part of the recovery to payment of debts?

A. No; the administrator is really only a statutory trustee for the persons beneficially entitled under the statute. Under the usual statute, the recovery is not assets of the estate.

Holt v. Stollenwerck, 56 So. 912, 174 Ala. 213.

Gottlieb v. North Jersey St. R. Co., 63 A. 339, 72 N. J. Law, 480.

For other cases see *Decennial Digests*, Death $\S$ 101.

SECTION 28.—ABATEMENT OF LEGACIES

Q. 92. T's will gave ten general legacies, amounting to \$100,000. C, a creditor, was given a legacy of \$10,000 by the will; it being provided therein that the legacy should be in full payment of all claims of C against T's estate. After payment of T's debts, the executor had in hand \$50,000. How should he distribute this sum?

A. C is entitled to payment in full before general legatees, who take merely of testator's bounty. General legacies, unsupported by consideration, abate before a legacy given to extinguish a debt.

Reynolds v. Reynolds, 63 A. 804, 27 R. I. 520.

Duncan v. Township of Franklin, 10 A. 546, 43 N. J. Eq. 143.

For other cases see *Decennial Digests*, Wills $\S$ 808.

Q. 93. T's will gave to each of his daughters, A and B, a legacy of \$10,000. T's will then contained an item reading: "After the payment of my debts and legacies, I give and bequeath to my son C all my realty and personalty." After T's death, C granted to D a farm

which passed to C under the will. All T's personalty was devoted to payment of T's debts. What are the rights of A and B?

A. A and B may hold C personally, since he accepted the devise, and they also have a lien on D's farm. The will being recorded, D had constructive notice that T had charged his realty with the payment of legacies.

Conkling v. Weatherwax, 65 N. E. 855, 173 N. Y. 43.

Steele v. Korn, 118 N. W. 207, 120 N. W. 261, 137 Wis. 51, 129 Am. St. Rep. 1051.

For other cases see Decennial Digests, Wills ⌘821(5), 824.

Q. 94. D died intestate, and A was appointed administrator of his estate. C had an account against D's estate, which was barred by the statute of limitations at the time of D's death. C brings an action on his account against A as administrator. Is A required to plead the statute of limitations?

A. In some jurisdictions an executor or administrator is bound to interpose the statute of limitations, when it is available to bar claims against the estate. Other jurisdictions permit the personal representative to waive the statute. It is usually held that the personal representative may toll the statute when the statutory bar is not complete.

Dern v. Olsen, 110 P. 164, 18 Idaho, 358, L. R. A. 1915B, 1016, Ann. Cas. 1912A, 1.

Haskell v. Korn, 86 N. E. 937, 200 Mass. 599, 128 Am. St. Rep. 452.

For other cases see Decennial Digests, Limitation of Actions ⌘143(5).

Q. 95. A was appointed administrator of the estate of D. Having obtained authority of court to sell realty of the estate to pay debts, A, as administrator, entered into a written contract with B, a real estate broker, agreeing to pay B a commission of 5 per cent. if B could sell a block belonging to the estate for \$50,000. B effected a sale, and now sues A individually for his commissions, payment having been refused. Is he entitled to recover a judgment against A personally?

A. Yes; as a general rule, contracts made by an administrator or executor are deemed personal contracts of the personal representative, and do not bind the estate as such, even where made in the representative capacity and for the benefit of the estate.

Rosenthal v. Schwartz, 101 N. E. 1070, 214 Mass. 371.

McFarland v. Howell, 143 N. W. 860, 162 Iowa, 110.

For other cases see Decennial Digests, Executors and Administrators ⌘97.

Q. 96. T devised his farm, worth \$25,000, to A, his son, and the residue of his estate, which consisted of personalty worth \$25,000, to his daughter B. Unsecured claims, amounting to \$24,000, were presented to the administrator. From what property should administrator pay these claims?

A. From the personal property. Where testator makes no specific provision for the payment of debts, the personal estate is the primary fund for their payment.

Morse v. Hayden, 19 A. 443, 82 Me. 227.

Frasier v. Littleton's Ex'rs, 40 S. E. 108, 100 Va. 9.

Smith v. Kibbe, 178 P. 427, 104 Kan. 159, 5 A. L. R. 483.

For other cases see Decennial Digests, Executors and Administrators 271, 272; Wills 832.

SECTION 29.—GIFTS CAUSA MORTIS

Q. 97. A executed a deed, which purported to convey his farm to B and his heirs. A delivered this deed to C, saying, as he did so: "Take this deed and keep it. If I get well, I will call for it. If I don't, give it to B." A, who was then ill, died shortly thereafter of the same illness, and C handed the deed to B, who recorded it. Has B good title to the farm?

A. No; real estate is not the subject of a gift causa mortis. This is an attempt to make a testamentary disposition, reserving the right of revocation, without making a will. The reservation of the right of recall made the delivery ineffectual. Had the grantor parted with all control, the delivery would have been sufficient.

Cook v. Brown, 34 N. H. 460.

Williams v. Schatz, 42 Ohio St. 47.

See Ballantine, When are Deeds Testamentary? 18 Mich. Law Rev. 470.

For other cases see Decennial Digests, Deeds 61.

Q. 98. T, in apprehension of death from a present illness, delivered to B by way of gift bonds negotiable by delivery in the amount of \$5,000. Later T made a duly executed will, in which he bequeathed to C all of his property, real and personal. T died without having recovered from his illness. Who is entitled to the bonds?

A. B. A gift causa mortis is not thus revoked by a subsequent will of the donor. An intention to revoke in the future is not enough, and the testator does not intend the will to speak until after his death.

Emery v. Clough, 4 A. 796, 63 N. H. 552, 56 Am. Rep. 343.

Brunson v. Henry, 39 N. E. 256, 140 Ind. 455.

For other cases see Decennial Digests, Gifts 74, 76.

Q. 99. D had \$5,000 on deposit in a savings account in the Dollar Savings Bank. Being in apprehension of death, D delivered his bank passbook to B as a gift. D died shortly thereafter, and the money in the bank is claimed by B and by D's administrator. Who is entitled thereto?

A. B. The delivery of the savings bank passbook constitutes a good gift causa mortis. The passbook represents the deposit, since it is the instrument by which alone money can be withdrawn on the account. The result would have been different, had the book merely evidenced a deposit on a checking account.

Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425, 37 Am. Rep. 371.
Ridden v. Thrall, 26 N. E. 627, 125 N. Y. 572, 11 L. R. A. 684, 21 Am. St. Rep. 758.

For other cases see Decennial Digests, Gifts $\S$ 30(3), 66(2).

Q. 100. D, in apprehension of death from an illness, made a delivery by way of gift of certain bonds to B. A few days later D demanded the return of the bonds. B refused to comply, insisting that the gift to him was irrevocable, since D had attached no condition. D caused suit for recovery to be instituted, but died a few days later of his illness. Is B entitled to keep the bonds?

A: No; a gift made when donor is in apprehension of death is presumed to be a gift causa mortis, and therefore revocable. It is not essential to the revocation that the donor succeed in acquiring possession of the subject of the gift during his lifetime.

Adams v. Atherton, 64 P. 283, 132 Cal. 164.

Doran v. Doran, 33 P. 929, 99 Cal. 311.

Williams v. Guile, 22 N. E. 1071, 117 N. Y. 343, 6 L. R. A. 366.

For other cases see Decennial Digests, Gifts $\S$ 59, 66(1), 76.

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